Matter of DHANASAR, Petitioner

Decided December 27, 2016

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office

USCIS may 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 he or she is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), vacated.

ON BEHALF OF PETITIONER: Gerard M. Chapman, Esquire, Greensboro, North Carolina

In this decision, we have occasion to revisit the analytical framework for assessing eligibility for "national interest waivers" under section 203(b)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(B)(i) (2012). The self-petitioner, a researcher and educator in the field of aerospace engineering, filed an immigrant visa petition seeking classification under section 203(b)(2) of the Act as a member of the professions holding an advanced degree. The petitioner also sought a "national interest waiver" of the job offer otherwise required by section 203(b)(2)(A).

The Director of the Texas Service Center denied the petition under the existing analytical framework, concluding that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that a waiver of the job offer requirement would not be in the national interest of the United States. Upon de novo review, and based on the revised national interest standard adopted herein, we will sustain the appeal and approve the petition.

I. LEGAL BACKGROUND

Subparagraph (A) of section 203(b)(2) of the Act makes immigrant visas 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." Under subparagraph (A), immigrant visas are available to such individuals only if their "services in the sciences, arts, professions, or business are sought by an employer in the United States."

Before hiring a foreign national under this immigrant classification, an employer must first obtain a permanent labor certification from the United States Department of Labor ("DOL") under section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i) (2012). *See also* 8 C.F.R. § 204.5(k)(4)(i) (2016). A labor certification demonstrates that DOL has determined that there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such skilled or unskilled labor, and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. In its labor certification application, the employer must list the position's job requirements consistent with what is normally required for the occupation. *See* 20 C.F.R. § 656.17(h)(1) (2016). Moreover, the job requirements described on the labor certification application must represent the actual minimum requirements for the job opportunity. *See* 20 C.F.R. § 656.17(i)(1). That is, the employer may not tailor the position requirements to the foreign worker's qualifications; it may only list the position's minimum requirements, regardless of the foreign worker's additional skills that go beyond what is normally required for the occupation. The employer must then test the labor market to determine if able, willing, or qualified U.S. workers are available with the advertised minimum qualifications. If such U.S. workers are found, the employer may not hire the foreign worker for the position, even if the foreign worker clearly has more skills (beyond the advertised qualifications). If the employer does not identify such U.S. workers and DOL determines that those workers are indeed unavailable, DOL will certify the labor certification. After securing the DOL-approved labor certification, the employer may then file a petition with DHS requesting the immigrant classification.

Under subparagraph (B) of section 203(b)(2), however, the Secretary of Homeland Security may waive the requirement of a "job offer" (namely, that the beneficiary's services are sought by a U.S. employer) and, under the applicable regulations, of "a labor certification." 8 C.F.R. § 204.5(k)(4)(ii).[1] That subparagraph states, in pertinent part, that the

[1] While appearing to limit national interest waivers to only aliens possessing exceptional ability in the sciences, arts, or business, 8 C.F.R. § 204.5(k)(4)(ii) was superseded in part by section 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1743 (continued . . .)

Secretary "may, when the [Secretary] 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."[2] Section 203(b)(2)(i) of the Act.

USCIS may grant a national interest waiver as a matter of discretion if the petitioner satisfies both subparagraphs (A) and (B). Thus, a petitioner who seeks a "national interest waiver" must first satisfy subparagraph (A) by demonstrating that the beneficiary qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(1)–(3) (providing definitions and considerations for making such determinations); *see also* section 203(b)(2)(C) of the Act (providing that possession of requisite academic degree or professional license "shall not by itself be considered sufficient evidence of exceptional ability"). The petitioner must then satisfy subparagraph (B) by establishing that it would be in the national interest to waive the "job offer" requirement under subparagraph (A).[3] *See* 8 C.F.R. § 204.5(k)(4)(ii). This two-part statutory scheme is relatively straightforward, but the term "national interest" is ambiguous. Undefined by statute and regulation, "national interest" is a broad concept subject to various interpretations.

In 1998, under the legacy Immigration and Naturalization Service, we issued a precedent decision establishing a framework for evaluating national interest waiver petitions. *Matter of New York State Dep't of Transp.* ("*NYSDOT*"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998).

("MTINA"). Section 302(b)(2) of MTINA amended section 203(b)(2)(B)(i) of the Act by inserting the word "professions" after the word "arts," and thereby made the national interest waiver available to members of the professions holding advanced degrees in addition to individuals of exceptional ability.

[2] Pursuant to section 1517 of the Homeland Security Act ("HSA") of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

[3] To do so, a petitioner must go beyond showing the individual's expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his field of expertise.

The *NYSDOT* framework looks first to see if a petitioner has shown that the area of employment is of "substantial intrinsic merit." *Id.* at 217. Next, a petitioner must establish that any proposed benefit from the individual's endeavors will be "national in scope." *Id.* Finally, the petitioner must demonstrate that the national interest would be adversely affected if a labor certification were required for the foreign national. *Id.*

Based on our experience with that decision in the intervening period, we believe it is now time for a reassessment. While the first prong has held up under adjudicative experience, the term "intrinsic" adds little to the analysis yet is susceptible to unnecessary subjective evaluation.[4] Similarly, the second prong has caused relatively few problems in adjudications, but occasionally the term "national in scope" is construed too narrowly by focusing primarily on the geographic impact of the benefit. While *NYSDOT* found a civil engineer's employment to be national in scope even though it was limited to a particular region, that finding hinged on the geographic connections between New York's bridges and roads and the national transportation system. Certain locally or regionally focused endeavors, however, may be of national importance despite being difficult to quantify with respect to geographic scope.

What has generated the greatest confusion for petitioners and adjudicators, however, is *NYSDOT*'s third prong. First, this prong is explained in several different ways within *NYSDOT* itself, leaving the reader uncertain what ultimately is the relevant inquiry. We initially state the third prong as requiring a petitioner to "demonstrate that the national interest would be adversely affected if a labor certification were required." *NYSDOT*, 22 I&N Dec. at 217. We then alternatively describe the third prong as requiring the petitioner to demonstrate that the individual "present[s] a national benefit so great as to outweigh the national interest inherent in the labor certification process." *Id.* at 218. Immediately thereafter, we restate the third prong yet again: the petitioner must establish that the individual will "serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications."[5] *Id.* Finally, in what may be construed as either a fourth restatement of prong three or as an explanation of how to satisfy it, we state that "it clearly must be established that the alien's past record justifies projections of future benefit to the national interest." *Id.* at 219. A footnote

[4] *Cf., e.g., 24/7 Records, Inc. v. Sony Music Entm't, Inc.*, 514 F. Supp. 2d 571, 575 (S.D.N.Y. 2007) ("'Intrinsic value' is an inherently subjective and speculative concept.").

[5] Other, slight variations of the third prong emerge later in the decision. *See NYSDOT*, 22 I&N at 220 ("to a greater extent than U.S. workers"); *see also id.* at 221 ("considerably outweigh").

to this statement clarifies that USCIS seeks "a past history of demonstrable achievement with some degree of influence on the field as a whole." *Id.* at 219 n.6. Although residing in footnote 6, this "influence" standard has in practice become the primary yardstick against which petitions are measured.[6]

Second, and a more fundamental challenge than parsing its several restatements, *NYSDOT*'s third prong can be misinterpreted to require the petitioner to submit, and the adjudicator to evaluate, evidence relevant to the very labor market test that the waiver is intended to forego. The first iteration of prong three, that the national interest would be adversely affected if a labor certification were required, implies that petitioners should submit evidence of harm to the national interest. The third iteration, that the individual will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, suggests that petitioners should submit evidence comparing foreign nationals to unidentified U.S. workers. These concepts have proven to be difficult for many qualified individuals to establish or analyze in the abstract. It has proven particularly ill-suited for USCIS to evaluate petitions from self-employed individuals, such as entrepreneurs. In *NYSDOT*, we even "acknowledge[d] that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification." *Id.* at 218 n.5. Nonetheless, we did not modify the test to resolve this scenario, which continues to challenge petitioners and USCIS adjudicators. Lastly, this concept of harm-to-national-interest is not required by, and unnecessarily narrows, the Secretary's broad discretionary authority to grant a waiver when he "deems it to be in the national interest."

II. NEW ANALYTICAL FRAMEWORK

Accordingly, our decision in *NYSDOT* is ripe for revision. Today, we vacate *NYSDOT* and adopt a new framework for adjudicating national interest waiver petitions, one that will provide greater clarity, apply more flexibly to circumstances of both petitioning employers and self-petitioning

[6] While this "influence" standard rests upon the reasonable notion that past success will often predict future benefit, our adjudication experience in the years since *NYSDOT* has revealed that there are some talented individuals for whom past achievements are not necessarily the best or only predictor of future success.

individuals, and better advance the purpose of the broad discretionary waiver provision to benefit the United States.[7]

Under the new framework, and after eligibility for EB-2 classification has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence:[8] (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.[9]

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. Evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required, as an endeavor's merit may be established without immediate or quantifiable economic impact. For example, endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States.

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. An undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance. In modifying this prong to assess "national

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[7] Going forward, we will use "petitioners" to include both employers who have filed petitions on behalf of employees and individuals who have filed petitions on their own behalf (namely, self-petitioners).

[8] Under the "preponderance of the evidence" standard, a petitioner must establish that he or she more likely than not satisfies the qualifying elements. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We will consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.*

[9] Because the national interest waiver is "purely discretionary," *Schneider v. Chertoff*, 450 F.3d 944, 948 (9th Cir. 2006), the petitioner also must show that the foreign national otherwise merits a favorable exercise of discretion. *See Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005); *cf. Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002).

importance" rather than "national in scope," as used in *NYSDOT*, we seek to avoid overemphasis on the geographic breadth of the endeavor. An 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.

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.

We recognize that forecasting feasibility or future success may present challenges to petitioners and USCIS officers, and that many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed. But notwithstanding this inherent uncertainty, in order to merit a national interest waiver, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.

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. On the one hand, Congress clearly sought to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. On the other hand, by creating the national interest waiver, Congress recognized that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. Congress entrusted the Secretary to balance these interests within the context of individual national interest waiver adjudications.

In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or 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;[10]

[10] For example, the labor certification process may prevent a petitioning employer from hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor certification. *See generally* 20 C.F.R. § 656.17(i). Likewise, because of the nature of the proposed endeavor, it may be impractical for an entrepreneur or (continued . . .)

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. We emphasize that, 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.

We note that this new prong, unlike the third prong of *NYSDOT*, does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner's field. As stated previously, *NYSDOT*'s third prong was especially problematic for certain petitioners, such as entrepreneurs and self-employed individuals. This more flexible test, which can be met in a range of ways as described above, is meant to apply to a greater variety of individuals.

III. ANALYSIS

The director found the petitioner to be qualified for the classification sought by virtue of his advanced degrees. We agree that he holds advanced degrees and therefore qualifies under section 203(b)(2)(A). The remaining issue before us is whether the petitioner has established, by a preponderance of the evidence, that he is eligible for and merits a national interest waiver.

The petitioner proposes to engage in research and development relating to air and space propulsion systems, as well as to teach aerospace engineering, at North Carolina Agricultural and Technical State University ("North Carolina A&T"). The petitioner holds two master of science degrees, in mechanical engineering and in applied physics, as well as a Ph.D. in engineering, from North Carolina A&T. At the time of filing the instant petition, he also worked as a postdoctoral research associate at the university. The record reflects that the petitioner's graduate and postgraduate research has focused on hypersonic propulsion systems (systems involving propulsion at speeds of Mach 5 and above) and on computational fluid dynamics. He has developed a validated computational model of a high-speed air-breathing propulsion engine, as well as a novel numerical method for accurately calculating hypersonic air flow. The petitioner intends to continue his research at the university.

The extensive record includes: reliable evidence of the petitioner's credentials; copies of his publications and other published materials that

self-employed inventor, when advancing an endeavor on his or her own, to secure a job offer from a U.S. employer.

cite his work; evidence of his membership in professional associations; and documentation regarding his research and teaching activities. The petitioner also submitted several letters from individuals who establish their own expertise in aerospace, describe the petitioner's research in detail and attest to his expertise in the field of hypersonic propulsion systems.

We determine that the petitioner is eligible for a national interest waiver under the new framework. First, we conclude that the petitioner has established both the substantial merit and national importance of his proposed endeavor. The petitioner demonstrated that he intends to continue research into the design and development of propulsion systems for potential use in military and civilian technologies such as nano-satellites, rocket-propelled ballistic missiles, and single-stage-to-orbit vehicles. In letters supporting the petition, he describes how research in this area enhances our national security and defense by allowing the United States to maintain its advantage over other nations in the field of hypersonic flight. We find that this proposed research has substantial merit because it aims to advance scientific knowledge and further national security interests and U.S. competitiveness in the civil space sector.

The record further demonstrates that the petitioner's proposed endeavor is of national importance. The petitioner submitted probative expert letters from individuals holding senior positions in academia, government, and industry that describe the importance of hypersonic propulsion research as it relates to U.S. strategic interests. He also provided media articles and other evidence documenting the interest of the House Committee on Armed Services in the development of hypersonic technologies and discussing the potential significance of U.S. advances in this area of research and development. The letters and the media articles discuss efforts and advances that other countries are currently making in the area of hypersonic propulsion systems and the strategic importance of U.S. advancement in researching and developing these technologies for use in missiles, satellites, and aircraft.

Second, we find that the record establishes that the petitioner is well positioned to advance the proposed endeavor. Beyond his multiple graduate degrees in relevant fields, the petitioner has experience conducting research and developing computational models that support the mission of the United States Department of Defense ("DOD") to develop air superiority and protection capabilities of U.S. military forces, and that assist in the development of platforms for Earth observation and interplanetary exploration. The petitioner submitted detailed expert letters describing U.S. Government interest and investment in his research, and the record includes documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space

Administration ("NASA") and the Air Force Research Laboratories ("AFRL") within DOD.[11] Thus, the significance of the petitioner's research in his field is corroborated by evidence of peer and government interest in his research, as well as by consistent government funding of the petitioner's research projects. The petitioner's education, experience, and expertise in his field, the significance of his role in research projects, as well as the sustained interest of and funding from government entities such as NASA and AFRL, position him well to continue to advance his proposed endeavor of hypersonic technology research.

Third and finally, we conclude 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. As noted above, the petitioner holds three graduate degrees in fields tied to the proposed endeavor, and the record demonstrates that he possesses considerable experience and expertise in a highly specialized field. The evidence also shows that research on hypersonic propulsion holds significant implications for U.S. national security and competitiveness. In addition, the repeated funding of research in which the petitioner played a key role indicates that government agencies, including NASA and the DOD, have found his work on this topic to be promising and useful. Because of his record of successful research in an area that furthers U.S. interests, we find that this petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available.

In addition to conducting research, the petitioner proposes to support teaching activities in science, technology, engineering, and math ("STEM") disciplines. He submits letters favorably attesting to his teaching abilities at the university level and evidence of his participation in mentorship programs for middle school students. While STEM teaching has substantial merit in relation to U.S. educational interests, the record does not indicate by a preponderance of the evidence that the petitioner would be engaged in activities that would impact the field of STEM education more broadly. Accordingly, as the petitioner has not established by a preponderance of the evidence that his proposed teaching activities meet the "national importance" element of the first prong of the new framework, we do not address the remaining prongs in relation to the petitioner's teaching activities.

[11] Although the director of North Carolina A&T's Center for Aerospace Research ("CAR") is listed as the lead principal investigator on all grants for CAR research, the record establishes that the petitioner initiated or is the primary award contact on several funded grant proposals and that he is the only listed researcher on many of the grants.

IV. CONCLUSION

The record demonstrates by a preponderance of the evidence that: (1) the petitioner's research in aerospace engineering has both substantial merit and national importance; (2) the petitioner is well positioned to advance his research; and (3) on balance, it is beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. We find that the petitioner has established eligibility for and otherwise merits a national interest waiver as a matter of discretion.

In visa petition 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 (2012). The petitioner has met that burden.

ORDER: The appeal is sustained and the petition is approved.

U.S. Citizenship and Immigration Services

January 27, 2017

Adjudication of National Interest Waivers after *Matter of Dhanasar*

Objectives

- Provide an overview of the decision in *Matter of Dhanasar* and the new framework for adjudication of National Interest Waivers (NIW)
- Train all USCIS employees involved in the adjudication of Form I-140 E21 NIW petitions on how to apply the new guidance pertaining to that classification.

Authorities

- INA Section 203(b)(2)(B)(i)
- 8 C.F.R. Section 204.5(k)(4)(ii)
- *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016)

Background

- With the *Dhanasar* decision, USCIS has clarified the standard by which national interest waivers may be granted, in particular to foreign inventors, researchers and founders of start-up enterprises intended to benefit the U.S. economy.

U.S. Citizenship and Immigration Services

The *Dhanasar* Decision

- Vacates *Matter of New York State Dep't of Transp.*, 22 I. & N. Dec. 215 (Acting Assoc. Comm'r 1998).
- Adopts a new, more flexible framework for the adjudication of national interest waiver petitions.
- Retains a three-prong approach, but de-emphasizes NYSDOT's focus on the geographical scope of the proposed endeavor and does not require comparison to U.S. workers.

Dhanasar's Three Prongs

After eligibility for the EB-2 classification has been established, the petitioner must demonstrate:

- That the foreign national's proposed endeavor has both substantial merit and national importance;
- That the foreign national is well-positioned to advance the proposed endeavor; and
- 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.

U.S. Citizenship and Immigration Services

First Prong

The proposed endeavor has both substantial merit and national importance.

- Focuses on the specific endeavor that the foreign national proposes to undertake.
- Substantial merit of an endeavor can be shown in any of a number of areas, including, but not limited to, business, entrepreneurialism, science, technology, culture, health, education, arts or the social sciences.
- Substantial merit factors may include, but are not limited to:
  - Potential to create a significant economic impact
  - Endeavor related to research or the pursuit of knowledge
  - Potential to create a significant cultural impact

U.S. Citizenship and Immigration Services

First Prong

National importance of the proposed endeavor.

- Again look at potential impact, and whether the endeavor has national or global implications within a particular field.
- Not solely evaluated in geographic terms, unlike "national in scope" from NYSDOT. Even endeavors focused on a certain geographic area may have national importance.
- Examples where a "local" endeavor might have national importance:
  - Improved manufacturing processes
  - Medical advances
  - Significant job growth, particularly in an economically depressed area

First Prong

An NIW petition must include a detailed description of the endeavor and the reasons why it should be considered meritorious and of national importance, which should be supported by documentary evidence of the substantial merit and national importance of the proposed endeavor. This evidence may include, but is not limited to:

- Reports from government agencies, industry groups or NGOs describing the field of endeavor
- Letters from officials representing the above
- Articles in professional or scientific journals, or media

U.S. Citizenship and Immigration Services

Second Prong

The foreign national must be well-positioned to advance the proposed endeavor. This is quite different from NYSDOT's "serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications," in that there is no comparison required.

The focus here is on whether the foreign national has the qualifications (skills, experience, track record), support (financial and otherwise) and commitment (plans, progress) to drive the endeavor forward.

Second Prong

Unlike the first prong, the second prong focuses on the foreign national

Factors to consider:

- Education, skills, knowledge and record of success in similar or related endeavors
- Model or plan for future activities
- Progress towards achieving the proposed endeavor
- Interest from potential customers, users, investors or other relevant entities

- No requirement that the petitioner establish that the endeavor is more likely than not to succeed, only that he or she is well-positioned to advance the endeavor.

U.S. Citizenship and Immigration Services

Second Prong

Depending upon the petitioner's endeavor, evidence of education, skills, knowledge and a of a record of success might include:

- Degrees, certificates or licenses in the field
- Intellectual property owned or developed by the petitioner
- Letters from experts in the field with knowledge of the petitioner's past achievements and providing specific examples of how the petitioner is well-positioned to advance the endeavor
- Published articles in professional journals or media reports about the petitioner's achievements

U.S. Citizenship and Immigration Services

Second Prong

Depending upon the petitioner's endeavor, evidence of education, skills, knowledge and a of a record of success might also include:

- Evidence showing that the petitioner has played a leading, critical or indispensable role in similar endeavors
- Use or licensing of the petitioner's inventions or innovations by others in the field
- Evidence of influence on the field of endeavor, such as a strong citation history.

Second Prong

Depending upon the petitioner's endeavor, evidence of a model or plan for future activities might include:

- A plan describing how the foreign national intends to continue his or her work in the United States
- Where appropriate, a detailed business model
- Correspondence from prospective or potential employers, clients or customers
- Documentation reflecting feasible plans for financial support
  - Evidence relating to financing for entrepreneurs is discussed later in the presentation

U.S. Citizenship and Immigration Services

Second Prong

Depending upon the petitioner's endeavor, evidence of progress towards achieving the proposed endeavor might include:

- Grants received by the foreign national, including the amount and terms of the grant and the identity of the grantees
- Copies of contracts, agreements or licenses resulting from the endeavor
- Evidence of achievements the foreign national will build upon in advancing the endeavor, including types of evidence submitted to show the individual's record of success
- Evidence demonstrating that the individual has a leading, critical or indispensable role in the endeavor.

U.S. Citizenship and Immigration Services

Second Prong

Depending upon the petitioner's endeavor, evidence of the interest of potential customers, investors, or other relevant individuals might include:

- Letters from a government entity demonstrating interest in the proposed endeavor, together with corroborating evidence
- Investment from venture capital firms, angel investors, or start-up accelerators, in amounts appropriate to the relevant endeavor
- Awards, grants or other non-monetary support from government entities with authority over the field of endeavor
  - Non-monetary support may include the free use of facilities, for example

U.S. Citizenship and Immigration Services

Second Prong

Depending upon the petitioner's endeavor, evidence of the interest of potential customers, investors, or other relevant individuals might include:

- Demonstrations of how the individual's work is being used by others in the field, such as:
  - Contracts with companies using products or services that the individual developed in whole or in part
  - Evidence of the licensing of technology or other procedural or technological advancements developed in whole or in part by the individual
  - Patents or licenses awarded to the individual with documentation showing why the patent or license is significant to the field

Second Prong

In *Dhanasar*, the individual was able to show that he was well-positioned to advance his proposed endeavor, thus meeting the second prong, by submitting evidence of peer and government interest in his work, and through the consistent federal funding of his research.

Again, individuals are not required to establish that it is more likely than not that their proposed endeavor will succeed. However, claims must be substantiated through the submission of documentary evidence, and officers must review the totality of the evidence to determine whether the individual is well-positioned to advance the proposed endeavor.

Third Prong

On balance, it would be beneficial to the United States to waive the requirements of a job offer, and thus of a labor certification.

- National interest in protecting U.S. jobs balanced against other national interests that weigh in favor of granting a waiver.
- Factors that may be considered, among others:
  - Whether a labor certification would be impractical
  - Whether, even assuming that other qualified U.S. workers are available, the U.S. would benefit from the foreign national's contributions
  - Whether the national interest in the foreign national's contributions is sufficiently urgent
  - Whether the endeavor has the potential for job creation
  - Whether the individual's employment does not adversely affect U.S. workers

U.S. Citizenship and Immigration Services

Third Prong

While *Dhanasar's* third prong sounds very much like one iteration of NYSDOT's third prong, the two should not be confused. *Dhanasar* doesn't require a showing of harm to the national interest, nor is a comparison made to U.S. workers in the petitioner's field. Rather, *Dhanasar* focuses on whether the benefit provided by the beneficiary and his or her proposed endeavor serves the national interest.

Third Prong

In what circumstances might the impracticality of obtaining a labor certification be a factor in the balancing of national interests?

- DOL's regulations at 20 CFR 656.17(l) may limit the ability of a foreign national who has an ownership interest in a petitioning company, such as the founder of a startup company, from obtaining a labor certification.
- A self-employed foreign national would also have difficulty in obtaining a labor certification.
- A petitioner with unique knowledge or skills that are not easily articulable in a labor certification.

Third Prong

In what circumstances might the availability of qualified U.S. workers be counterbalanced by the benefit from the foreign national's contributions?

- A scientist with years of experience working on a particular research project
- An engineer with skills not possessed by the typical qualified U.S. worker

U.S. Citizenship and Immigration Services

Third Prong

In what circumstances might the national interest in the foreign national's contributions be sufficiently urgent?

- An individual involved in a time-sensitive project of national interest
- An individual whose expertise is needed to advise on an urgent problem

Entrepreneurs

The memo includes a section which describes the types of evidence that might be submitted by an entrepreneur seeking to advance a business endeavor. These types of evidence may be submitted to meet the requirements of one or more of the *Dhanasar* prongs.

Entrepreneurs

What is an entrepreneur?

- Someone who undertakes a proposed endeavor either individually (as a sole proprietor) or through a start-up entity based in the United States in which they typically:
  - Possess an ownership interest; and
  - Maintain an active and central role in the business such that knowledge, skills and experience would significantly advance the proposed endeavor
- May not follow a traditional career path

Start-up entities may be structured in a variety of different ways.

U.S. Citizenship and Immigration Services

Entrepreneurs

When reviewing evidence of investments, revenue and job creation, officers should keep in mind the individual circumstances of each case. Evidence that might show that a petitioner is well-positioned to advance the proposed endeavor in one case may not be sufficient for a different type of business endeavor, geographical area or field.

In addition, while unsubstantiated claims cannot form the basis of a successful NIW petition, officers may encounter entrepreneurial endeavors that are not currently employing a significant amount of workers or generating a substantial amount of revenue, yet the petitioner may still be able to demonstrate, by a preponderance of the evidence, eligibility for an NIW. Petitioners are not required to establish that the endeavor will ultimately succeed.

Entrepreneurs and Evidence

Ownership and Role in U.S. Entity – the petitioner's ownership and active role in the entity may show that he or she is well-positioned to advance the endeavor. Since this role may disqualify the entity from filing a labor certification on the petitioner's behalf, this evidence could also be weighed in determining the national interest in granting a waiver.

Degrees, Certifications, Licenses, Employment Letters, and Other Evidence of Experience – could be submitted to establish the second prong, but also the third prong to show that the petitioner's skills could be difficult to represent on a labor certification, and that despite the possible presence of qualified U.S. workers, a balancing of the petitioner's unique qualifications justify a waiver.

Entrepreneurs and Evidence

Investments – evidence of an investment may be submitted to establish the substantial merit of the endeavor, such as a research grant from a federal agency, and may also be submitted to establish that the petitioner is well-positioned to advance the entrepreneurial endeavor.

Participation in Growth Accelerators and Incubators – the competitiveness of entry into these organizations may establish the petitioner's record of success as well as demonstrating progress towards achieving the endeavor.

Entrepreneurs and Evidence

Awards or grants – Awards or grants from government entities, or from private entities such as research institutes and think tanks, may provide evidence that establishes the substantial merit and/or national importance of the endeavor, as well as the second prong.

Intellectual Property – Patents and other types of intellectual property, combined with evidence of their significance (such as licenses) may show a prior record of success as well as progress towards achieving the endeavor.

Entrepreneurs and Evidence

Published materials about the petitioner and entity – this evidence can help to document claims made under any of the three *Dhanasar* prongs.

Job creation and revenue generation – evidence demonstrating that the entity already has produced significant job creation, or has the potential to, could establish the endeavor's substantial merit and national importance, as well as helping to establish the second prong by showing the stage of development of the entity.

U.S. Citizenship and Immigration Services

Entrepreneurs and Evidence

Letters and other statements – Letters from government entities, outside investors or others with knowledge of the entity's research, intellectual property, business plan, products or services, or the petitioner's skills and experience, may provide support for claims made under any of the *Dhanasar* prongs when supported by documentary evidence.

U.S. Citizenship and Immigration Services

Summary

- While *Dhanasar* adopts a three-pronged approach that was also used in *NYSDOT*, there is more balance among the prongs than was true with *NYSDOT*.
- *Dhanasar's* first prong focuses on the merit and importance of the specific proposed endeavor, and de-emphasizes the geographic scope of the endeavor in place of a broader perspective.
- Dhanasar's second prong focuses on the ability of the foreign national to advance the endeavor, and does not require a showing that the endeavor is more likely than not to succeed.
- The third prong balances the national interest in protecting U.S. jobs with the benefit to the national interest from the foreign national's proposed endeavor.

Questions?

U.S. Citizenship and Immigration Services

About this Presentation

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- Date of last revision: January 27, 2017. This presentation is current only as of the date of last revision.
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U.S. Citizenship and Immigration Services

Form I-140 E21 National Interest Waiver (NIW) Manual
Revised September 2017

Tab 1: I-140 Types

Form I-140 At a Glance:
A Brief Summary of Petition Subtypes

First-Preference Petitions

Box "A" or E11 -- Aliens of Extraordinary Ability

- One of the very few at the top of the field of endeavor
- Sustained national or international acclaim
- Must be working in the field of acclaim
- Must have won a major, international prize or award (i.e. Pulitzer, Oscar, Olympic Medal), or meet 3 of 10 criteria articulated at 8 CFR Section 204.5(h)(3)
- Officer must apply some discretion in defining beneficiary's "field of endeavor"

Box "B" or E12 -- Outstanding Professor or Researcher

- Requires official job offer; sometimes an issue for universities
- Petitioner's eligibility may be an issue for smaller, private-sector entities
- Beneficiary is recognized internationally as outstanding in field; often documented by citation record of bene's scholarly publications
- Government agencies may *not* petition under this subclass

Box "C" or E13 -- Multinational Executives and Managers

- Qualifying relationship between US petitioner and employer abroad
- Nature of position abroad (3 year window for 1 year qualifying employment)
- Nature of proposed/current position in US
- For small entities: does tax return support claimed organizational structure and thus, the nature of the claimed position; and do the scope and nature of operations support a truly executive position?
- Initial entry as L-1B raises question about the nature of the position abroad
- Petitioner bears burden of demonstrating ability to pay

Second-Preference Petitions

Box "D" or E21 – Filed with Valid Labor Certification

- Position must require advanced degree (or bachelor's plus 5 years' experience) OR exceptional ability as represented on the labor certification
- Beneficiary must meet the requirements of the labor certification

- Educational equivalency and recruitment issues
- Petitioner must establish ability to pay proffered wage

Box "I" or E21 -- National Interest Waiver (other than underserved-area physicians)

- Waiver of the job offer/labor certification in the national interest
- Position must require advanced degree or exceptional ability
- Many cases are in behalf of Ph.D researchers, at the beginning of their careers
- Must meet the three prongs articulated in the *Dhanasar* decision:
    - Proposed endeavor has both substantial merit and national importance
    - Beneficiary is well positioned to advance the proposed endeavor
    - On balance, it would be beneficial to the U.S. to waive the job offer and labor certification requirements

Box "I" or E21 National Interest Waiver (underserved area physicians)

- Note: not all "I" or NIW physicians are underserved area physicians; the officer must determine which type they have (they all come up together)
- Establish that a waiver of the requirement that the beneficiary serve for at least two years overseas was approved (when applicable)
- Contract covering remaining commitment (5 years total) in qualifying area
- Attestation from state or Veterans Administration finding employment to be in national interest
- Alien meets requirements of an immigrant physician: Degree, exams, licensure
- Officers enter cases into a special database upon approval

Third-Preference Petitions

Box "E" or E31 Skilled Workers and E32 Professionals – With Labor Cert

- Position must require two years of experience (E31) or a bachelor's degree (E32), as represented on the labor certification
- Beneficiary must meet the requirements of the labor certification
- Educational equivalency and recruitment issues
- Petitioner must establish the ability to pay the proffered wage

Box "G" or EW3 -- Other Workers (With Labor Certification)

- Beneficiary must meet the requirements of the labor certification
- Petitioner must establish the ability to pay the proffered wage

Cases in which USCIS Adjudicates Labor Cert

Schedule A, Group I -- USCIS Approves Labor Cert; Usually 3rd Pref

- Registered nurses (generally E31) –must have CGFNS certificate or License from state of intended employment
- Physical therapists (E21 or E32) –must have license or be qualified to sit for license exam
- Job posting requirements must be met
- Wage determination from DOL OFLC National Processing Center (NPC)
- Petitioner must establish ability to pay proffered wage

Schedule A, Group II -- USCIS Approves Labor Cert -- 2nd Preference

- Position must *require* exceptional ability (per Title 8 CFR), or advanced degree
- Bene must *possess* exceptional ability or an advanced degree
- For Schedule A portion, beneficiary must demonstrate "current, widespread acclaim and international recognition" in the Schedule A portion of the adjudication
- Bene must meet either two of six, or two of seven, criteria at Title 20 CFR Part 656.15
- Prevailing Wage Determination (PWD) from DOL OFLC National Processing Center (NPC)
- DOL job posting requirements, articulated in 20 CFR Part 656, must be met
- Petitioner must establish ability to pay the proffered wage

Special Designation -- Sheepherders – Typically EW3

- Beneficiary must meet requirements listed on labor certification
- Prevailing Wage Determination (PWD) from DOL OFLC NPC
- Job posting requirements must be met
- Petitioner must establish ability to pay the proffered wage

Tab 2: Aliens of Exceptional Ability

Immigration and Nationality Act (*INA*), Section 203(b)(1-3)
(Portions Most Relevant to NIW Adjudication Marked in Orange)

203(b) Preference Allocation for Employment-Based Immigrants. - Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers. - Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. - An alien is described in this subparagraph if -

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers. An alien is described in this subparagraph if-

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States-

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers. An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue

to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

(A) In general. - Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), 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) (i) 1/ 1a/[1] Subject to clause (ii), the 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.

(ii) (I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 204(b) , and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 245 , until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 101(a)(15)(J)), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 204(a) , or the filing of an application for adjustment of status under section 245 , by an alien physician described in subclause (I) prior to the date by which such alien physician has completed the service described in subclause (II).

[1] Section 203(b)(2)(B) is amended in its entirety by section 117 , of Public Law 106-113 , Appendix A (H.R. 3421) dated November 29, 1999.

(IV) The requirements of this subsection do not affect waivers on behalf of alien physicians approved under section 203(b)(2)(B) before the enactment date of this subsection. In the case of a physician for whom an application for a waiver was filed under section 203(b)(2)(B) prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to section 203(b)(2)(B) except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 101(a)(15)(J)) before a visa can be issued to the alien under section 204(b) or the status of the alien is adjusted to permanent resident under section 245.

(C) Determination of exceptional ability. - In determining under subparagraph (A) whether an immigrant has exceptional ability, the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability.

(3) Skilled workers, professionals, and other workers.-

(A) In general. - Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers. - Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers. - Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required.- An immigrant visa may not be issued to an immigrant under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(5)(A).

Title 8, Code of Federal Regulations, Section 204.5(k) – Advanced-Degree Professionals or Aliens of Exceptional Ability

(Sections most relevant to NIW adjudication marked in orange)

(k) *Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.* (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of the professions holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business. If an alien is claiming exceptional ability in the sciences, arts, or business and is seeking an exemption from the requirement of a job offer in the United States pursuant to section 203(b)(2)(B) of the Act, then the alien, or anyone in the alien's behalf, may be the petitioner.

(2) *Definitions.* As used in this section: *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 into the occupation.

(3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An 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.

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

(4) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program*—(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

(ii) *Exemption from job offer.* The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

Adjudicator's Field Manual, Chapter 22.2, Section (j)(2)

Adjudicating Forms I-140 Involving Exceptional Ability

...Alternatively, an alien may qualify for E21 visa preference classification if: (a) he or she has exceptional ability in the sciences, arts, or business, (b) will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and (c) if the alien's services in one of those fields are sought by an employer in the United States. Note that the term "exceptional ability" is defined in 8 CFR 204.5(k)(i)(2) as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." This standard is of course lower than that for E11 aliens of extraordinary ability.

(A) Evaluation of Evidence Submitted in Support of a Petition for an Alien of Exceptional Ability. [Revised 12/22/2010, AD 10-41; PM-602-0005.1]

8 CFR 204.5(k)(3)(ii) describes the various types of initial evidence that must be submitted in support of an I-140 petition for an alien of exceptional ability. The initial evidence must include evidence of at least three of the types of evidence listed in 8 CFR 204.5(k)(3)(ii).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(2) of the INA. First, USCIS officers should objectively evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the visa category.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least three of the six regulatory criteria listed at 8 CFR 204.5(k)(3)(ii) (as discussed below), applying a preponderance of the evidence standard.

Note:
While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is an alien of exceptional ability in Part One of the case analysis.

Following is a list of the types of evidence listed at 8 CFR 204.5(k)(3)(ii) applicable to this immigrant classification. Note that in some cases, evidence relevant to one criterion may be relevant to other criteria set forth in these provisions.

8 CFR 204.5(k)(3)(ii)

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability;

Note:
To satisfy this criterion, the evidence must show that the alien has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field.

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Additionally, 8 CFR 204.5(k)(3)(iii), states, "If the above standards to not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Note: This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(k)(3)(ii) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.

General assertions that any of the six objective criteria described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(k)(3)(ii) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(k)(3)(ii).

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Exceptional Ability under section 203(b)(2) of the INA.

For example:

Being a member of professional associations alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's membership should be evaluated to determine whether it is indicative of the alien having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The issue of whether the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business should be addressed and articulated in part two of the analysis, not in part one where USCIS officers are only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of exceptional ability under section 203(b)(2) of the INA. The quality of the evidence must be considered. In Part Two of the analysis, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

If the USCIS officer determines that the petitioner has failed to demonstrate this requirement, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of exceptional ability under 203(b)(2) of the INA.

Note: The petitioner must demonstrate that the alien is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise "significantly above that ordinarily encountered." Note that section 203(b)(2)(C) of INA provides that mere possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Therefore, formal recognition in the form of certificates and other documentation that are contemporaneous with the alien's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the alien's achievements.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

POGHOS KAZARIAN,
Plaintiff-Appellant,
v.
US CITIZENSHIP AND IMMIGRATION SERVICES, a Bureau of the Department of Homeland Security; JOHN DOES, 1 through 10,
Defendants-Appellees.

No. 07-56774
D.C. No. CV-07-03522-R-E
ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
December 9, 2008—Pasadena, California

Filed March 4, 2010

Before: Harry Pregerson, Dorothy W. Nelson and David R. Thompson, Circuit Judges.

Opinion by Judge D.W. Nelson;
Concurrence by Judge Pregerson

COUNSEL

Ruben N. Sarkisian, Glendale, California, for plaintiff-appellant Poghos Kazarian.

Craig W. Kuhn and Elizabeth J. Stevens, Office of Immigration Litigation, Department of Justice, Washington, D.C.; for defendant-appellee U.S. Citizenship & Immigration Services.

ORDER

The opinion with dissent filed on September 4, 2009, and published at 580 F.3d 1030 (9th Cir. 2009), is withdrawn and superceded by the opinion filed concurrently herewith.

With the filing of the new opinion, appellant's pending petition for rehearing/petition for rehearing en banc is DENIED as moot, without prejudice to refiling a subsequent petition for rehearing and/or petition for rehearing en banc. *See* 9th Cir. G.O. 5.3(a).

OPINION

D.W. NELSON, Senior Circuit Judge:

Poghos Kazarian appeals the District Court's grant of summary judgment to the United States Citizenship and Immigration Service ("USCIS"), finding that the USCIS's denial of an "extraordinary ability" visa was not arbitrary, capricious, or contrary to law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 31, 2003, Poghos Kazarian, a thirty-four-year-old native and citizen of Armenia, filed an application for an employment-based immigrant visa for "aliens of extraordinary ability" (Form I-140) contending that he was an alien with extraordinary ability as a theoretical physicist.

Kazarian received a Ph.D in Theoretical Physics from Yerevan State University ("YSU") in Yerevan, Armenia, in 1997. From 1997 to 2000, he remained at YSU as a Research Associate, where, among other things, he "reviewe[d] [the] diploma works of the Department's graduates."

At YSU, Kazarian specialized in non-Einsteinian theories of gravitation. According to a colleague, "[t]his work offered a mechanism for the control of solutions' accuracy, which guarantees the accuracy of calculations in many theories of gravitation." Kazarian "solve[d] [the] more than 20 year[ ] old problem of construction of the theory, satisfying the cosmogony conception of worldwide acknowledged scientist, academician V.A. Hambartsumian."

Since 2000, Kazarian has served as a Physics / Math / Programming Tutor, an Adjunct Physics and Mathematics Instructor, and a Science Lecture Series speaker at Glendale

Community College ("GCC"). Between 2000 and 2004, Kazarian's work at GCC was on a volunteer basis.

In support of his application, Kazarian submitted several letters of reference. The first reference was a letter from Dr. Kip S. Thorne, the Feynman Professor of Theoretical Physics at California's Institute of Technology. Dr. Thorne, who worked in the same research group as Kazarian, stated that he had "formed a good opinion of Dr. Kazarian's research. It is of the caliber that one would expect from a young professor at a strong research-oriented university in the United States." Kazarian also provided letters from professors at YSU, stating that Kazarian "possesse[d] great ability and considerable potency in science," was "a young scientist with enough scientific potential," had "high professionalism," and had "displayed himself as exceptionally diligent, hard-working, [and] highly qualified." Finally, Kazarian submitted three letters from colleagues at GCC praising his hard work and active participation at GCC.

Kazarian also noted that he had authored a self-published textbook, titled "Concepts in Physics: Classical Mechanics." According to one of his colleagues at GCC, the book "is certain to be required reading in many secondary schools, colleges and universities throughout the country." Kazarian, however, presented no evidence that the book was actually used in any class. Kazarian also submitted two scholarly articles where the authors acknowledged him for his useful scientific discussions. Kazarian also submitted his resume, which listed six publications in *Astrophysics* that he had authored or co-authored, as well as one e-print published in the public web archives of the Los Alamos National Laboratory.

Finally, Kazarian presented evidence of his Science Lecture Series at GCC. His resume also listed lectures at the 17th and 20th Pacific Coast Gravity Meetings, the Conference on Strong Gravitational Fields at UC Santa Barbara, the 8th International Symposium on the Science and Technology of

Light Sources, and the Foundations of Gravitation and Cosmology, International School-Seminar.

In August 2005, the USCIS denied the petition. Kazarian appealed the denial to the Administrative Appeals Office ("AAO"). The AAO dismissed the appeal, finding that Kazarian failed to satisfy any of the evidentiary criteria set forth in the relevant "extraordinary ability" visa regulations. Having exhausted his administrative remedies, Kazarian filed a complaint in the Central District of California. The District Court granted the USCIS's motion for summary judgment, and Kazarian timely appealed to this court.

STANDARD OF REVIEW

This court "review[s] the entry of summary judgment *de novo*." *Family Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir. 2006). "However, the underlying agency action may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* (quoting 5 U.S.C. § 706(2)(A)). "We have held it an abuse of discretion for the Service to act if there is no evidence to support the decision or if the decision was based on an improper understanding of the law." *Tongatapu Woodcraft Hawaii Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984) (internal quotations omitted).

"In circumstances where an agency errs, we may evaluate whether such an error was harmless." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004); *see* 5 U.S.C. § 706. "In the context of agency review, the role of harmless error is constrained. The doctrine may be employed only 'when a mistake of the administrative body is one that *clearly* had *no bearing* on the procedure used or the substance of decision reached.' " *Gifford Pinchot*, 378 F.3d at 1071 (citing *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982)) (emphasis added by the *Gifford Pinchot* court). "We will not usually overturn agency action unless

there is a showing of prejudice to the petitioner." *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002).

DISCUSSION

A. THE "EXTRAORDINARY ABILITY" VISA

[1] Pursuant to 8 U.S.C. § 1153(b)(1)(A), aliens may apply for a visa on the basis of "extraordinary ability." An alien can prove an extraordinary ability in one of two ways. The first is "evidence of a one-time achievement (that is, a major, international recognized award)." 8 C.F.R. § 204.5(h)(3). Receipt of the Nobel prize is the quintessential example of a major award. H.R. Rep. No. 101-723(I & II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6739. Kazarian concedes that he has won no such prize.

The second way to prove extraordinary ability is to provide evidence of at least three of the following:

> (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
>
> (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
>
> (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
>
> (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of oth-

> ers in the same or an allied field of specification for which classification is sought;
>
> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
>
> (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
>
> (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
>
> (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
>
> (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
>
> (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

8 C.F.R. § 204.5(h)(3). If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

The "extraordinary ability" visa can be better understood in context. Under the Immigration Act of 1990, thousands of employment-based visas were created according to three employment preferences. Pub. L. No. 101-649, 101 Stat. 4978. "Aliens with extraordinary ability" are "priority workers" and have the first preference. 8 U.S.C. § 1153(b)(1).

"*Extraordinary* ability" is distinct from "*exceptional* ability," however, which receives second preference. *Compare id.* § 1153(b)(1)(A) (emphasis added), *with id.* § 1153(b)(2) (emphasis added).[1] To qualify for the "exceptional ability" visa, a petitioner must make a lesser showing of ability, and need only show three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or

[1]Skilled workers, professionals, and "other workers" make up the third preference. *Id.* § 1153(b)(3).

> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

8 C.F.R. § 204.5(k)(3)(ii).

[2] To qualify for an "exceptional ability" visa, however, the alien must also provide evidence that his services are sought by a United States employer. *Id.* The "extraordinary ability" visa thus has considerable advantages. Unlike the "exceptional ability" visa petition, the "extraordinary ability" petition is not dependent on an actual offer for employment in the United States, and is exempt from the time-consuming labor certification process, which requires that employers first test the marketplace for existing qualified domestic workers. *Compare id.* § 204.5(h)(3)(5), *with id.* § 204.5(k)(4).

[3] Interpretation of the statutory and regulatory requirements for the "extraordinary ability" visa presents a question of first impression for this court. The scant caselaw indicates that "[t]he regulations regarding this preference classification are extremely restrictive." *Lee v. Ziglar*, 237 F. Supp.2d 914, 918 (N.D. Ill.2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for the visa as a baseball coach for the Chicago White Sox because his acclaim was limited to his skills as a player and not as a coach); *cf. Grimson v. INS*, 934 F.Supp. 965, 969 (N.D. Ill. 1996) (finding denial arbitrary and capricious where NHL hockey enforcer was one of the top three players in the world and agency improperly discounted the importance of the enforcer position); *Muni v. INS*, 891 F.Supp. 440 (N.D. Ill. 1995) (finding the agency improperly discounted evidence for an NHL hockey player who won the Stanley Cup three times, won "most underrated defenseman," was paid more than the average NHL player, submitted numerous articles establishing his stature in the hockey world, and provided affidavits from eight renowned hockey players stating that he was highly

regarded); *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994) (finding denial was arbitrary and capricious where Albanian physician won a national award, published a medical dictionary and numerous articles, was responsible for general health projects, and served as an adjunct professor); *Matter of Price*, 20 I. & N. Dec. 953, 955-56 (BIA 1994) (granting the visa petition to a professional golfer who won the 1983 World Series of Golf and the 1991 Canadian Open, ranked 10th in the 1989 PGA Tour, collected $714,389 in 1991, provided numerous affidavits from well-known and celebrated golfers, and received widespread major media coverage).

B. APPLICATION TO KAZARIAN

The AAO found that Kazarian did not meet any of the regulatory criteria. Only four of the ten are at issue in this appeal. We find that the AAO erred in its consideration of two of these issues.

1. Authorship of Scholarly Articles in the Field of Endeavor

Pursuant to 8 C.F.R. § 204.5(h)(3)(vi), Kazarian submitted proof of his six articles in *Astrophysics* and his e-print in the Los Alamos National Laboratory archives, but did not demonstrate that other scholars had cited to his publications. The AAO held that without evidence of such citations, Kazarian's articles did not meet the regulatory definition of evidence, because "publication of scholarly articles is not automatically evidence of sustained acclaim" and "we must consider the research community's reaction to these articles."

[4] The AAO's conclusion rests on an improper understanding of 8 C.F.R. § 204.5(h)(3)(vi). Nothing in that provision requires a petitioner to demonstrate the research community's reaction to his published articles before those articles can be considered as evidence, and neither USCIS nor

an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). While other authors' citations (or a lack thereof) might be relevant to the final merits determination of whether a petitioner is at the very top of his or her field of endeavor, they are not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence. 8 C.F.R. § 204.5(h)(3). "If the agency intended to impose [peer citations] as a threshold requirement, we have little doubt that such records would have been included among the detailed substantive and evidentiary requirements set forth at 8 C.F.R. § 204.5[(h)(3)(i)-(x)]." *Love Korean Church*, 549 F.3d at 758.

2. Participation as a Judge of the Work of Others

Pursuant to 8 C.F.R. § 204.5(h)(3)(iv), Kazarian submitted proof that he was a judge of graduate-level diploma works at Yerevan State University. The AAO held that "reviewing 'diploma works' for fellow students at one's own university is not persuasive evidence of acclaim beyond that university," and that absent "evidence that the petitioner served as an external dissertation reviewer for a university with which he is not otherwise affiliated," Kazarian's submission did not meet the regulatory definition of evidence.

[5] The AAO's conclusion rests on an improper understanding of 8 C.F.R. § 204.5(h)(3)(iv). Nothing in that provision suggests that whether judging university dissertations counts as evidence turns on which university the judge is affiliated with. Again, while the AAO's analysis might be relevant to a final merits determination, the AAO may not unilaterally impose a novel evidentiary requirement. *Love Korean Church*, 549 F.3d at 758.

3. Evidence of Original Scientific or Scholarly Contributions of Major Significance in the Field of Endeavor

[6] Pursuant to 8 C.F.R. § 204.5(h)(3)(v), Kazarian submitted letters from physics professors attesting to his contributions in the field. The AAO found that his contributions were not major, and thus did not meet the regulatory definition of evidence. The AAO's analysis here is consistent with the relevant regulatory language, and the AAO's determination that Kazarian did not submit material that met the regulatory definition of evidence set forth at 8 C.F.R. § 204.5(h)(3)(v) is neither arbitrary, capricious, nor an abuse of discretion.

4. Display of the Alien's Work at Artistic Exhibitions or Showcases

[7] Pursuant to 8 C.F.R. § 204.5(h)(3)(vii), Kazarian submitted proof that he had self-published a textbook, had given lectures at a community college, and had made presentations at conferences. The AAO found that none of these activities were displays at artistic exhibitions or showcases. The AAO's analysis here is again consistent with the relevant regulatory language, and the AAO's determination that Kazarian did not submit evidence as defined at 8 C.F.R. § 204.5(h)(3)(vii) is neither arbitrary, capricious, nor an abuse of discretion.

C. HARMLESSNESS

Having found that the AAO erred by unilaterally introducing new evidentiary requirements into 8 C.F.R. § 204.5(h)(3)(iv) and (vi), we must now determine whether these errors were prejudicial. 5 U.S.C. § 706; *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879-80 (9th Cir. 2009). They were not.

The AAO held that Kazarian provided zero of the ten types of evidence set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x). The

AAO should have held that Kazarian presented two types of evidence. The regulation requires three types of evidence. 8 C.F.R. § 204.5(h)(3).

[8] Whether an applicant for an extraordinary visa presents two types of evidence or none, the proper procedure is to count the types of evidence provided (which the AAO did), and the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded). 8 C.F.R. § 204.5(h)(3). Here, although the AAO committed clear legal error, that error "clearly had no bearing" on either "the procedure used or the substance of decision reached." *Gifford Pinchot*, 378 F.3d at 1071 (quotations omitted).

CONCLUSION

[9] Although Kazarian appears to be a well-respected, promising physicist, who may well have been able to qualify for an "exceptional ability" visa, he instead applied for an "extraordinary ability" visa, and presented only two of the types of evidence set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x), and the "extraordinary ability" visa regulations require three. The AAO's conclusion that Kazarian presented zero types of evidence was in error, but the error was harmless. Kazarian failed to establish his eligibility for an "extraordinary ability" visa, and the District Court correctly granted USCIS' summary judgment motion.

AFFIRMED.

PREGERSON, Circuit Judge, concurring:

I am pleased to concur in Judge Nelson's opinion. I write separately, however, to emphasize the injustice perpetrated by our immigration laws and system in this case. Dr. Poghos

Kazarian received his Ph.D. in the field of theoretical physics from Yerevan State University and, since arriving in the United States, has continued to research and teach in this challenging field. Starting around 2000, Dr. Kazarian participated in a research group headed by Dr. Kip Thorne at the California Institute of Technology. Dr. Thorne, among others, submitted a letter in support of Dr. Kazarian's visa application. Dr. Kazarian volunteers his teaching services at Glendale Community College and has authored and published his own physics textbook. Dr. Kazarian has received strong words of praise from colleagues at Yerevan State University, Glendale Community College, and the California Institute of Technology. Dr. Kazarian's contributions in the United States have been undoubtedly valuable. Forcing Dr. Kazarian to depart from our country would be undoubtedly wasteful and make one think that there is something haywire in our system. Although, as the opinion points out, Dr. Kazarian did not submit three of the types of evidence required for the "extraordinary visa," he would have been an excellent candidate for an "exceptional ability" visa. Indeed, it was likely the error of an ineffective lawyer that led Kazarian to apply for the wrong visa in the first place.[1]

[1]At oral argument, Dr. Kazarian's current counsel represented to the court that the attorney who started Dr. Kazarian on the path of applying for this "extraordinary ability" visa was George Verdin. Verdin is listed as being indefinitely suspended from practice before the Immigration Service, the Immigration Courts, and the Board of Immigration Appeals. Executive Office for Immigration Review, Office of General Counsel, List of Currently Disciplined Practitioners (Aug. 11, 2009), http://www.usdoj.gov/eoir/profcond/chart.htm. Verdin has also been disbarred by the Supreme Court of Hawai'i. *Office of Disciplinary Counsel v. Verdin*, No. 22349 (Haw. Sept. 27, 2001). It is distressing how many good people—including the highly educated and the minimally educated—fall prey to disreputable lawyers known to the immigration system.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

December 22, 2010 **PM-602-0005.1**

Policy Memorandum

SUBJECT: Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual* (*AFM*) Chapter 22.2, *AFM* Update AD11-14

Purpose
This Policy Memorandum (PM) provides guidance regarding the analysis that U.S. Citizenship and Immigration Service (USCIS) officers who adjudicate these petitions should use when evaluating evidence submitted in support of Form I-140, Immigrant Petition for Alien Worker, filed for:

- Aliens of Extraordinary Ability under section 203(b)(1)(A) of the Immigration and Nationality Act (INA);
- Outstanding Professors or Researchers under section 203(b)(1)(B) INA; and
- Aliens of Exceptional Ability under section 203(b)(2) INA.

The purpose of this PM is to ensure that USCIS processes Form I-140 petitions filed under these employment-based immigrant classifications with a consistent standard.

In addition, this PM revises *AFM* Chapter 22.2 to clarify that USCIS will make successor-in-interest (SII) determinations in Form I-140 petitions supported by an approved labor certification application if the transfer of ownership took place anytime while such application for labor certification was still pending or after the labor certification was approved by the Department of Labor (DOL).[1]

Lastly, this PM revises *AFM* Chapter 22.2 to update the DOL e-mail address for USCIS officers to use when making duplicate labor certification application requests.

Scope
This PM rescinds and supersedes all previously published policy guidance[2] issued by USCIS and the legacy Immigration and Naturalization Service (INS) specific to the evaluation of required

[1] *See* USCIS memorandum, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)*, dated August 6, 2009. It is noted on page 7 of that memorandum that SII determinations could only be made in cases where the labor certification application had been approved prior to the transfer of ownership.

initial evidence submitted in support of Form I-140 petitions under Title 8 Code of Federal Regulations (8 CFR) sections 204.5(h)(3) and (4), 204.5(i)(3)(i), and 204.5(k)(3)(ii). Unless specifically exempted herein, this PM applies to all USCIS officers adjudicating these petitions.

Authority

The Department of Homeland Security (DHS) has delegated to USCIS the authority to make determinations of eligibility in immigrant petitions filed under INA 203(b) and 8 CFR 204.5. *See* INA 103(a) generally.

Background

USCIS and INS have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant classifications as aliens of extraordinary ability.[3] In order to qualify for admission in this classification, an alien must, among other things, demonstrate sustained national or international acclaim and that his or her achievements have been recognized in the alien's field of expertise in accordance with INA 203(b)(1)(A). Qualification under this classification is reserved for the small percentage of individuals at the very top of their fields of endeavor.8 CFR 204.5(h)(2).

The regulation at 8 CFR 204.5(h)(3), published in the Federal Register at 56 Fed. Reg. 60897 (Nov. 29, 1991), provides that a petition for an alien of extraordinary ability must be accompanied by initial evidence that the alien has achieved the requisite acclaim and recognition in the alien's field of expertise. Such evidence must be either a one-time achievement (that is, a major, internationally recognized award) or at least three out of the ten other types of evidence listed in the regulation (e.g., scholarly articles, high salary, commercial successes).

The statutory provision for the Outstanding Professor or Researcher immigrant classification at INA 203(b)(1)(B) requires that the alien be recognized internationally as outstanding in a specific academic field. Outstanding Professors or Researchers should stand apart in the academic community through eminence and distinction based on international recognition.[4] The regulation at 8 CFR 204.5(i)(3)(i) requires a petition for an outstanding professor or researcher to be accompanied by evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. This evidence must consist of at least two out of the six types of evidence listed in the regulation (e.g., major prizes, membership in associations).

The statutory provision for the Alien of Exceptional Ability immigrant classification at INA 203(b)(2)(A) requires that the alien will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States because of his or her exceptional ability in the sciences, arts, or business. The alien must also have a job offer from a U.S.

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[2] AFM sections that have not been updated by this memo shall remain in effect.
[3] *See* House Report 101-723, 1990 U.S.C.C.A.N. 6710. (Sep. 19, 1990), 56 FR 60897 (Nov. 29, 1991).
[4] *See* 56 Fed. Reg. 30703 (July 5, 1991).

employer to provide services in the sciences, arts, professions, or business.[5] The regulation at 8 CFR 204.5(k)(2) defines exceptional ability in the sciences, arts, or business as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The regulation at 8 CFR 204.5(k)(3)(ii) requires that a petition for this immigrant classification must be accompanied by documentation consisting of at least three out of six types of evidence listed in the regulation (e.g., academic record, professional license, membership in professional associations).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the Administrative Appeals Office's (AAO) dismissal of a petitioner's appeal of a denial of a petition filed under 203(b)(1)(A) of the INA. *Kazarian* v. *USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although affirming the decision, the Ninth Circuit found that the AAO erred in its evaluation of the initial evidence submitted with the petition pursuant to 8 CFR 204.5(h)(3). Specifically, the Ninth Circuit concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted, those concerns should have been raised in a subsequent "final merits determination" of whether the petitioner has the requisite extraordinary ability. *Id.* at 1122. The Ninth Circuit further stated that the concerns were "not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence." *Id.* at 1121.

USCIS agrees with the *Kazarian* court's two-part adjudicative approach to evaluating evidence submitted in connection with petitions for aliens of extraordinary ability: (1) Determine whether the petitioner or self-petitioner has submitted the required evidence that meets the parameters for each type of evidence listed at 8 CFR 204.5(h)(3); and (2) Determine whether the evidence submitted is sufficient to demonstrate that the beneficiary or self-petitioner meets the required high level of expertise for the extraordinary ability immigrant classification during a final merits determination. By contrast, the approach taken by USCIS officers in *Kazarian* collapsed these two parts and evaluated the evidence at the beginning stage of the adjudicative process, with each type of evidence being evaluated individually to determine whether the self-petitioner was extraordinary.

The two-part adjudicative approach to evaluating evidence described in *Kazarian* simplifies the adjudicative process by eliminating piecemeal consideration of extraordinary ability and shifting the analysis of overall extraordinary ability to the end of the adjudicative process when a determination on the entire petition is made (the final merits determination). Therefore, under this approach, an objective evaluation of the initial evidence listed at 8 CFR 204.5(h)(3) will continue as before; what changes is when the determination of extraordinary ability occurs in the adjudicative process. USCIS believes that this approach will lead to decisions that more clearly explain how evidence was considered, the basis for the overall determination of eligibility (or lack thereof), and greater consistency in decisions on petitions for aliens with extraordinary ability.

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[5] No job offer is required for an alien of exceptional ability under INA 203(b)(2) if a waiver of the job offer in the national interest (NIW) is granted under INA 203(b)(2)(B).

This approach is equally applicable to the evaluation of evidence in the adjudication of petitions for outstanding professors or researchers and aliens of exceptional ability. Similar evidentiary requirements and qualitative analyses apply to these types of petitions. Therefore, a similar adjudication process also should apply.

Policy
In order to promote consistency in decision-making, USCIS officers should use a two-part approach for evaluating evidence submitted in support of all petitions filed for Aliens of Extraordinary Ability, Outstanding Professors or Researchers, and Aliens of Exceptional Ability. USCIS officers should first objectively evaluate each type of evidence submitted to determine if it meets the parameters applicable to that type of evidence described in the regulations (also referred to as "regulatory criteria"). USCIS officers then should consider all of the evidence in totality in making the final merits determination regarding the required high level of expertise for the immigrant classification.

Proof
USCIS officers are reminded that the standard of proof for most administrative immigration proceedings, including petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, and for Aliens of Exceptional Ability is the "preponderance of the evidence" standard. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Thus, if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the standard of proof. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989); *see also U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

If a petitioner provides initial evidence (including but not limited to articles, publications, reference letters, expert testimony, support letters) that is probative (*e.g.*, does not merely recite the regulations) and credible, USCIS officers should objectively evaluate such initial evidence under a preponderance of the evidence standard to determine whether or not it is acceptable. In other words, USCIS officers may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth in the regulations, but instead should evaluate the evidence to determine if it falls within the parameters of the regulations applicable to that type of evidence by a preponderance of the evidence standard. USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established by a preponderance of the evidence that the self-petitioner or beneficiary has the required high level of expertise for the immigrant classification.

Implementation
Effective December 22, 2010, USCIS officers are to follow the amended procedures in this update of the *AFM*, AD11-14, in the adjudication of all Form I-140 petitions filed for Aliens of Extraordinary Ability, Outstanding Professors or Researchers, and for Alien of Exceptional Ability pending as of that date, as follows:

☞ 1. Paragraph (1)(A) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(A) Evaluating Evidence Submitted in Support of a Petition for an Alien of Extraordinary Ability. 8 CFR 204.5(h)(3) and (4) describe the various types of evidence that must be submitted in support of an I-140 petition for an alien of extraordinary ability. In general, the petition must be accompanied by initial evidence that: (a) the alien has sustained national or international acclaim; and (b) the alien's achievements have been recognized in the field of expertise. This initial evidence must include either evidence of a one-time achievement (*i.e.*, a major international recognized award, such as the Nobel Prize), or at least three of the types of evidence listed in 8 CFR 204.5(h)(3).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(1)(A) of the INA. First, USCIS officers should evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence objectively meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the immigrant classification.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of either a one-time achievement (that is, a major, internationally recognized award) or at least three of the ten regulatory criteria listed at 8 CFR 204.5(h)(3) (as discussed below), applying a preponderance of the evidence standard.

Note: While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is one of that small percentage who have risen to the very top of the field or if the alien has sustained national or international acclaim in Part One of the case analysis. See the table below for guidance on the limited determinations that should be made in Part One of the E11 analysis:

Part One Analysis of Evidence Submitted Under 8 CFR 204.5(h)(3) and (4) **Note:** In some cases, evidence relevant to one criterion may be relevant to other criteria set forth in 8 CFR 204.5(h)(3).	
Regulation	**Limited Determination**
8 CFR 204.5(h)(3)(i): *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;*	**1. Determine if the alien was the recipient of prizes or awards.** The description of this type of evidence in the regulation provides that the focus should be on the alien's receipt of the awards or prizes, as opposed to his or her employer's receipt of the awards or prizes. **2. Determine whether the alien has received lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.** Relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field include, but are not limited to: • The criteria used to grant the awards or prizes; • The national or international significance of the awards or prizes in the field; and • The number of awardees or prize recipients as well as any limitations on competitors (an award limited to competitors from a single institution, for example, may have little national or international significance).
8 CFR 204.5(h)(3)(ii): *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their*	**1. Determine if the association for which the alien claims membership requires that members have outstanding achievements in the field as judged by recognized experts in that field.** The petitioner must show that membership in the associations is based on the alien being judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought. For example, admission to membership in the National Academy of Sciences as a Foreign Associate requires individuals to be nominated by an academy member, and membership is ultimately granted based upon recognition of the individual's distinguished achievements in original research. *See*

members, as judged by recognized national or international experts in their disciplines or fields;	www.nasonline.org. Associations may have multiple levels of membership. The level of membership afforded to the alien must show that in order to obtain that level of membership, the alien was judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought. Relevant factors that may lead to a conclusion that the alien's membership in the associations was not based on outstanding achievements in the field include, but are not limited to, instances where the alien's membership was based: • Solely on a level of education or years of experience in a particular field; • On the payment of a fee or by subscribing to an association's publications; or • On a requirement, compulsory or otherwise, for employment in certain occupations, such as union membership or guild affiliation for actors.
8 CFR 204.5(h)(3)(iii): *Published material about the alien in professional or major trade publications or other major media relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;*	**1. Determine whether the published material was related to the alien and the alien's specific work in the field for which classification is sought.** The published material should be about the alien relating to his or her work in the field, not just about his or her employer or another organization that he or she is associated with. Note that marketing materials created for the purpose of selling the alien's products or promoting his or her services are not generally considered to be published material about the beneficiary. **2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.** Evidence of published material in professional or major trade publications or in other major media publications about the alien should establish that the circulation (on-line or in print) is high compared to other circulation statistics and show who the intended audience of the publication is, as well as the title, date and author of the material.

8 CFR 204.5(h)(3)(iv): *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;*	**Determine whether the alien has acted as the judge of the work of others in the same or an allied field of specialization.** The petitioner must show that the alien has not only been invited to judge the work of others, but also that the alien actually participated in the judging of the work of others in the same or allied field of specialization. For example: • Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed. • Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by departmental records.
8 CFR 204.5(h)(3)(v): *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;*	**1. Determine whether the alien has made original contributions in the field.** **2. Determine whether the alien's original contributions are of major significance to the field.** USCIS officers must evaluate whether the original work constitutes major, significant contributions to the field. Although funded and published work may be "original," this fact alone is not sufficient to establish that the work is of major significance. For example, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals that have provoked widespread commentary or received notice from others working in the field, or entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, may be probative of the significance of the alien's contributions to the field of endeavor. USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the significance of the alien's contributions in order to assist in giving an assessment of the alien's original contributions of major significance. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien's contributions are of major significance to the field and its impact

	on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion.
8 CFR 204.5 (h)(3)(vi): *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;*	**1. Determine whether the alien has authored scholarly articles in the field.** As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. For other fields, a scholarly article should be written for learned persons in that field. ("Learned" is defined as "having or demonstrating profound knowledge or scholarship"). Learned persons include all persons having profound knowledge of a field. **2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.** Evidence of published material in professional or major trade publications or in other major media publications should establish that the circulation (on-line or in print) is high compared to other circulation statistics and who the intended audience of the publication is.
8 CFR 204.5 (h)(3)(vii): *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;*	**1. Determine whether the work that was displayed is the alien's work product.** The description of this type of evidence in the regulation provides that the work must be <u>the alien's.</u> **2. Determine whether the venues (virtual or otherwise) where the alien's work was displayed were <u>*artistic*</u> exhibitions or showcases.** Webster's online dictionary defines:

	Exhibition as a public showing. (*See*: http://www.merriam-webster.com/dictionary/exhibition) *Showcase* as a setting, occasion, or medium for exhibiting something or someone especially in an attractive or favorable aspect. (*See*: http://www.merriam-webster.com/dictionary/showcase)
8 CFR 204.5 (h)(3)(viii): *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;*	**1. Determine whether the alien has performed in leading or critical roles for organizations or establishments.** In evaluating such evidence, USCIS officers must examine whether the role is (or was) leading or critical. If a leading role, the evidence must establish that the alien is (or was) a leader. A title, with appropriate matching duties, can help to establish if a role is (or was), in fact, leading. If a critical role, the evidence must establish that the alien has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. A supporting role may be considered "critical" if the alien's performance in the role is (or was) important in that way. It is not the title of the alien's role, but rather the alien's performance in the role that determines whether the role is (or was) critical. This is one criterion where letters from individuals with personal knowledge of the significance of the alien's leading or critical role can be particularly helpful to USCIS officers in making this determination as long as the letters contain detailed and probative information that specifically addresses how the alien's role for the organization or establishment was leading or critical. Note: 8 CFR 204.5(g)(1) states that evidence of experience "shall" consist of letters from employers. **2. Determine whether the organization or establishment has a distinguished reputation.** USCIS officers should keep in mind that the relative size or longevity of an organization or establishment is not in and of itself a determining factor. Rather, the organization or establishment must be recognized as having a distinguished

	reputation. Webster's online dictionary defines *distinguished* as ***1:*** *marked by eminence, distinction, or excellence <distinguished leadership* and ***2:*** *befitting an eminent person <a distinguished setting.* (*See* http://www.merriam-webster.com/dictionary/distinguished)
8 CFR 204.5(h)(3)(ix): *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field;*	**1. Determine whether the alien's salary or remuneration is high relative to the compensation paid to others working in the field.** Evidence regarding whether the alien's compensation is high relative to that of others working in the field may take many forms. If the petitioner is claiming to meet this criterion, then the burden is on the petitioner to provide appropriate evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data. Three Web sites that may be helpful in evaluating the evidence provided by the petitioner are: The Bureau of Labor Statistics (BLS): http://www.bls.gov/bls/blswage.htm The Department of Labor's Career One Stop website: http://www.careeronestop.org/SalariesBenefits/Sal_default.aspx The Department of Labor's Office of Foreign Labor Certification Online Wage Library: http://www.flcdatacenter.com Note: Aliens working in different countries should be evaluated based on the wage statistics or comparable evidence in that country, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.
8 CFR 204.5(h)(3)(x): *Evidence of commercial successes in the performing arts, as shown*	**Determine whether the alien has enjoyed commercial successes in the performing arts.** This criterion focuses on volume of sales and box office receipts as a measure of the alien's commercial success in the performing arts. Therefore, the mere fact that an alien has recorded and released musical compilations or performed in

by box office receipts or record, cassette, compact disk, or video sales.	theatrical, motion picture or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the alien's commercial success relative to others involved in similar pursuits in the performing arts.
8 CFR 204.5(h)(4): *If the standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.*	**Determine if the evidence submitted is comparable to the evidence required in 8 CFR 204.5(h)(3).** This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(h)(3) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. General assertions that any of the ten objective criteria described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(h)(3) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(h)(3). On the other hand, the following are examples of where 8 CFR 204.5(h)(4) might apply. (1) An alien beneficiary who is an Olympic coach whose athlete wins an Olympic medal while under the alien's principal tutelage would likely constitute evidence comparable to that in 8 CFR 204.5(h)(3)(v). (2) Election to a national all-star or Olympic team might serve as comparable evidence for evidence of memberships in 8 CFR 204.5(h)(3)(ii). **Note:** There is no comparable evidence for the one-time achievement of a major, international recognized award.

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Extraordinary Ability under section 203(b)(1)(A) of the INA.

For example:

Participating in the judging of the work of others in the same or an allied field of specialization alone, regardless of the circumstances, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

Publishing scholarly articles in professional or major trade publications or other major media alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's publications should be evaluated to determine whether they were indicative of the alien being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

The issue related to whether the alien is one of that small percentage who have risen to the very top of the field of endeavor and enjoys sustained national or international acclaim should be addressed and articulated in part two of the analysis, not in part one where the USCIS officer is only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement of providing required initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the INA. As part of the final merits determination, the quality of the evidence also should be considered, such as whether the judging responsibilities were internal and whether the scholarly articles (if inherent to the occupation) are cited by others in the field.

In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the alien is one of that small percentage who has risen to the very top of the field of endeavor.

If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of extraordinary ability under section 203(b)(1)(A) of the INA.

☞ 2. The introductory language of paragraph (1)(E) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(E) Sustained National or International Acclaim. Under 8 CFR 204.5(h)(3), a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that the alien's achievements have been recognized in the field of expertise. In determining whether the beneficiary has enjoyed "sustained" national or international acclaim, bear in mind that such acclaim must be maintained. (According to Black's Law Dictionary, 1585 (9th Ed, 2009), the definition of *sustain* is "(1) to support or maintain, especially over a long period of time; 6. To persist in making (an effort) over a long period of time.") However, the word "sustained" does not imply an age limit on the beneficiary. A beneficiary may be very young in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes "sustained." If an alien was recognized for a particular achievement, the USCIS officer should determine whether the alien continues to maintain a comparable level of acclaim in the field of expertise since the alien was originally afforded that recognition. An alien may have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

Note: Section 22.2(i)(1)(A) of this chapter describes the limited determinations that should be made in Part One of the analysis to determine whether the alien has met any of the evidentiary criteria claimed by the petitioner at 8 CFR 204.5(h)(3). However, the evidence evaluated in Part One is also reviewed in Part Two to determine whether the alien is one of that small percentage who has risen to the very top of the field of endeavor, and that he or she has sustained national or international acclaim.

☞ 3. The existing text of paragraph (1)(F) of Chapter 22.2(i) of the *AFM* is removed and the paragraph is reserved.

☞ 4. Paragraph (2)(A) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(A) Evaluating Evidence Submitted in Support of a Petition for an Outstanding Professor or Researcher. 8 CFR 204.5(i)(3) describes the evidence that must be submitted in support of an I-140 petition for an outstanding professor or

researcher. The evidence that must be provided in support of E12, outstanding professor or researcher petitions must demonstrate that the alien is recognized *internationally* as outstanding in the academic field specified in the petition. 8 CFR 204.5(i)(2) defines academic field as "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education." By regulatory definition, a body of specialized knowledge is larger than a very small area of specialization in which only a single course is taught or is the subject of a very specialized dissertation. As such, it would be acceptable to find the alien is an outstanding professor or researcher in the claimed field (e.g., particle physics vs. physics in general), as long as the petitioner has demonstrated that the claimed field is "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education." In addition, the petition must be accompanied by an offer of permanent, tenured, or tenure-track employment (limited to "permanent positions" in the case of research positions) from a qualifying prospective employer and evidence that the alien has had at least three years of experience in teaching or research in the "academic field" in which the alien will be engaged. *See* 8 CFR 204.5(i)(3)(ii) and (iii). The definitions for "permanent" and "academic field" can be found in 8 CFR 204.5(i)(2).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(1)(B) of the INA. First, USCIS officers should evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence objectively meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the immigrant classification.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least two of the six regulatory criteria listed at 8 CFR 204.5(i)(3)(i) as discussed below, applying a preponderance of the evidence standard.

Note: While USCIS officers should objectively consider the quality and caliber of the evidence as required by the parameters of the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination relative to the alien's claimed international recognition in Part One of the case analysis. See the table below for guidance on the limited determinations that should be made in Part One of the E12 analysis:

Part One Analysis of Evidence Submitted Under 8 CFR 204.5(i)(3)(i)	
Note: In some cases, evidence relevant to one criterion may be relevant to other criteria set forth in 8 CFR 204.5(i)(3).	
Regulation	**Limited Determination**
8 CFR 204.5(i)(3)(i)(A): *Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;*	**1. Determine if the alien was the recipient of prizes or awards.** The description of this type of evidence in the regulation provides that the focus must be on the alien's receipt of the major prizes or awards, as opposed to his or her employer's receipt of the prizes or awards. **2. Determine whether the alien has received major prizes or awards for outstanding achievement in the academic field.** Relevant considerations regarding whether the basis for granting the major prizes or awards for outstanding achievement in the academic field include, but are not limited to: • The criteria used to grant the major prizes or awards; and, • The number of prize recipients or awardees as well as any limitations on competitors (a prize or award limited to competitors from a single institution, for example, may not rise to the level of major).
8 CFR 204.5(i)(3)(i)(B): *Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;*	**1. Determine if the association for which the alien claims membership requires outstanding achievements in the academic field.** The petitioner must show that membership in the associations is based on the alien's outstanding achievements in the academic field. Associations may have multiple levels of membership. The level of membership afforded to the alien must show that it requires outstanding achievements in the academic field for which classification is sought. Relevant factors that may lead to a conclusion that the

	alien's membership in the association was not based on outstanding achievements in the academic field include, but are not limited to, instances where the alien's membership was based: • Solely on a level of education or years of experience in a particular field; or • On the payment of a fee or by subscribing to an association's publications.
8 CFR 204.5(i)(3)(i)(C): *Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;*	**1. Determine whether the published material was about the alien's work.** The published material should be about the alien's work in the field, not just about his or her employer or another organization that he or she is associated with. Articles that cite the alien's work as one of multiple footnotes or endnotes are not generally "about" the alien's work. **2. Determine whether the publication qualifies as a professional publication.** Evidence of published material in professional publications about the alien should establish the circulation (online or in print) and that the intended audience of the publication, as well as the title, date, and author of the material.
8 CFR 204.5(i)(3)(i)(D): *Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;*	**Determine whether the alien has participated either individually or on a panel, as the judge of the work of others in the same or an allied academic field.** The petitioner must show that the alien has not only been invited to judge the work of others, but also that the alien actually participated in the judging of the work of others in the same or allied academic field. For example: • Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed. • Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by

	departmental records.
8 CFR 204.5(i)(3)(i)(E): *Evidence of the alien's original scientific or scholarly research contributions to the academic field;*	**Determine whether the alien has made original scientific or scholarly research contributions to the academic field.** As a reminder, this regulation does not require that the alien's contributions be of "major significance." That said, the description of this type of evidence in the regulation does not simply require original research, but an original scientific or scholarly research contribution. Moreover, the description of this type of evidence in the regulation requires that the contribution must be "to the academic field" rather than an individual laboratory or institution. The regulations include a separate criterion for scholarly articles at 8 CFR 204.5(i)(3)(i)(F). Therefore, contributions are a separate evidentiary requirement from scholarly articles. Possible items that could satisfy this criteria, include but are not limited to: • Citation history/patterns for the alien's work, as evidenced by number of citations, as well as an examination of the impact factor for the journals in which the alien publishes. While many scholars publish, not all are cited or publish in journals with significant impact factors. The petitioner may use web tools such as GoogleScholar, SciFinder, and the Web of Science to establish the number of citations and the impact factor for journals. • Since scholarly work tends to be specialized and to be expressed in arcane and specialized language, USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the alien's contributions in order to assist in giving an assessment of the alien's original contributions. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien has contributed to the field and its impact on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that

	may form the basis for meeting this criterion.
8 CFR 204.5(i)(3)(i)(F): *Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;*	**1. Determine whether the alien has authored scholarly articles in the field.** As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college or university. It should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. **2. Determine whether the publication qualifies as a scholarly book or as a scholarly journal with international circulation in the academic field.** Evidence of published material in scholarly journals with international circulation should establish that the circulation (online or in print) is in fact, international, and who the intended audience of the publication is. Scholarly journals are typically written for a specialized audience often using technical jargon. Articles normally include an abstract, a description of methodology, footnotes, endnotes, and bibliography (See http://www.nova.edu/library/help/misc/glossary.html#s).

Part One Note: Objectively meeting the regulatory criteria in part one, alone does not establish that the alien in fact meets the requirements for classification as an outstanding professor or researcher under section 203(b)(1)(B) of the INA.

For example:

Participating in the judging of the work of others in the same or an allied academic field alone, regardless of the circumstances, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being recognized internationally as outstanding in a specific academic area.

Authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the

alien's authorship of book or articles should be evaluated to determine whether they were indicative of the alien being recognized internationally as outstanding in a specific academic area.

The issue of whether the alien is recognized internationally as outstanding in a specific academic area should be addressed and articulated in part two of the analysis, not in part one where the USCIS officer is only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least two types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an outstanding professor or researcher under section 203(b)(1)(B) of the INA. The quality of the evidence also must be considered. In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien is recognized internationally as outstanding in a specific academic area.

If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an Outstanding Professor or Researcher under section 203(b)(1)(B) of the INA.

☞ 5. Paragraph (2)(A) of Chapter 22.2(j) of the *AFM* is revised to read as follows:

(A) Evaluation of Evidence Submitted in Support of a Petition for an Alien of Exceptional Ability. 8 CFR 204.5(k)(3)(ii) describes the various types of initial evidence that must be submitted in support of an I-140 petition for an alien of exceptional ability. The initial evidence must include evidence of at least three of the types of evidence listed in 8 CFR 204.5(k)(3)(ii).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(2) of the INA. First, USCIS officers should objectively evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the visa category.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least three of the six regulatory criteria listed at 8 CFR 204.5(k)(3)(ii) (as discussed below), applying a preponderance of the evidence standard.

Note: While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is an alien of exceptional ability in Part One of the case analysis.

Following is a list of the types of evidence listed at 8 CFR 204.5(k)(3)(ii) applicable to this immigrant classification. Note that in some cases, evidence relevant to one criterion may be relevant to other criteria set forth in these provisions.

8 CFR 204.5(k)(3)(ii)

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

> **Note:** To satisfy this criterion, the evidence must show that the alien has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field.

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Additionally, 8 CFR 204.5(k)(3)(iii), states, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Note: This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(k)(3)(ii) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.

General assertions that any of the six objective criteria described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(k)(3)(ii) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(k)(3)(ii).

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Exceptional Ability under section 203(b)(2) of the INA.

For example:

Being a member of professional associations alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's membership should be evaluated to determine whether it is indicative of the alien having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The issue of whether the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business should be addressed and articulated in part two of the analysis, not in part one where USCIS officers are only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of exceptional ability under section 203(b)(2) of the INA. The quality of the evidence must be considered. In Part Two of the analysis, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the

final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

If the USCIS officer determines that the petitioner has failed to demonstrate this requirement, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of exceptional ability under 203(b)(2) of the INA.

Note: The petitioner must demonstrate that the alien is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise "significantly above that ordinarily encountered." Note that section 203(b)(2)(C) of INA provides that mere possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Therefore, formal recognition in the form of certificates and other documentation that are contemporaneous with the alien's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the alien's achievements.

☞ 6. The existing text of paragraph (2)(B) of Chapter 22.2(j) of the *AFM* is removed and the paragraph is reserved.

☞ 7. Technical Correction: The thirteenth paragraph in Chapter 22.2(b)(5)(B) of the *AFM* is revised to read as follows:

For successor-in-interest purposes, the transfer of ownership may occur at any time after the filing or approval of the original labor certification with DOL.

☞ 8. Technical Correction: The DOL e-mail address to use to request duplicate approved labor certifications from DOL in paragraphs (9) and (10) of Chapter 22.2(b) of the *AFM* is revised (in both paragraphs) to read as follows:

The duplicate certification e-mail request to DOL should be sent to Duplicate.PERM@dol.gov. The e-mail must contain the petitioner's name in the subject line.

☞ 9. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD11-14 12/22/10	Chapter 22.2(b)(5)(B), Chapter 22.2(b)(9), Chapter 22.2(b)(10), Chapter 22.2(i)(1)(A), Chapter 22.2(i)(1)(E), Chapter 22.2(i)(1)(F), Chapter 22.2(i)(2)(A), Chapter 22.2(j)(2)(A), and Chapter 22.2(j)(2)(B)	Finalizes guidance provided in AFM Update AD10-41 on evaluation of evidentiary criteria in certain Form I-140 petitions, and makes technical revisions to other portions of Chapter 22.2. Although this update clarifies some of the language in the earlier update, it does so without revising the basic policy stated therein.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Business Employment Services Team within the Service Center Operations Directorate.

E21 Exceptional Ability Professional Athlete Clarification

1. **In general, can a professional athlete qualify for E21 "Exceptional Ability" classification?** Yes. Although historically the majority of professional athletes have been filing under the EB1 or EB3 classifications, USCIS policy and practice has been to allow professional atheletes to file as an alien of exceptional ability in the arts. According to AFM Chapter 22.2(j)(3), professional athletes may be classified as an alien of exceptional ability in the arts based on the precedent decision of Matter of Masters, 13 I&N Dec. 125(D.D. 1969). The decision held that a professional golfer could, if he was otherwise qualified, qualify as an alien of exceptional ability *in the arts* under section 203(b)(2) of the Act. Although this decision pre-dates IMMACT 90,. Matter of Masters has been interpreted to apply to E21 petitions filed on behalf of any athlete as Congress did not make it clear whether the term "arts" should continue to include athletics in amending the employment based immigrant visa preferences.

2. **Does DOL process professional athlete labor certifications differently than other occupations/industries?** Yes. Unlike other occupations, applications for labor certification for professional athletes are still filed using the Form ETA-750A. This is a much shorter form than the ETA-9089 used for labor certification of all other occupations. The DOL defines the term "professional athlete" in 20 CFR 656.40(f) to mean an individual who is employed as an athlete by:
    - A team that is a member of an association of 6 or more professional sports teams whose total combined revenues exceed $10,000,000 per year, if the association governs the conduct of its members and regulates the contests and exhibitions in which its member teams regularly engage; or
    - Any minor league team that is affiliated with such an association. See section 212(a)(5)(A)(iii) of the Act.

    Furthermore, 20 CFR 656.40(f) states that in computing the prevailing wage for a professional athlete when the job opportunity is covered by professional sports league rules or regulations, the wage set forth in those rules or regulations is considered to be the prevailing wage.

3. **What are the eligibility requirements that a professional athlete must meet to qualify for E21 "Exceptional Ability" classification?** The regulations state the following about this classification:

    Section 203(b)(2)(A):

    > Visas shall be made available . . . to qualified immigrants who . . . because of their exceptional ability in the sciences, arts [including athletics as an "art"], 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.

    8 CFR 204.5(k)(1) states:

> Any United States employer may file a petition on Form I-140 for classification of an lien under section 203(b)(2) of the Act as . . . an alien of exceptional ability in the sciences, arts, or business.

8 CFR 204(k)(4) states:

> Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor. . . The job offer portion of the individual labor certification . . . must demonstrate that the job requires . . . an alien of exceptional ability.

8 CFR 204.5(2) defines "exceptional ability in the sciences, arts, or business" as "a degree of expertise above that ordinarily encountered in the sciences, arts, or business."

8 CFR 204.5(k)(3)(ii) states:

> To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:
>
> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he/she is being sought;
> (C) A license to practice the profession or certification for a particular profession or occupation;
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
> (E) Evidence of membership in professional associations; or
> (F) Evidence of recognition for achievements and significant contributions to the industry of field by peers, governmental entities, or professional or business organizations.

Like any other E21 "Exceptional Ability" petition, the petitioner for a professional athlete must establish that the alien meets 3 of the above 6 criteria. Furthermore, the regulations do allow for comparable evidence to be submitted for some occupations. 8 CFR 204.5(k)(3)(iii) states:

> If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

4. **Does the ETA-750A need to list/describe at least 3 of the 6 criteria as job requirements in order for the alien to qualify for E21 "Exceptional Ability" classification as a professional**

athlete? No. The job offer portion of the individual labor certification is required only to demonstrate that the job requires an alien of exceptional ability. The regulations do not state that the job offered must necessarily have any minimum educational or experience requirements. Furthermore, each of the criteria seem to refer to evidence that the alien meets the criteria –they do not state that the evidence must show the job offered meets each applicable criteria. Plus, listing specific criteria on the labor certification may likely be deemed by DOL as "tailoring" the job duties for the alien.

TSC mentioned that there have been non-precedent decisions filed on behalf of E21 non-athlete cases from the AAO that have stressed the need for each applicable criteria to be listed on the labor certification. SCOPS believes that the AAO decisions TSC may be referring to were involving non-professional athlete cases where the labor certification was filed on an ETA-9089. Aside from the fact that these cases were not precedent decisions, SCOPS does not believe that these cases can be applied to professional athlete cases, which involve an ETA-750A and receives different handling by DOL. Furthermore, in review of other similar labor certifications for previously approved E21 "Exceptional Ability" professional athlete cases, SCOPS finds that USCIS has not historically required that these criteria be described on the labor certification. Both USCIS has approved numerous E21 "exceptional ability" petitions for professional athletes that only state the job requires a worker with "exceptional ability".

For example: In analyzing whether a beneficiary meets criteria (B), evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he/she is being sought analysis of this criterion is focused on the job experience of the alien, not on the minimum experience requirements of the job offered. The job listed on the ETA-750A would not necessarily have to require a minimum of 10 years' experience as a professional athlete in order for the alien to meet this criterion If the labor certification requires a minimum of only 2 years' experience working as a professional athlete of "exceptional ability", it is still possible for criterion B to be met. The petitioner may meet this criterion if the evidence of record shows that the beneficiary has worked as a professional athlete for over ten years (even though the labor certification requires a minimum of only 2 years).

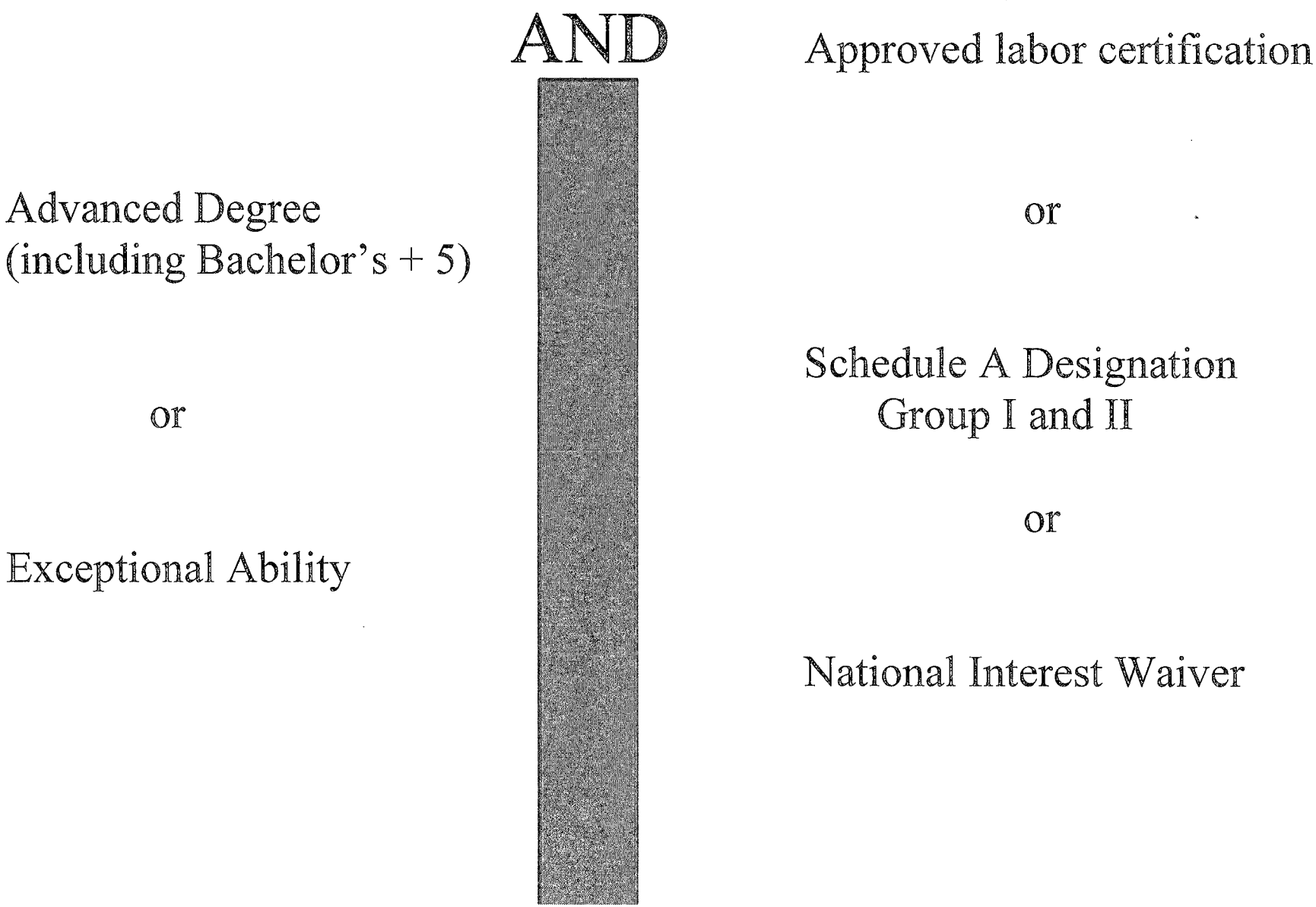
5. **What evidence is sufficient to establish that a professional athlete meets criterion (E), evidence of membership in a professional association?** A copy of a valid contract with a major league sports team for the beneficiary to be employed as a professional athlete often will be submitted as evidence for this criterion. Adjudicators should look for evidence of exceptional ability beyond the mere existence of a contract with a major league team or an approved labor certification. It would be incongruous to grant an immigrant visa petition on behalf of a major league player on the basis of section 203(b)(2) of the Act if the alien is unlikely to continue to perform the duties specified in the underlying petition for a reasonable period following a grant of lawful permanent resident status. Many athletes, for example, enjoy substantial signing

bonuses, but may not, thereafter, prove to be of "major league," let alone "exceptional" caliber. Similarly, the fact that an alien played for a portion of a season for a major league team does not automatically establish that the alien will continue to play at a major league level.

For example: The alien could be cut from the major league roster, may announce his permanent retirement as a player in the sport, or suffer from a career-ending injury prior to adjudication of the petition, thereby removing the job offer that formed the basis of the I-140, thus, resulting in a denial of the petition.

TSC has argued that in order to meet this criterion, the "professional association" would need to require a baccalaureate degree or its foreign equivalent as the minimum requirement for entry into the occupation –based on the definition of "profession" as defined in 8 CFR 204.5(k)(2). Upon consultation with OCC, SCOPS has clarified that use of the term "professional association" is separate and apart from the use of the term "profession" in this section of the regulations: the definition of "profession" is referring to terminology applied specifically to E21 "Advanced Degree" petitions, not E21 "Exceptional Ability" petitions. Evidence of a membership in a "professional association" for this criterion is much more flexible and may allow for professional athletes (who typically do not require any minimum education) to meet this criterion if they are an active member of a major league team.

Second Preference Possibilities



Tab 3:

Matter of Dhanasar

Matter of DHANASAR, Petitioner

Decided December 27, 2016

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office

USCIS may 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 he or she is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), vacated.

ON BEHALF OF PETITIONER: Gerard M. Chapman, Esquire, Greensboro, North Carolina

In this decision, we have occasion to revisit the analytical framework for assessing eligibility for "national interest waivers" under section 203(b)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(B)(i) (2012). The self-petitioner, a researcher and educator in the field of aerospace engineering, filed an immigrant visa petition seeking classification under section 203(b)(2) of the Act as a member of the professions holding an advanced degree. The petitioner also sought a "national interest waiver" of the job offer otherwise required by section 203(b)(2)(A).

The Director of the Texas Service Center denied the petition under the existing analytical framework, concluding that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that a waiver of the job offer requirement would not be in the national interest of the United States. Upon de novo review, and based on the revised national interest standard adopted herein, we will sustain the appeal and approve the petition.

I. LEGAL BACKGROUND

Subparagraph (A) of section 203(b)(2) of the Act makes immigrant visas 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." Under subparagraph (A), immigrant visas are available to such individuals only if their "services in the sciences, arts, professions, or business are sought by an employer in the United States."

Before hiring a foreign national under this immigrant classification, an employer must first obtain a permanent labor certification from the United States Department of Labor ("DOL") under section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i) (2012). *See also* 8 C.F.R. § 204.5(k)(4)(i) (2016). A labor certification demonstrates that DOL has determined that there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such skilled or unskilled labor, and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. In its labor certification application, the employer must list the position's job requirements consistent with what is normally required for the occupation. *See* 20 C.F.R. § 656.17(h)(1) (2016). Moreover, the job requirements described on the labor certification application must represent the actual minimum requirements for the job opportunity. *See* 20 C.F.R. § 656.17(i)(1). That is, the employer may not tailor the position requirements to the foreign worker's qualifications; it may only list the position's minimum requirements, regardless of the foreign worker's additional skills that go beyond what is normally required for the occupation. The employer must then test the labor market to determine if able, willing, or qualified U.S. workers are available with the advertised minimum qualifications. If such U.S. workers are found, the employer may not hire the foreign worker for the position, even if the foreign worker clearly has more skills (beyond the advertised qualifications). If the employer does not identify such U.S. workers and DOL determines that those workers are indeed unavailable, DOL will certify the labor certification. After securing the DOL-approved labor certification, the employer may then file a petition with DHS requesting the immigrant classification.

Under subparagraph (B) of section 203(b)(2), however, the Secretary of Homeland Security may waive the requirement of a "job offer" (namely, that the beneficiary's services are sought by a U.S. employer) and, under the applicable regulations, of "a labor certification." 8 C.F.R. § 204.5(k)(4)(ii).[1] That subparagraph states, in pertinent part, that the

[1] While appearing to limit national interest waivers to only aliens possessing exceptional ability in the sciences, arts, or business, 8 C.F.R. § 204.5(k)(4)(ii) was superseded in part by section 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1743 (continued . . .)

Secretary "may, when the [Secretary] 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."[2] Section 203(b)(2)(i) of the Act.

USCIS may grant a national interest waiver as a matter of discretion if the petitioner satisfies both subparagraphs (A) and (B). Thus, a petitioner who seeks a "national interest waiver" must first satisfy subparagraph (A) by demonstrating that the beneficiary qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(1)–(3) (providing definitions and considerations for making such determinations); *see also* section 203(b)(2)(C) of the Act (providing that possession of requisite academic degree or professional license "shall not by itself be considered sufficient evidence of exceptional ability"). The petitioner must then satisfy subparagraph (B) by establishing that it would be in the national interest to waive the "job offer" requirement under subparagraph (A).[3] *See* 8 C.F.R. § 204.5(k)(4)(ii). This two-part statutory scheme is relatively straightforward, but the term "national interest" is ambiguous. Undefined by statute and regulation, "national interest" is a broad concept subject to various interpretations.

In 1998, under the legacy Immigration and Naturalization Service, we issued a precedent decision establishing a framework for evaluating national interest waiver petitions. *Matter of New York State Dep't of Transp.* ("*NYSDOT*"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998).

("MTINA"). Section 302(b)(2) of MTINA amended section 203(b)(2)(B)(i) of the Act by inserting the word "professions" after the word "arts," and thereby made the national interest waiver available to members of the professions holding advanced degrees in addition to individuals of exceptional ability.

[2] Pursuant to section 1517 of the Homeland Security Act ("HSA") of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

[3] To do so, a petitioner must go beyond showing the individual's expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his field of expertise.

The *NYSDOT* framework looks first to see if a petitioner has shown that the area of employment is of "substantial intrinsic merit." *Id.* at 217. Next, a petitioner must establish that any proposed benefit from the individual's endeavors will be "national in scope." *Id.* Finally, the petitioner must demonstrate that the national interest would be adversely affected if a labor certification were required for the foreign national. *Id.*

Based on our experience with that decision in the intervening period, we believe it is now time for a reassessment. While the first prong has held up under adjudicative experience, the term "intrinsic" adds little to the analysis yet is susceptible to unnecessary subjective evaluation.[4] Similarly, the second prong has caused relatively few problems in adjudications, but occasionally the term "national in scope" is construed too narrowly by focusing primarily on the geographic impact of the benefit. While *NYSDOT* found a civil engineer's employment to be national in scope even though it was limited to a particular region, that finding hinged on the geographic connections between New York's bridges and roads and the national transportation system. Certain locally or regionally focused endeavors, however, may be of national importance despite being difficult to quantify with respect to geographic scope.

What has generated the greatest confusion for petitioners and adjudicators, however, is *NYSDOT*'s third prong. First, this prong is explained in several different ways within *NYSDOT* itself, leaving the reader uncertain what ultimately is the relevant inquiry. We initially state the third prong as requiring a petitioner to "demonstrate that the national interest would be adversely affected if a labor certification were required." *NYSDOT*, 22 I&N Dec. at 217. We then alternatively describe the third prong as requiring the petitioner to demonstrate that the individual "present[s] a national benefit so great as to outweigh the national interest inherent in the labor certification process." *Id.* at 218. Immediately thereafter, we restate the third prong yet again: the petitioner must establish that the individual will "serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications."[5] *Id.* Finally, in what may be construed as either a fourth restatement of prong three or as an explanation of how to satisfy it, we state that "it clearly must be established that the alien's past record justifies projections of future benefit to the national interest." *Id.* at 219. A footnote

[4] *Cf., e.g., 24/7 Records, Inc. v. Sony Music Entm't, Inc.*, 514 F. Supp. 2d 571, 575 (S.D.N.Y. 2007) ("'Intrinsic value' is an inherently subjective and speculative concept.").

[5] Other, slight variations of the third prong emerge later in the decision. *See NYSDOT*, 22 I&N at 220 ("to a greater extent than U.S. workers"); *see also id.* at 221 ("considerably outweigh").

to this statement clarifies that USCIS seeks "a past history of demonstrable achievement with some degree of influence on the field as a whole." *Id.* at 219 n.6. Although residing in footnote 6, this "influence" standard has in practice become the primary yardstick against which petitions are measured.[6]

Second, and a more fundamental challenge than parsing its several restatements, *NYSDOT*'s third prong can be misinterpreted to require the petitioner to submit, and the adjudicator to evaluate, evidence relevant to the very labor market test that the waiver is intended to forego. The first iteration of prong three, that the national interest would be adversely affected if a labor certification were required, implies that petitioners should submit evidence of harm to the national interest. The third iteration, that the individual will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, suggests that petitioners should submit evidence comparing foreign nationals to unidentified U.S. workers. These concepts have proven to be difficult for many qualified individuals to establish or analyze in the abstract. It has proven particularly ill-suited for USCIS to evaluate petitions from self-employed individuals, such as entrepreneurs. In *NYSDOT*, we even "acknowledge[d] that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification." *Id.* at 218 n.5. Nonetheless, we did not modify the test to resolve this scenario, which continues to challenge petitioners and USCIS adjudicators. Lastly, this concept of harm-to-national-interest is not required by, and unnecessarily narrows, the Secretary's broad discretionary authority to grant a waiver when he "deems it to be in the national interest."

II. NEW ANALYTICAL FRAMEWORK

Accordingly, our decision in *NYSDOT* is ripe for revision. Today, we vacate *NYSDOT* and adopt a new framework for adjudicating national interest waiver petitions, one that will provide greater clarity, apply more flexibly to circumstances of both petitioning employers and self-petitioning

[6] While this "influence" standard rests upon the reasonable notion that past success will often predict future benefit, our adjudication experience in the years since *NYSDOT* has revealed that there are some talented individuals for whom past achievements are not necessarily the best or only predictor of future success.

individuals, and better advance the purpose of the broad discretionary waiver provision to benefit the United States.[7]

Under the new framework, and after eligibility for EB-2 classification has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence:[8] (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.[9]

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. Evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required, as an endeavor's merit may be established without immediate or quantifiable economic impact. For example, endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States.

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. An undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance. In modifying this prong to assess "national

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[7] Going forward, we will use "petitioners" to include both employers who have filed petitions on behalf of employees and individuals who have filed petitions on their own behalf (namely, self-petitioners).

[8] Under the "preponderance of the evidence" standard, a petitioner must establish that he or she more likely than not satisfies the qualifying elements. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We will consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.*

[9] Because the national interest waiver is "purely discretionary," *Schneider v. Chertoff*, 450 F.3d 944, 948 (9th Cir. 2006), the petitioner also must show that the foreign national otherwise merits a favorable exercise of discretion. *See Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005); *cf. Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002).

importance" rather than "national in scope," as used in *NYSDOT*, we seek to avoid overemphasis on the geographic breadth of the endeavor. An 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.

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.

We recognize that forecasting feasibility or future success may present challenges to petitioners and USCIS officers, and that many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed. But notwithstanding this inherent uncertainty, in order to merit a national interest waiver, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.

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. On the one hand, Congress clearly sought to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. On the other hand, by creating the national interest waiver, Congress recognized that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. Congress entrusted the Secretary to balance these interests within the context of individual national interest waiver adjudications.

In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or 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;[10]

[10] For example, the labor certification process may prevent a petitioning employer from hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor certification. *See generally* 20 C.F.R. § 656.17(i). Likewise, because of the nature of the proposed endeavor, it may be impractical for an entrepreneur or (continued . . .)

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. We emphasize that, 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.

We note that this new prong, unlike the third prong of *NYSDOT*, does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner's field. As stated previously, *NYSDOT*'s third prong was especially problematic for certain petitioners, such as entrepreneurs and self-employed individuals. This more flexible test, which can be met in a range of ways as described above, is meant to apply to a greater variety of individuals.

III. ANALYSIS

The director found the petitioner to be qualified for the classification sought by virtue of his advanced degrees. We agree that he holds advanced degrees and therefore qualifies under section 203(b)(2)(A). The remaining issue before us is whether the petitioner has established, by a preponderance of the evidence, that he is eligible for and merits a national interest waiver.

The petitioner proposes to engage in research and development relating to air and space propulsion systems, as well as to teach aerospace engineering, at North Carolina Agricultural and Technical State University ("North Carolina A&T"). The petitioner holds two master of science degrees, in mechanical engineering and in applied physics, as well as a Ph.D. in engineering, from North Carolina A&T. At the time of filing the instant petition, he also worked as a postdoctoral research associate at the university. The record reflects that the petitioner's graduate and postgraduate research has focused on hypersonic propulsion systems (systems involving propulsion at speeds of Mach 5 and above) and on computational fluid dynamics. He has developed a validated computational model of a high-speed air-breathing propulsion engine, as well as a novel numerical method for accurately calculating hypersonic air flow. The petitioner intends to continue his research at the university.

The extensive record includes: reliable evidence of the petitioner's credentials; copies of his publications and other published materials that

self-employed inventor, when advancing an endeavor on his or her own, to secure a job offer from a U.S. employer.

cite his work; evidence of his membership in professional associations; and documentation regarding his research and teaching activities. The petitioner also submitted several letters from individuals who establish their own expertise in aerospace, describe the petitioner's research in detail and attest to his expertise in the field of hypersonic propulsion systems.

We determine that the petitioner is eligible for a national interest waiver under the new framework. First, we conclude that the petitioner has established both the substantial merit and national importance of his proposed endeavor. The petitioner demonstrated that he intends to continue research into the design and development of propulsion systems for potential use in military and civilian technologies such as nano-satellites, rocket-propelled ballistic missiles, and single-stage-to-orbit vehicles. In letters supporting the petition, he describes how research in this area enhances our national security and defense by allowing the United States to maintain its advantage over other nations in the field of hypersonic flight. We find that this proposed research has substantial merit because it aims to advance scientific knowledge and further national security interests and U.S. competitiveness in the civil space sector.

The record further demonstrates that the petitioner's proposed endeavor is of national importance. The petitioner submitted probative expert letters from individuals holding senior positions in academia, government, and industry that describe the importance of hypersonic propulsion research as it relates to U.S. strategic interests. He also provided media articles and other evidence documenting the interest of the House Committee on Armed Services in the development of hypersonic technologies and discussing the potential significance of U.S. advances in this area of research and development. The letters and the media articles discuss efforts and advances that other countries are currently making in the area of hypersonic propulsion systems and the strategic importance of U.S. advancement in researching and developing these technologies for use in missiles, satellites, and aircraft.

Second, we find that the record establishes that the petitioner is well positioned to advance the proposed endeavor. Beyond his multiple graduate degrees in relevant fields, the petitioner has experience conducting research and developing computational models that support the mission of the United States Department of Defense ("DOD") to develop air superiority and protection capabilities of U.S. military forces, and that assist in the development of platforms for Earth observation and interplanetary exploration. The petitioner submitted detailed expert letters describing U.S. Government interest and investment in his research, and the record includes documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space

Administration ("NASA") and the Air Force Research Laboratories ("AFRL") within DOD.[11] Thus, the significance of the petitioner's research in his field is corroborated by evidence of peer and government interest in his research, as well as by consistent government funding of the petitioner's research projects. The petitioner's education, experience, and expertise in his field, the significance of his role in research projects, as well as the sustained interest of and funding from government entities such as NASA and AFRL, position him well to continue to advance his proposed endeavor of hypersonic technology research.

Third and finally, we conclude 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. As noted above, the petitioner holds three graduate degrees in fields tied to the proposed endeavor, and the record demonstrates that he possesses considerable experience and expertise in a highly specialized field. The evidence also shows that research on hypersonic propulsion holds significant implications for U.S. national security and competitiveness. In addition, the repeated funding of research in which the petitioner played a key role indicates that government agencies, including NASA and the DOD, have found his work on this topic to be promising and useful. Because of his record of successful research in an area that furthers U.S. interests, we find that this petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available.

In addition to conducting research, the petitioner proposes to support teaching activities in science, technology, engineering, and math ("STEM") disciplines. He submits letters favorably attesting to his teaching abilities at the university level and evidence of his participation in mentorship programs for middle school students. While STEM teaching has substantial merit in relation to U.S. educational interests, the record does not indicate by a preponderance of the evidence that the petitioner would be engaged in activities that would impact the field of STEM education more broadly. Accordingly, as the petitioner has not established by a preponderance of the evidence that his proposed teaching activities meet the "national importance" element of the first prong of the new framework, we do not address the remaining prongs in relation to the petitioner's teaching activities.

[11] Although the director of North Carolina A&T's Center for Aerospace Research ("CAR") is listed as the lead principal investigator on all grants for CAR research, the record establishes that the petitioner initiated or is the primary award contact on several funded grant proposals and that he is the only listed researcher on many of the grants.

IV. CONCLUSION

The record demonstrates by a preponderance of the evidence that: (1) the petitioner's research in aerospace engineering has both substantial merit and national importance; (2) the petitioner is well positioned to advance his research; and (3) on balance, it is beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. We find that the petitioner has established eligibility for and otherwise merits a national interest waiver as a matter of discretion.

In visa petition 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 (2012). The petitioner has met that burden.

ORDER: The appeal is sustained and the petition is approved.

In re NEW YORK STATE DEPT OF TRANSPORTATION, Petitioner

In Visa Petition Proceedings

EAC 96 063 51031

Designated by the Acting Associate Commissioner, Programs, August 7, 1998

(1) An alien seeking immigrant classification as an alien of exceptional ability or as a member of the professions holding an advanced degree cannot meet the threshold for a national interest waiver of the job offer requirement simply by establishing a certain level of training or education which could be articulated on an application for a labor certification.

(2) General arguments regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an individual alien benefits the national interest by virtue of engaging in the field or seeking an as yet undiscovered solution to the problematic issue.

(3) A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

ON BEHALF OF PETITIONER: Jill Nagy
Lee and LeForestier, P.C.
Box 1054
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DISCUSSION

The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.[1]

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2), as

[1]This decision was originally entered on April 27, 1998. The matter has been reopened on Service motion for the limited purpose of incorporating revisions for publication.

a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a civil engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (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. — The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks to classify the beneficiary both as an advanced degree professional and as an alien of exceptional ability. The record establishes that the beneficiary holds a Master of Science degree in Civil Engineering (Structures) from Iowa State University and thus qualifies as a member of the professions holding an advanced degree. The issue of whether the beneficiary is also an alien of exceptional ability is moot. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must

> make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Several factors must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. This beneficiary's field of endeavor, engineering of bridges, clearly satisfies this first threshold. The importance of bridges, and their proper maintenance, is immediately apparent. It must be stressed, however, that eligibility is not established solely by a showing that the beneficiary's field of endeavor has intrinsic merit. A petitioner cannot establish qualification for a national interest waiver based solely on the importance of the alien's occupation. It is the position of the Service to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization.

Next, it must be shown that the proposed benefit will be national in scope. While the alien's employment may be limited to a particular geographic area, New York's bridges and roads connect the state to the national transportation system. The proper maintenance and operation of these bridges and roads therefore serve the interests of other regions of the country. Moreover, nothing in the record indicates that proper maintenance of New York's transportation infrastructure would have an adverse impact on the interests of other regions.[2] We therefore conclude that the occupation in this case serves the national interest.[3]

The final threshold is therefore specific to the alien. The petitioner seeking the waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the serv-

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[2]There may be cases where the benefit is not only purely local, but may even be harmful to the national interest. For example, the construction of a dam may benefit one area while cutting off a crucial water supply to another area.

[3]In reaching this conclusion, we note that the analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

ices of the alien by making available to U.S. workers the position sought by the alien. The labor certification process exists because protecting the jobs and job opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest.[4] An alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process.

Stated another way, the petitioner, whether the U.S. employer or the alien, must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. It is not sufficient for the petitioner simply to enumerate the alien's qualifications, since the labor certification process might reveal that an available U.S. worker has the qualifications as well. Likewise, it cannot be argued that an alien qualifies for a national interest waiver simply by virtue of playing an important role in a given project, if such a role could be filled by a competent and available U.S. worker. The alien must clearly present a significant benefit to the field of endeavor.

With regard to the unavailability of qualified U.S. workers, the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. Similarly, the Department of Labor allows a prospective U.S. employer to specify the minimum education, training, experience, and other special requirements needed to qualify for the position in question. Therefore, these qualifications, taken alone, do not justify a waiver of the certification process which takes these elements into account.[5]

Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree profes-

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[4]A limited exception to the minimum requirements rule exists, as set forth in Department of Labor regulations at 20 C.F.R. § 656.21a, (A U.S. college or university seeking to fill a teaching position can establish that the alien was found, through a competitive recruitment and selection process, to be more qualified than U.S. applicants.) This exception does not apply in this case.

[5]The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification. While this fact will be given due consideration in appropriate cases, the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

sionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. While the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest.[6] The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petitioner, the New York State Department of Transportation (NYSDOT), has employed the beneficiary since November 1993. The beneficiary's supervisor, Project Engineer Anil Desai, P.E., describes the function of the NYSDOT Structures Division as "the provision of professional engineering services for the rehabilitation, replacement, maintenance and inspection of bridges." Counsel states that the beneficiary's "expertise is in prestressed concrete construction and design of post-tensioning and of curved bridges."

A.M. Shirole, P.E., then Director of Structures and Deputy Chief Engineer at NYSDOT, stated in a November 3, 1995 letter that 60% of New York's bridges contain steel bearings which are susceptible to earthquake damage. The beneficiary "has been involved in detailed seismic analysis using state-of-the-art seismic analysis software." Mr. Shirole observes that recent earthquakes have demonstrated "the need for careful implementation of new guidelines for improving the seismic resistance of bridges." The petitioner has submitted evidence showing that the State of New York has withstood four earthquakes at or above 5.0 on the Richter scale since 1884, as well as numerous smaller earthquakes.

The beneficiary also analyzes and designs curved bridges, which "can provide 10 to 15% economy over a conventional system comprising of straight girders." Mr. Shirole asserted "I am personally aware of the national shortage of the type of expertise [the beneficiary] possesses in the design

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[6]It should be noted that the alien's past record need not be limited to prior work experience. The alien, however, clearly must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest.

of curved girder bridges." Knowledge of specialized design techniques would appear to be a valid requirement for the petitioner to set forth on an application for a labor certification. Mr. Shirole's assertion of a labor shortage, therefore, should be tested through the labor certification process.

Mr. Shirole continued:

> 32% of all bridges in the United States are deficient in some manner. . . . As more and more of the bridges that were built in the post world war construction boom reach the end of their service life, the nation's need for expert engineers with experience in structural rehabilitation has already started out pacing their availability, indicating their shortage in the industry's marketplace.

Harold J. Brown, Administrator of the New York Division of the Federal Highway Administration (FHWA), states that "[t]he work of the FHWA is in the national interest, as it will benefit the whole of America in providing a safer and cost-effective traveling way across the nation." Mr. Brown makes no specific assertion about the beneficiary, offering only the general statement that "maintenance of a trained and competent engineering staff by each State DOT is paramount to the success of the Federal Highway program."

The above arguments, and similar testimony from numerous other witnesses, focus largely on the critical state of the bridges and related infrastructure in New York and elsewhere in the United States. It is indisputably true that the nation's bridges play a fundamental role in the transportation system and, by extension, in the economy itself which depends on the transportation of goods and mobility of commuters and tourists. The employer's assertions regarding the overall importance of an alien's area of expertise cannot suffice, however, to establish eligibility for a national interest waiver. The issue in this case is not whether proper bridge maintenance is in the national interest, but rather whether this particular beneficiary, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role in the preservation and construction of bridges.

Anil Desai asserts that the beneficiary's "qualifications make him ideally suited for the kind of complicated engineering design that is done here." George A. Christian, P.E., Director of the Bridge Design Section at NYSDOT, states that the beneficiary's prior work experience "was a key consideration in our hiring him in 1993." Lowell Greimann, Chair of the Department of Civil and Construction Engineering at Iowa State University, states that the beneficiary's "unique background and experience in the field of bridge rehabilitation by applying techniques such as post-tensioning is a resource that can be applied toward the many bridge projects upcoming in the United States."

Any objective qualifications which are necessary for the performance of the occupation can be articulated in an application for alien labor certifi-

cation; the fact that the alien is qualified for the job does not warrant a waiver of the job offer/labor certification requirement. It cannot suffice to state that the alien possesses useful skills, or a "unique background." As noted above, regardless of the alien's particular experience or skills, even assuming they are unique, the benefit the alien's skills or background will provide to the United States must also considerably outweigh the inherent national interest in protecting U.S. workers through the labor certification process.

P.Y. Manjure, Chief Executive of Freyssinet (India) where the beneficiary worked for two years, states that the beneficiary "had rigorous training in the use and application of the world famous Freyssinet System of Post-tensioning." Ayaz H. Malik, P.E., Chairman of the Bridge Design Committee at NYSDOT, states that the beneficiary "has worked on innovative projects such as segmental arch structures patented by the French company 'Matiere'." It is not clear in what capacity the beneficiary "worked on" the Matiere project; in any event, the beneficiary's involvement with Freyssinet and Matiere, standing alone, does not qualify him for a national interest waiver. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification.[7] Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor.

George A. Christian observes that NYSDOT, and other federal and state agencies, are in the process of converting to metric measurements. Mr. Christian notes that the beneficiary's previous experience with metric measurements is aiding in this transition. The beneficiary's knowledge of this system would not rise to the level of being in the national interest for purposes of section 203(b)(2)(B) of the Act, since standard English measurements can be converted to metric though simple and widely available arithmetical formulas. Moreover, the metric system is accepted as the standard throughout most of the industrialized world, and is therefore commonly known among alien engineers. In any event, the employer's need for a worker trained in the metric system can be expressed on an application for a labor certification.

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[7]The record does not contain any indication that the beneficiary developed the technology for which Matiere holds the patent. An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. While innovation of a new method is of greater importance than mere training in that method, it must be stressed that such innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis.

Reports submitted on appeal reflect substantial cost savings on projects on which the beneficiary worked. The record does not show that these savings are due to the beneficiary's involvement, or that comparable projects executed without the beneficiary incurred significantly higher costs. The reports merely indicated that the projects on which the beneficiary worked could have cost more than they actually did.

A number of the witnesses in this case assert that engineers with the beneficiary's qualifications are in short supply, yet are desperately needed because of the deterioration of U.S. bridges. The petitioner has never clearly explained why the job offer and thus the labor certification requirement should be waived. Given the asserted shortage of qualified engineers with the requisite training, and the evident existence of an offer of permanent employment, the situation appears to correspond closely to the very situation that the labor certification process was designed to address.

Mr. Christian states in a letter that the beneficiary's "training and on-the-job experience becomes all the more important since our engineering staff development is a cost-intensive, time consuming process that affects the productivity and quality of the design process." In fact, documents submitted subsequent to the appeal establish the beneficiary's continued involvement in various projects undertaken by the petitioner. The Service does not dispute that the beneficiary provides valuable services to his employer; at issue here is the effect of such services on the national interest when compared to others in the profession. The Service also does not dispute the advantage to the petitioner of retaining qualified staff rather than training inexperienced, newly hired workers. The contention that no other experienced workers are available, however, should be tested on an application for a labor certification. The petitioner has not shown that it will suffer a substantial disruption in its efforts to maintain New York's bridges and roads if a national interest waiver is not granted and the petitioner is required to test the U.S. labor market through the labor certification process. Furthermore, with regard to experience, the regulations indicate that *ten years* of progressive experience is one possible criterion that may be used to establish exceptional ability. Because exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand.

Based on the above discussion and a careful review of the record, it is concluded that although the petitioner has shown that the beneficiary is a competent engineer whose skills and abilities are of value to his current employer, the petitioner has failed to establish that a job offer waiver based on national interest is warranted. As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not

appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien as they relate to the job to be performed. Moreover, the mere fact that an alien may play an important role in the activity to be performed by the petitioner is insufficient to establish eligibility for a job offer waiver based on national interest, since qualified U.S. workers may be available to play a similar role. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director denying the petition will not be disturbed.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

Tab 4: Precedent Decisions

D(2) Chart of Mandatory Authority – Burden of Proof and Common Legal Issues

Authority	Type*	Issue	Statement of Law
INA Sec 291 8 USC Section 1361	S	Burden of Proof	As summarized by AAO: The burden of proof in visa petition proceedings remains with the petitioner. Language of statute: "Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act [chapter], and, if an alien, that he is entitled to the nonimmigrant; immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person. . . ."
Matter of Price 20 I&N Dec. 953 (Assoc. Comm. Exams)	SPD	Burden of Proof	The burden of proof in these proceedings rests solely with the petitioner.
Matter of Treasure Craft of California 14 I&N Dec. 190 (Reg. Comm. 1972)	SPD	Burden of Proof	The burden of proof to establish eligibility for the benefit sought rests with the petitioner.
Matter of Chawathe (USCIS Adopted Decision January 6, 2006)	SAD	Burden of Proof	The burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 316(b)(2) of the Act; *see also* section 291 of the Act, 8 U.S.C. Section 1361. Additionally, the "preponderance of the evidence" standard does not relieve the petitioner or applicant from satisfying the basic evidentiary requirements set by regulation.
Matter of Treasure Craft of California 14 I&N at 193-94	SPD	Burden of Proof	Simply going on record without supporting documentary evidence is not sufficient for meeting the burden of proof.
Matter of Laureano, 19 I&N Dec. 1,3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)	SPD	Burden of Proof	The assertions of counsel do not constitute evidence.

*S= Statute, R =Regulation, SPD = Service Precedent Decision, SAD = Service Adopted Decision.

Authority	Type*	Issue	Statement of Law
Matter of Caron International Inc., 19 I&N Dec. 791 (Comm. 1988)	SPD	Burden of Proof	The immigration and Naturalization Service may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence.
Matter of Ho, 19 I&N Dec. 582 (BIA 1988)	SPD	Burden of Proof	(1) The petitioner bears the burden in visa petition revocation proceedings of establishing that the beneficiary qualifies for the benefit sought under the immigration laws. *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968), reaffirmed. (2) Approval of a visa petition vests no rights in the beneficiary of the petition but is only a preliminary step in the visa or adjustment of status application process, and the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. (3) The realization by the district director that he made an error in judgment in initially approving a visa petition may, in and of itself, be good and sufficient cause for revoking the approval, provided the district director's revised opinion is supported by the record. (4) Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and the sufficiency of the remaining evidence offered in support of the visa petition. (5) Evidence serving as the basis of a notice of intention to revoke approval of a visa petition need not have been previously unavailable or undiscoverable. (6) It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.
Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971)	SPD	Burden of Proof	Beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.
Matter of Izummi, 22 I&N Dec. 169 (Assoc. Comm. Examinations 1998)	SPD	Burden of Proof	A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements.

Authority	Type*	Issue	Statement of Law
8 CFR Section 103.8(d)	R	Basis of Decisions	The term record of proceeding is the official history of any hearing, examination, or proceeding before the Service, and in addition to the application, petition or other initiating document, including the transcript of hearing or interview, exhibits, and any other evidence relied upon in the adjudication; papers filed in connection with the proceedings, including motions and briefs; the Service officer's determination; notice of appeal or certification; the Board or other appellate determination; motions to reconsider or reopen; and documents submitted in support of appeals, certifications, or motions.
8 CFR Section 103.3(c)	R	Mandatory Authority	(c) *Service precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in Section 1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. Precedent decisions must be published and made available to the public as described in Section 103.9(a) of this part.
Matter of K-S, 20 I&N 715, 719 (BIA 1993)	SPD	Persuasive Authority	"[w]hile the reasoning of a district court judge's decision must be given due consideration . . . the analysis does not have to be followed as a matter of law."

*S= Statute, R =Regulation, SPD = Service Precedent Decision, SAD = Service Adopted Decision.

A. Precedent Decisions by Category

Burden of Proof

- ***Matter of Chawathe,*** *25 I&N Dec. 369 (AAO 2010)*

AC21

- ***Matter of Al Wazzan,*** 25 I&N Dec. 359 (AAO 2010)
- *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005)
- *Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010)

Priority Date (date of eligibility)

- *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm'r 1971).
- *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg. Comm'r 1977)
- *Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Act. Reg. Comm'r 1977)
- *Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r 1998) (EB5)

Successor-in-Interest

- *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986)
- *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984) (no longer good law?)

Corporation a Distinct Entity

- *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).
- *Matter of M*, 8 I&N Dec. 24 (BIA 1958).

Employer/Employee Relationship

- *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992)
- *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440 (2003)
- *Matter of Smith*, 12 I&N Dec. 772 (1968)
- *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm'r 1992)
- *Matter of Artee*, 18 I&N Dec. 366 (Comm'r 1982)

Ability to Pay

- *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967)
- *Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Act. Reg. Comm'r 1977)

Education

- *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977) (baccalaureate generally requires a 4 years of education)
- *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988) (weight of evaluation)
- *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988)

Labor Certification Issues

- *Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm'r 1986). USCIS may not approve a visa petition when the approved labor certification has already been used by another alien.
- *Matter of Francisco Javier Villarreal-Zuniga,* 23 I&N Dec. 886, 889-90 (BIA 2006)
- *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm'r 1966). Proposed employment must be in accordance with terms of labor cert.
- *Matter of Sunoco Energy Development Co.*, 17 I. & N. Dec. 283 (Reg. Comm'r 1979). Immigrant visa petition must be supported by a labor certification for the particular job opportunity and be premised upon a shortage of workers in the area where employment actually will take place.
- *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976). The beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

EB-2 labor certification

- *Matter of Masters*, 20 I&N Dec. 953 (Comm'r 1994) (exceptional ability includes athletes)
- *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986)

NIW

- *New York State Dep't of Transp.*, 22 I&N Dec. 215 (Comm'r 1998)

E11

- *Matter of Price*, 20 I&N Dec. 953 (Comm'r 1994)

E13

- *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (L-1)
- *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1981)

Revocation & 204(c)

- *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)
- *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988)
- *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990)
- *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988)
- *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978)
- *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972)
- *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974)
- *Herrera v. USCIS,* 2009 WL 1911596 (9th Cir. 2009) [Not a Precedent Decision]

Misc.

- *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought.

- *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true.

- *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought.

- *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988);

- *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.

- *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

- *Matter of Onal*, 18 I&N Dec. 147 (BIA 1981) – involves a rescission after invalidation of the ETA by DOL.

- *Matter of Bennett*, 19 I&N Dec. 21 (BIA 1984) a nonimmigrant is deportable for unauthorized compensated religious work.

- *Matter of Golden Dragon Chinese Restaurant*, 19 I&N Dec. 238 (BIA 1984). H NIV issue. Relevance limited.

- *Matter of Faith Assembly*, 19 I&N Dec. 391 (BIA 1986). Religious worker issues. Relevance limited.

B. Federal Court Decisions by Category

ATP

- *Taco Especial v. Napolitano*, 2010 WL 956001 (E.D. Mich. 2010) ATP
- *River Street Donuts, LLC v. Napolitano*, 558 F. 3d 111 (1st Cir. 2009)
- *Confluence International, Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009)
- *Construction & Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009) ATP
- *Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003)
- *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) ATP, DOL's role
- *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989)
- *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988)
- *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986)
- *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985)
- *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983)

Alien's Credentials

- *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010)
- *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010)
- *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)
- *Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007)
- *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006)
- *Grace Korean United Methodist Church et al v. Ridge,* 437 F. Supp. 1174 (D. Ore. Nov. 3, 2005)
- *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984)
- *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)
- *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983)
- *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983).

E11

- *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010)
- *Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008)
- *Gulen v. Chertoff,* Civ. No. 07-2148 (E.D. Penn. July 16, 2008)
- *Braga v. Poulos,* (No. CV 06-5105 SJO (FMOx) (C.D. Calif. July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009)
- *Yasar v. DHS,* 2006 WL 778623 *9 (S.D. Tex. March 24, 2006)
- *All Pro Cleaning Services v. DOL et al.,* 2005 WL 4045866 *11 (S.D. Tex. Aug. 26, 2005)

- *Denisov v. Weiman,* 2004 WL 2599407 (N. D. Tex. Nov. 12, 2004)
- *Lee v. I.N.S.*, 237 F. Supp. 2d 914 (N.D. Ill. 2002)
- *Russell v. INS,* 2001 WL 11055 (N.D. Ill. Jan. 4, 2001)
- *Muni v. INS,* 891 F. Supp. 440 (E.D. Ill. 1995)
- *Racine v. INS,* 1995 WL 153319 (N.D. Ill. 1995)
- *Buletini v. INS,* 860 F. Supp. 1234 (E.D. Mich. 1994)

NIW

- *Schneider v. Chertoff,* 450 F. 3d 944 (9th Cir. 2006) (Underserved doctor law)
- *Mikhailik v. Gonzalez,* No. C 04-0904 FMS (N.D. Calif. May 4, 2005)
- *Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001)

E13

- *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003)
- *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001)
- *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999)
- *Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996)
- *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995) (L-1)
- *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991)
- *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991) (L-1)
- *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990)
- *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990)

AC21

- *Sung v. Keisler,* 2007 WL 3052778 (5th Cir. Oct. 22, 2007)
- *Matovski v. Gonzales,* 492 F.3d 722 (6th Cir. Jun. 15, 2007)
- *Perez-Vargas v. Gonzales,* 478 F.3d 191 (4th Cir. 2007)

DETERMINING WHETHER A CASE IS STILL VALID LAW

Whenever an adjudicator is using published precedent decisions in a written order, it is important to check whether the case is still valid law. Subsequent cases may clarify, distinguish, explain, follow, generally cite, modify, overrule, reaffirm, or supersede a prior case. It is especially embarrassing when you cite a precedent decision in your order and it is later brought to your attention, usually by an attorney representing the petitioner/applicant, that the case you are citing has been overruled in a subsequent decision.

How do you check the validity of a precedent decision?

You first start with the most recent bound volume of the Administrative Decisions. Currently that would be volume 22.

From the Table of Contents, locate the section entitled "Notice Regarding Decisions in Volumes 16, 17, 18, 19, 20, 21, and 22 Inclusive, Affected by Subsequent Reported Administrative of Judicial Decisions." If the decision you are citing has been published in a bound volume, part of the citation will note the volume and page number. For example: 17 I&N Dec. 41.

You then look on the list for 17-41. If in the second column following 17-41 there is an entry (in this cases there is an entry which states See 17-605), the case you are citing has had some subsequent action.

The very first column will have a letter. In this case the letter "o" appears. This means that case 17 I&N Dec. 41 has been overruled by a decision which you will find at 17 I&N Dec. 605.

Your case is therefore not valid anymore and you must read the subsequent case to find out if the issue you are concerned with still relates to your case.

If a case you are citing is found in volume 15 or under, you must also check the same listing of cases in volume 15. This is required because some cases that had subsequent actions in volumes 15 or under are not listed in volumes 16-22. If a case was listed in volume 11, later modified by a case in volume 14, still valid, and the issue has not been dealt with in a case in volumes 16-22, it will not be noted in volumes 16-22. Only prior cases relating to the cases dealt with in volumes 16-22 will be listed in the latest bound volume.

One final issue must also be noted. If a subsequent statute or regulation becomes effective which renders prior case law moot, the precedent case cannot be cited as it is no longer valid. If such a change applies, the index of cases referred to above will not be updated to state that the decision has been rendered moot because of legislation or regulation. The adjudicator must apply the new statute or regulation if there is a conflict with a decision issued prior to the effective date of the new statute or regulation.

Tab 5: Scholarly Research

Basics of Scholarly Research
An Adjudicator's Guide

Several of the self-petitioners and beneficiaries of I-140s in the categories of E11 (A), E12 (B), and E21 (I -National Interest Waivers) are scholarly researchers. We see the greatest number in scientific fields such as engineering, chemistry, biology, and physics, but we also see researchers in the social sciences, the arts, and the humanities. It is imperative to have a basic understanding of how researchers/scholars work so we can properly evaluate the significance of the evidence submitted with the petition.

Typically the researchers that we encounter have already completed a Master's and/or Doctor of Philosophy degree (Ph.D.). It is not unusual to see a researcher with both a Doctor of Medicine degree (M.D.) and a Ph.D. Oftentimes after graduation, a new Ph.D. will spend some time as a post-doctoral researcher prior to either advancing in academia or taking a position in industry or for a private research institute. Of course, not all Ph.D.s spend time as post-docs; however, it is worth mentioning because many individuals file I-140s, especially under the NIW category, at this stage in their careers or shortly thereafter.

Grant Funding

In general, the research process begins with the solicitation of grants from various entities that have funds available to support research. Some of these entities are government agencies such as the National Institutes of Health (NIH), the National Science Foundation (NSF), Department of Energy (DOE), and the Department of Defense (DOD). Others are non-profit organizations dedicated to a particular cause, such as the American Cancer Society and the American Heart Association, just to name a few. The individual or team soliciting grant funding could work for a university, private research institute, or a private company. It is not uncommon to see small, private, start-up companies that spin-off technology that began development at a university. (It is noted that some companies and government agencies have their own research & development departments and may receive their funding internally, rather than go through the grant funding process.)

You may see grant applications in your petitions. These documents contain information regarding the nature of the research and the roles each member of the team will perform in the research. (Research is commonly performed by several people working together in the same laboratory. It may also occur that two or more labs collaborate on the same research, sometimes in labs located in different parts of the country or world.) The principal investigator (PI) is the person who, according to 42 C.F.R. Part 52, is "the single individual designated by the grantee in a grant application who is responsible for the scientific and technical direction of the project." Frequently, the PI is the university professor in charge of the lab or the president of the small company. Sometimes the PI does not actually conduct the research but is the person who had the idea contained in the grant application and is the one who is leading the effort. Some grantors of funding preclude someone who is not a LPR or a USC from being the PI on a grant. Again, a

grant application submitted as evidence can provide information regarding the self-petitioner or beneficiary's role in a particular project.

Publishing of Results in Scholarly Journals

After the funding is obtained, the researchers conduct their research. For example, experiments are conducted to study the effectiveness of a new cancer drug. The researchers then write a manuscript detailing their work and the findings of their research. In footnotes or endnotes the researchers list all of the sources used in their research, such as scholarly articles and books. These manuscripts are then submitted to scholarly journals for publication. At that point, most manuscripts go through a peer-review process[1]. This process is important for us to understand because it relates to the "judge the work of others" criterion enumerated in E11 and E12 petitions. *See* 8 C.F.R. sections 204.5(h)(3)(iv) and 204.5(i)(3)(i)(D). A scholarly journal's editorial staff solicits individuals in the field to read the manuscript and critique the substance and presentation of the research. Generally, the request for reviewers will be addressed to the professor leading a research group and a different member of the group will perform the review of the paper on his or behalf. Subsequently, the person who actually did the review will be placed in the database of potential reviewers on a specific field. The reviewers make the recommendation that either the paper is ready as-is, needs revision, or is inherently flawed and not fit for publication.

Obviously, we do not have the expertise to evaluate the significance of these scholarly works by reading them ourselves. Instead we rely on the reaction of the experts in the field as a gauge of the significance of our researcher's work. One of the most reliable ways we do this is to review the citation record of a researcher's publications. For more on citations see the section "Additional Issues Related to Publication and Citation Records" that is part of the "Google Scholar Guide."

Participation in Professional Conferences

Another venue in which researchers share the results of their work is at professional conferences. These conferences can be regional, national, or international. Some are held annually or semi-annually. There is usually a keynote speaker who is a well-known veteran in the field, or an up-and-coming star in a particular area of research. Prior to the conference, the organizers issue a call for papers on a particular topic. The researchers will then submit an abstract (summary) of a research project prior to the conference. The organizers will choose certain researchers to sit on various discussion panels or to give "invited talks" about their research. Researchers commonly bring "poster presentations" as visual aids to accompany their abstracts. Typically, the posters are set up in the conference venue to afford researchers the opportunity to see what others are working on and to meet others with similar professional interests. Generally, the organizers award prizes for the best poster presentations. The submitted abstracts will usually be made into a publication that is distributed at the conference. Some of these conference proceedings are peer-reviewed and others accept all submitted abstracts. You will see that your researcher will usually include a list of abstracts that were included in

[1] Not all publications are peer-reviewed.

the proceedings of professional conferences. You may also see that a researcher has been awarded a "travel grant" to help defray the cost of attending the conference.

For our purposes, most participation in professional conferences is not indicative of "national acclaim" or "international recognition", nor does it establish that the beneficiary is well positioned to advance the proposed endeavor as is required by NIWs. Certainly, giving the keynote speech would carry an enormous amount of weight. Normally, anyone chosen as such would also have a file full of other documentary evidence establishing the importance of their work. How much weight we give to participation as a panel member depends on various factors. Sitting as the chair of a panel discussion would carry more weight than sitting on the panel. The meeting schedules that are sometimes submitted with the petition may offer clues into the significance of the participation. For example, did our researcher give a 10 minute presentation or an hour presentation? Was it a break-out session or a general session? Again, in most of the cases that we adjudicate, the researcher's level of participation in conferences is not particularly noteworthy.

Patents

According to the U.S. Patent and Trademark Office (PTO), a patent is "the grant of a property right to the inventor." A patent grant confers upon the owner "the right to exclude others from making, using, offering for sale, selling, or importing the invention." A patent is granted by the PTO for an invention that has been sufficiently documented by the applicant and that has been verified as original by the PTO. A patent is generally valid for 20 years from the date of application and is effective only within the U.S., including territories and possessions. The owner of the patent may then grant a license to others for use of the invention or its design, often for a fee. The Patent Cooperation Treaty (PCT) provides some international protection for patents. More than 130 countries worldwide have adopted the PCT[2].

Frequently, researchers will submit evidence to establish that they are the inventor or co-inventor on a patent application or granted patent. As with other types of evidence, we are interested in the significance or impact of the invention on the field of endeavor. As with the publications, the order that the inventors are listed on the application or grant is not something with which we are concerned. We make the assumption that if they are listed then they contributed to the invention. The patent application process is very costly and arduous given the fees charged by a patent attorney or patent agent, as well as the bureaucracy involved with dealing with the patent offices of various governments. According to the PTO website, the processing time for applications as of August 2017 is over two years long. (We are not the only government agency with backlogs.) Because of this, much prior research is done by whoever is filing the patent to increase the chances of the eventual grant of the patent.

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[2] http://www.dummies.com/how-to/content/understanding-the-different-kinds-of-intellectual-.html

You will see evidence of both patent applications (otherwise known as pending patents) as well as patents that have already been adjudicated and approved by the PTO. It is very unlikely that you would see any denied patents. Unlike an unpublished manuscript, a patent application is considered to be published in that is assigned a number and title and it may be searched for and read by others in the field prior to its adjudication. You may have seen "patent pending" on a product that has already found its way to the marketplace and is already commercially successful. Thus, when determining the impact an invention has made to the field, we may also consider patent applications, not just granted patents. Conversely, you may have a granted patent that has not influenced the field whatsoever.

Much like a published article, the granted patent is indicative of novelty, not significance. We require the petitioner to establish that the field of endeavor has found the invention to be important in some way. Such evidence could include citations of the invention in scholarly works and articles about the invention and/or inventor in mainstream media or trade publications. Another key indicator of significance is whether an entity has paid money to use the invention. A license agreement would specify the details of such an arrangement. These agreements could be exclusive or non-exclusive. For example, a small company with two researchers and no production facilities may sell the rights of a drug delivery system to a company with manufacturing capabilities. If they sell exclusive rights to the patent there would only be one licensee that is allowed to produce the product. They would generally pay a higher price than if the invention was non-exclusive, meaning the assignee, or owner of the patent would reserve the right to license the use of the same invention to several different entities. You may also see where a researcher is working in industry and the patent is held internally. For example, researchers on the payroll of a major pharmaceutical company are listed as inventors on a patent that will only be used by its employer, the assignee[3].

Here is how to address patents in an RFE, "The record contains evidence that you are listed as the inventor on the XXXXX patent (or patent application.) Please submit documentary evidence to establish the significance of this invention to the field of endeavor."

[3] "An assignee is the person or entity to whom rights under a patent are legally transferred. It is not necessary that all the rights are transferred to an assignee. It is common in the United States for inventors to assign their ownership rights to a corporate entity. Inventors that work for a corporation, for example, often are required to assign their ownership rights to their corporation as a condition of their employment. Independent inventors often assign their ownership rights to a single entity so that only one entity has the right to grant a license. The ability to assign ownership rights increases the liquidity of a patent as property. Inventors can obtain patents and then sell them to third parties. The third parties then own the patents as if they had originally made the inventions themselves." Source: www.ustpo.gov

Researchers in Private Industry

If a researcher goes straight from graduate school to industry, he or she might not have an extensive publication record or, in some cases, any publication record at all. We still would be looking for evidence to establish that the researcher has somehow influenced the field of endeavor. However, the evidence may be in the form of internal awards or recognition, cash bonuses, or as mentioned in the section above, a patent with the researcher listed as an inventor. For example, if the researcher develops a new type of adhesive that is then used in a new kind of tape that becomes commercially successful, the record could include a copy of the granted patent (or even the patent application) listing the researcher as the inventor. You would then expect to see internal documentation tying the invention of the adhesive to the commercial success of the tape.

One thing to consider is that a company would generally hire someone as a researcher based on evidence of past performance as a researcher. All scientists with Ph.D.s that work in industry are not necessarily performing research or tasks that would be considered to be of "national importance" as required by an NIW, or be making "original contributions to the field of endeavor" as is a criterion to consider in E11 and E12s. To make a proper assessment we rely on letters of recommendation to inform us of the alien's role; however, we should also expect the existence of corroborating evidence.

Guide to Google Scholar™ Usage at NSC

Google Scholar™ (GS) is a tool that officers may use, when appropriate, to verify the authorship and/or citation record of scholarly publications. The use of this search engine can expedite the adjudication of E11, E12 and E21 NIW petitions, while in no way compromising the quality of the adjudication. After working all three of these petitions you will find that it is the most helpful, most frequently, in the adjudication of NIW petitions. It is important to point out that results found using GS will be used to facilitate a decision leading to an approval, or to influence the content of the RFE. However, the results found in GS will not be listed as a ground for denial. Please remember, just because a scholarly paper is not found in GS does not mean it does not exist. We are using it to help us find (or verify) what does exist; a negative result does not prove nonexistence.

There are other search engines that serve the same basic purpose as GS; including but not limited to the following: SciFinder, PubMed, and ISI's Web of Science. Some of the other search engines require a paid subscription but have more complete and timely results. For our purposes, GS is simple to use, very fast, and it is free.

The majority of E11, E12 and NIW petitions for scientists/researchers[1] will contain a claim of publications authored by the self-petitioner or beneficiary. Most of those will also contain a corresponding claim of publications by others that reference the self-petitioner or beneficiary's publication. This is the "citation record" of a particular paper. The petition will usually include an index of exhibits and/or a summary of the publication and citation record. It is helpful to tab such pages for easy reference. The record may also include hard copies of the publications authored by the researcher, and or hard copies of the articles citing the self-researcher's work. Other times, only part, or none of the above is submitted as evidence of the claimed articles.[2] You may also see results of search engines (see the list above), including GS, as evidence. **If the results are in the proper format[3] you may use these as evidence and there is no need to have the hard copy or to do an electronic search yourself.** Please note that self-generated lists are not evidence. However, they can be used to facilitate our verification process. **If much time has passed since the filing of the petition, the citation record may have expanded enough to alter the outcome of the adjudication; thus, an updated search may be warranted.** As mentioned in your E11, E12, or NIW training, the researcher's work must have been published prior to filing, however, the articles referencing his or her work need not be. Their purpose to us is as a measure of the influence of the researcher's publication, which was published prior to filing.

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[1] Scholars from the humanities, business, and arts also publish scholarly works; however, the majority that we see are from the many types of scientists. Of course, GS can be used to verify scholarly works from any field of endeavor.

[2] It is noted that some unscrupulous attorneys also withhold evidence of the citation record with the sole purpose of triggering an RFE and charging additional fees.

[3] Acceptable search engine results require the following information for both the cited and citing article: Title, publication, date, and authorship. Further research may be required to verify unnamed authors referenced as *et. al.* Read on for further explanation of *et. al.*

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Use GS in conjunction with the submitted index of publications to verify the publications co-authored by the researcher. If the author has a fairly unique name, the best strategy is to search by author name. If the author has a common name, it will be necessary to search by the article title. It is not necessary to type the entire article title. It is helpful to type quotations on the left of the article title but leave it open on the right side. You can also search with multiple authors; perhaps a frequent collaborator has an uncommon name. You can also search a combination of partial article title and one or more authors.

Once the article is found, click on "Cited by [number of citing articles]". If the search engine did not find any citations, then the above will not be shown; it might just say "cached," or "web search." Again, a lack of a result does not prove nonexistence of the article. After you click on "Cited by [number of citing articles]," it will bring up the papers that cite the article. Peruse the results, mentally crossing out the ones that are "self-citations" or "group citations". These are articles where the author and/or one of his or her collaborators cite their own work. Given the nature of research, this is a common practice. This is because one paper often builds on the results from previous work. However, we will not count these citations, as we are searching for "independent citations," as a measure of the influence a particular paper.

When a paper (either the cited or citing) has several authors, only a few of the authors will be listed followed by "*et. al.*" This annotation signifies "and others". (If there is no "*et. al.*" annotation, you can be confident that all of the authors are listed, unless it is followed by "...") To determine the accurate count of citations, we must know who is included the "*et. al.*" (of both the cited and citing papers) so we can be sure that the citation is by an author or authors that is/are independent from our author. However, the objective here is to save time, so you will only investigate the "*et. al.*" scenarios if you don't reach your citation threshold after checking the papers without such an annotation.

If the total citation count falls short of what you are looking for, then there are different ways to check who the other authors are included in "*et. al.*" If the index provided in the record lists all authors and the list has been accurate thus far, you could use this as secondary evidence. The file will sometimes include hard copies of the articles in question; these will list all of the authors. Keep in mind, our purpose is to get to our threshold as quickly as possible. If you click on the title of the article in your electronic search, you will usually be taken to a page that lists all of the authors of the paper.

You will sometimes encounter papers that are published in a foreign language (it may be the original paper or the citing paper, or both). Although the great majority of scholarly research that we see is published in English, we of course, do not discount articles published in another language. However, it can be difficult to verify the authors when the alphabet used is other than our own. Similar to the "*et. al.*" discussion above, we go for the "lowest hanging fruit" first. If you are close to your threshold and you have some foreign language documents to analyze, the following can be helpful. If you are looking at a hard copy in the file you can compare the characters (oftentimes Chinese) with the author's name (in characters) as found in his or her passport, usually found in the concurrent I-485 filing. In GS, the citation results can come up as characters or as rectangles, signifying that the website can't replicate the characters. If your original paper is written by authors who don't appear to write in the language in the citation, you might make the assumption that the citation is independent. For example, if your researcher's first language is presumably Spanish and the scholarly paper is written in English and the citing

paper is written in Korean, it would be reasonable to assume that the citing article is not self-referencing.

One important aspect to keep in mind here is that we don't necessarily always need 100% assurance of the independence of each citing article. In the example used above, you might find an exception to that scenario. However, we are looking at the big picture and we are looking to see if we can establish the citation record of our researcher in a very short period of time. Use your common sense and good judgment to reach a conclusion regarding whether the citation record meets your threshold.

Keep in mind that if you have to RFE for other issues, you will probably not spend too much time using this tool. (It should go without saying that you will not RFE for these items if they are already in the record.) This is why GS is most effectively used in conjunction with NIW petitions. E11s and E12s commonly have other issues that warrant an RFE. Even when the hard copies of all the cited and citing articles are included in the record it can be much more efficient to verify them using GS rather than flipping through thousands of pages of scholarly articles that you have in front of you. You may choose to use the hard copy and the electronic results together as you are gaining familiarity and experience using GS.

If you wish, you may print the results of your electronic searches and attach them to the right side of the file. Either way, if you are approving based on information that was not included with the record then make an annotation indicating as much in the remarks section. Such an annotation might read, "Citations verified via GS." Anyone doing a secondary review of the case will be able to verify the results of your electronic search.

The burden of proof is always on the petitioner to provide evidence of eligibility for the classification sought. Our use of this free tool does not change that fact *per se*. However, we need to work smart and know how to take advantage of the tools that are at our disposal. If you do not understand how to use this tool after reading this and practicing it, then please ask someone.

A newer feature of GS is the ability of researchers to create their own pages in GS, which includes a brief biography and a list of that researcher's publications and citations. You will know that a researcher has set up a profile like this if his or her name is underlined in the citations in GS. Clicking on that researcher's underlined name will bring you to his or her profile page. These can be very useful, especially in cases where the researcher has a common name, since you would no longer need to search through a list of publications to find those that were written by the beneficiary. Of course, it's important to make sure you have the right person by checking the profile's biography and list against the evidence in the file.

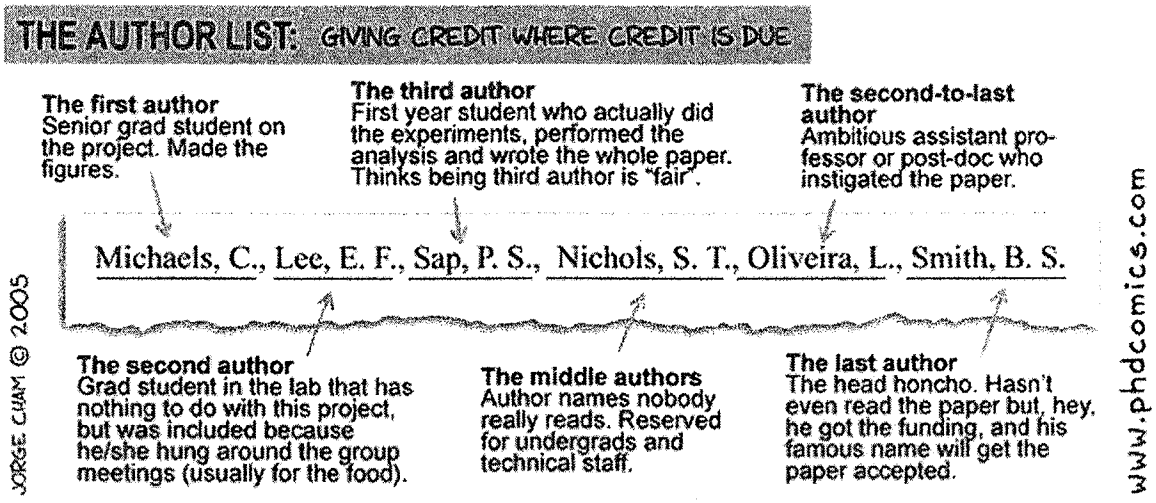
* * *

Additional Issues Related to Publication and Citation Records

Order in Which the Authors are Listed

The *first author* is the author that is listed first on the paper. The *corresponding author* of a paper is the point of contact for the publication. Sometimes the first author and/or the corresponding author made the most significant contribution to the paper. Oftentimes the author listed last is the professor or group leader who had the idea for and acquired the funding to do the research, but did not participate in the actual research. However, the rationale behind the order in which authors are listed can vary greatly between academic groups and/or projects. **Therefore, officers should not be overly concerned with the order in which the authors are listed. If the alien is included as an author of the publication, he or she should be given full credit as an author regardless of whether his or her name appears first, last or somewhere in the middle.** As mentioned above, the citation record of the publication is a key indicator of the importance of the work to the field of endeavor.

The following is a light-hearted commentary on the topic of the order in which the authors of scholarly works are listed.



Journal Impact Factor

Petitions oftentimes contain evidence regarding the "impact factor" of the journal in which an article was published. Again, we don't generally spend time on this issue for the same cost/benefit reason referenced above. For example, what if the beneficiary had several citations of an article published in a lower impact journal and fewer citations of an article published in a higher impact journal? Additionally, would we then also factor in the impact factor of the journals in which the citations appeared? No, we would not, because it is not practical and not sufficiently instructive to do so. Of course there are exceptions to every rule and some journals are very highly regarded and of such import that results published therein will be reported in the

mainstream media.[4] Such journals include *Nature*, *Science*, *New England Journal of Medicine (NEJM)*, and the *Journal of the American Medical Association (JAMA)*. While it is never a bad idea to further your knowledge on any matter that would improve your adjudication skills, it is not critical that we know the names and rankings of journals because the citation record will generally reflect the importance of the journal in which the cited article is published.

Other Citation-Counting Issues for Further Consideration:

- A paper cited one time each by 10 different research groups is demonstrative of more influence than a paper cited 10 times by the same research group.

- How much weight do you give a citation when it was written by someone who was not a collaborator on the cited paper but has collaborated with the researcher on other projects? Perhaps half or a quarter of the weight of an independent citation?

- Some physics papers can have 100+ authors. How much weight should be accorded to papers where the author is one of hundreds?[5] Hopefully, they have other papers in the record with fewer authors and a healthy citation record. If they don't...(good topic for further discussion!)

[4] In this scenario you might see evidence pertinent to criteria to §204.5(h)(3)(iii), and §204.5(i)(3)(C) which is the "published material" criterion for E11 and E12 petitions, respectively.

[5] How would you be able to check if the citations were self referencing?

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Short communication

Comparison of scientific impact expressed by the number of citations in different fields of science

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Citation distributions for 1992, 1994, 1996, 1997, 1999, and 2001, which were published in the 2004 report of the National Science Foundation, USA, are analyzed. It is shown that the ratio of the total number of citations of any two broad fields of science remains close to constant over the analyzed years. Based on this observation, normalization of total numbers of citations with respect to the number of citations in mathematics is suggested as a tool for comparing scientific impact expressed by the number of citations in different fields of science.

Introduction

Number of citations is usually considered as one of important indicators of the scientific impact of a scientist in his/her particular field. This criterion can be easily used in each particular field, when two mathematicians (or two physicists, or two chemists, or two medical researchers, or two engineers, etc.) are compared. This comparison is used by the Thomson ISI (the Institute for Scientific Information) for compiling various lists, like ISIHighlyCited.Com,[2] arranged by scientific field.

A more difficult problem arises when we have to compare two scientists working in *different* fields, for example, a mathematician and a chemist. The difficulty is underlined by the fact that even the most prolific author of citation analysis, Dr. E. Garfield, used only absolute figures for compiling lists of scientists with the highest impact – see, for example, the list in Ref 6, where we cannot see any mathematician, engineer, or a specialist in social sciences. The same approach (total numbers of citations) is used also in Ref 7, where one can observe the same absence of mathematicians, physicists, engineers, etc.

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It is obvious that we cannot compare total numbers of citations – it is well known that in absolute figures there is much less citations in mathematics than in chemistry, but a mathematician with a relatively low total number of citations can have higher impact in mathematics than a chemist with a larger number of citations in chemistry. The question, therefore, is: *is it possible to compare two scientists working in different fields of science on the basis of their citation numbers?* Surprisingly, the author of this article could not find any answer to this seemingly natural question in the available literature.

The answer suggested in this article is: *yes, it is possible, with the help of a certain normalization of their respective numbers of citations*. The proposed approach is described below.

The data

In a recent publication of the National Science Foundation the distribution of scientific citations of the U.S. scientific and engineering articles across wide fields of science in 1992, 1994, 1996, 1997, 1999, and 2001 was published (see Ref. 1, Chapter 5, Table 5-27 on page 5-50). The sources for the data appearing in that table were the Science Citation Index (SCI) and the Social Sciences Citation Index (SSCI).

The law of the constant ratio

The data in the NSF table for the distribution of scientific citations led me to the observation that *the ratio of the number of citations in any two fields of science remains close to constant.*

For example, for clinical medicine and physics we have the ratio close to 4:

(1992) 475793 / 137922 = 3.44972521
(1994) 516665 / 141653 = 3.64739893
(1996) 554332 / 138417 = 4.0047971
(1997) 574859 / 131958 = 4.35637854
(1999) 584330 / 125968 = 4.63871777
(2001) 589762 / 120593 = 4.89051603

Similarly, for engineering and mathematics the ratio is close to 5:

(1992) 32680 / 6858 = 4.76523768
(1994) 35189 / 6631 = 5.30674106
(1996) 33664 / 6961 = 4.83608677
(1997) 32958 / 6418 = 5.13524462
(1999) 34001 / 7520 = 4.52140957
(2001) 36809 / 7794 = 4.72273544

The same observation holds for any pair of fields of science in the Table 5-27 of the NSF 2004 report.

It is worth noting that a similar law of the constant ratio in citation analysis is known for the number of publications and the number of citations processed by ISI – it gives the so-called Garfield's constant.[5]

Normalization

Based on the observed law of the constant ratio, we can normalize all scientific fields by computing the ratio of the number of citations in each field to the number of citations in mathematics (the smallest number of citations among all fields). The results are shown in Table 1 in the columns titled "ratio to maths"; numbers are rounded to integers. In such a form the law of the constant ratio is even more obvious.

The average ratio of citation number to the number of citations in mathematics is given in a dedicated column in Table 1.

Table 1. Comparison of the numbers of citations in different fields of science. Based on the data from *Science and Engineering Indicators 2004. National Science Foundation, May 04, 2004.*

Field	Average ratio of citation number to the number of citations in mathematics	1992		1994		1996	
		Number of citations	Ratio to maths	Number of citations	Ratio to maths	Number of citations	Ratio to maths
Clinical medicine	78	475793	69	516665	78	554332	80
Biomedical research	78	460148	67	518304	78	562361	81
Biology	8	52535	8	57825	9	58649	8
Chemistry	15	88010	13	96827	15	105960	15
Physics	19	137922	20	141653	21	138417	20
Earth/space sciences	9	55086	5	58818	9	71230	10
Engineering/technology	5	32680	5	35189	5	33664	5
Mathematics	1	6858	1	6631	1	6961	1
Social/behavioral sciences	13	80282	12	84353	13	93032	13

Field	Average ratio of citation number to the number of citations in mathematics	1997		1999		2001	
		Number of citations	Ratio to maths	Number of citations	Ratio to maths	Number of citations	Ratio to maths
Clinical medicine	78	574859	90	584330	78	589762	76
Biomedical research	78	572122	89	594596	79	568328	73
Biology	8	58130	9	56981	8	57899	7
Chemistry	15	105762	16	110927	15	109703	14
Physics	19	131958	21	125968	17	120593	15
Earth/space sciences	9	73507	11	83053	11	82614	11
Engineering/technology	5	32958	5	34001	5	36809	5
Mathematics	1	6418	1	7520	1	7794	1
Social/behavioral sciences	13	93187	15	99481	13	104793	13

Comparing different fields of science

Using the suggested normalization of the citation data provided by the SCI (Science Citation Index), one could – to some extent – compare the relative scientific impact of research institutions and maybe even individual scientists working in different fields of science.

Example 1.

Q: Who has higher impact in his field: a physicist with 70 citations or an engineer with 20 citations?

A: In normalized units, the physicist's impact is 70:19=3.68, while the engineer's impact is 20:5=4. Therefore, the engineer has slightly higher impact in his field than the physicist in his one (although it is not clear at all from their total numbers of citations).

Example 2.

Q: How many citations can be considered as equivalent for mathematics, chemistry, physics, and clinical medicine?

A: According to Table 1, one citation in mathematics roughly corresponds to 15 citations in chemistry, 19 citations in physics, and 78 citations in clinical medicine. In other words, 250 citations in mathematics can be considered as roughly equivalent to 3750 citations in chemistry, 4750 citations in physics, and 19500 citations in clinical medicine.

Conclusion

In conclusion, the following could be mentioned.

For the proper interpretation of the above observation, it may be important that the total number of citations in the analyzed data is almost stabilized. The additional analysis of the impact of the growing number of publications and citations from emerging regions like Eastern Europe or Asia on the constants listed in Table 1 needs further data, which should include those regions.

It seems that the law of the constant ratio, described in this brief note, gives reasonable results and can be used in average as a macro criterion for comparing the scientific impact of research institutions belonging to different fields of science. At micro level, it can be used (with care) for comparing scientists with low or average scientific impact from the viewpoint of citations of their works. Even in this case it is necessary to take into account that the distribution of citations in small sets of

documents is usually irregular. In case of large numbers of citations it will probably need some correction, since the ratios of peaks in different fields of science do not necessary copy the ratios shown in Table 1.

It may seem that by considering only total numbers of citations in various fields of science we do not take into account the fact that the numbers of scientists working in those fields also differs significantly, as well as the total number of publications in those fields. However, the reality is the opposite: the smaller number of citations, for example, in mathematics compared to biomedicine, simply reflects the fact that the number of articles in mathematics is also smaller than the number of articles in biomedicine, that there is less people publishing in mathematics than in biomedicine, and that the average length of the reference list in mathematics is less than the average length of the reference list in biomedicine. Therefore, the differences in the number of people and in the number of publications in different fields are taken into account implicitly through the total numbers of citations produced by those people in those publications.

The approach suggested in this article can bring mathematicians, engineers, and other "less visible" scientists to the multidisciplinary lists of high-impact scientists, thus correcting the approach used in Ref. 6 and other similar lists.[7]

Finally, the formal analysis of citation data cannot be considered as a one and only one basis for evaluation of the scientific impact.[3,4] However, the approach described in this article allows at least a rough comparison of the scientific impact of research institutions and to some extent even individual scientists working in different fields.

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Association of American Universities

Committee on Postdoctoral Education

Report and Recommendations

March 31, 1998

Committee Members
Steven B. Sample, President, University of Southern California (Chair)
S. James Adelstein, Executive Dean for Academic Programs, Harvard Medical School
Joseph Cerny, Vice Chancellor for Research and Dean of the Graduate Division, University of California, Berkeley
David L. Goodstein, Vice Provost, California Institute of Technology
Richard L. McCormick, President, University of Washington
J. Dennis O'Connor, Chancellor, University of Pittsburgh *(through 1995)*
Frank E. Perkins, Dean of the Graduate School, Massachusetts Institute of Technology *(through 1995)*
Bernard J. Shapiro, Principal and Vice Chancellor, McGill University
Joab L. Thomas, President, Pennsylvania State University *(through 1995)*
John D. Wiley, Provost, University of Wisconsin-Madison

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John C. Vaughn, Executive Vice President, Association of American Universities

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Association of American Universities
Committee on Postdoctoral Education Report

Postdoctoral education plays an important role in the research enterprise of the United States. Postdoctoral appointments provide recent Ph.D. recipients with an opportunity to develop further the research skills acquired in their doctoral programs or to learn new research techniques. In the process of developing their own research skills,

postdoctoral appointees perform a significant portion of the nation's research and augment the role of graduate faculty in providing research instruction to graduate students.

Postdoctoral education has been a part of American higher education for over 100 years. The Johns Hopkins University began to support postdoctoral fellows shortly after the institution was founded in 1876. In the 1920s the Rockefeller Foundation established a formal program of postdoctoral fellowships for recent Ph.D. graduates in the physical sciences. The Foundation recognized the fact that physics had become so complex that training through the doctorate was not sufficient preparation for a research career. Recipients of these awards were known as "postdoctoral fellows," or simply "postdocs."

Postdoctoral education grew only modestly during the first half of the twentieth century. But the advent of the Cold War brought with it a boom in postdoctoral appointments. More recently, postdoctoral education has grown rapidly. From 1975 to 1995, the number of postdoctoral appointees in science, engineering, and health-related disciplines more than doubled, from 16,829 to 35,379. Moreover, the proportion of Ph.D.s accepting or seeking postdoctoral appointments in these disciplines increased from 25 percent in 1975 to over 37 percent in 1995. Although postdoctoral education has grown rapidly, it remains a highly concentrated enterprise: as shown in the Appendix attached, more than two-thirds of 1995 postdoctoral appointees were studying in just 50 institutions out of the nearly 350 doctorate-granting institutions surveyed.

Despite the increasingly prominent role played by postdoctoral education in the national research enterprise, there is reason to question how well this particular form of education has been incorporated into the overall academic enterprise. In many respects, postdoctoral education at the end of the twentieth century appears to resemble Ph.D. education at the end of the nineteenth century. In 1890, Ph.D. programs were a relatively new form of education in this country, lacking a consistent set of standards and expectations. Today there is cause for concern over the similarly *ad hoc* evolution of postdoctoral education. Some specific points of concern are:

- The steady growth in the number of postdoctoral appointments nationally-and the increasing number of those appointments that are being granted to foreign Ph.D.s on temporary visas
- The increasing number of postdoctoral appointees in their second, third, and even fourth appointment
- The widely held perception that the postdoctoral appointment is being used as an employment holding pattern
- The apparent transition, at least in some disciplines, of the postdoctoral appointment from an elective activity to a required credential
- The growing number of reports of dissatisfaction expressed by postdocs.

To address these concerns, the Association of American Universities formed the Committee on Postdoctoral Education in 1994. The Committee was charged to examine postdoctoral education and develop recommendations for the future management of this activity.

The Co[illegible]ttee conducted three informal surveys of selected major research univ[illegible]es to gain insight into campus

policie. practices governing postdoctoral education and to sample the views stdocs. Given the varying conceptions of postdoctoral education, the Committee recognized the need to establish a working definition of a postdoctoral appointment for its surveys. After a great deal of discussion among committee members, graduate deans, provosts, and presidents and chancellors of research universities, the Committee developed the following definition of a postdoctoral appointment, which was used consistently in the surveys.

DEFINITION OF A DOCTORAL APPOINTMENT

- The appointee was recently awarded a Ph.D. or equivalent doctorate (e.g., Sc.D., M.D.) in an appropriate field; and
- the appointment is temporary; and
- the appointment involves substantially full-time research or scholarship; and
- the appointment is viewed as preparatory for a full-time academic and/or research career; and
- the appointment is not part of a clinical training program; and
- the appointee works under the supervision of a senior scholar or a department in a university or similar research institution (e.g., national laboratory, NIH, etc.); and
- the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment.

The committee surveys solicited information and views from university administrations; university departments in four disciplines-biochemistry, mathematics, physics, and psychology; and postdocs in each of those departments. The surveys were not intended to provide comprehensive quantitative descriptions, but rather to provide insights through sampling of campus policies and practices and the views of postdocs.

Among the key findings of the surveys were the following:

1) Most institutions make little or no attempt to control the number or the quality of postdoctoral appointees on campus.

2) As was the case with Ph.D. students in the 1890s, most postdocs today are identified and recruited principally through professional contacts with faculty members.

3) It is common for institutions either to have no time limits on the length of postdoctoral appointments or regularly to ignore or waive established limits.

4) Few institutions report having campuswide compensation policies for postdoctoral appointees, and few report making any serious efforts to ensure that foreign and domestic postdocs receive equal compensation (as is required by federal law).

5) Most institutions report that they classify postdoctoral appointees as employees with attendant employment benefits; postdocs themselves, however, list benefits as one of their top areas of needed improvement.

6) Few institutions have policies established specifically for postdoctoral appointees: most institutions report that conflict-of-interest policies for faculty and staff apply to postdocs, but few institutions have policies governing outside business interests, consulting, or teaching activities by postdocs. Moreover, procedures for resolving postdoc misconduct or grievances vary widely and are often nonexistent.

7) Virtually no institutions have formal job placement procedures for postdocs.

8) In roughly two-thirds of surveyed departments, all assistant professors hired in the last five years have had postdoctoral experience; in two fields-biochemistry and physics-more than 80 percent of the departments surveyed said they would not even consider hiring someone without postdoctoral experience. Thus, in these fields, a postdoctoral appointment has become the *de facto* terminal academic credential.

9) Nearly half of the Ph.D.s who graduated from the surveyed departments in the last two years have gone on to postdoctoral appointments; in biochemistry, 80 percent have gone on to postdoctoral positions.

10) Upon completion of their appointments, roughly 60 percent of recent postdocs in surveyed departments have gone on to employment in research universities in some capacity. About one-fourth of postdocs in surveyed departments have gone into another postdoc position, about one-fourth into tenure-track faculty positions, and about 10 percent into non-tenure-track faculty positions.

11) A substantial majority of departmental officials and postdocs themselves view a postdoctoral appointment as a necessary step in an academic career, as opposed to being simply a holding pattern for Ph.D.s who cannot find a tenure-leading appointment or other appropriate employment.

12) Postdocs identify stipends, benefits, and career advising and job placement assistance as the aspects of postdoctoral education in most need of improvement.

13) Two-thirds of postdocs say that obtaining a tenure-track faculty position at a research university is their expected career path.

DISCUSSION

Although the Committee's surveys were small and informal and were focused exclusively on leading research universities, several findings stand out. Most fundamentally, the lack of institutional oversight of postdoctoral appointments, coupled with the evolution of postdoctoral education in a number of disciplines into a virtual requirement for a tenure-track faculty appointment, creates an unacceptable degree of variability and instability in this aspect of the academic enterprise.

As with Ph.D. at the end of the nineteenth century, postdoctoral education is e[illegible]ng as a series of *ad hoc* and unsy[illegible]matic responses to varied and often competing interests and pressures. [illegible]t universities lack the kind of

central administrative oversight of postdoctoral appointments that they maintain undergraduate and graduate students. Moreover, most institutions appear to have few policies designed for postdocs specifically; such policies appear often to be an amalgam of policies designed for students, faculty, and staff.

The lack of clear central oversight of postdoctoral education raises serious questions about how successfully institutions are meeting their obligations to postdocs as trainees and professional colleagues.

Upon completion of their appointments, most postdocs appear to find employment in research positions in their field of training. However, although the preponderance of postdocs *expect* to end up in a tenure track position, only one-fourth of recent postdocs in the surveyed departments actually entered such a position. Given this disparity between expectations and outcomes, it is not surprising that postdocs rank better career advising and job placement high on their list of recommended improvements; currently, institutions give little or no attention to these activities.

RECOMMENDATIONS

The Committee strongly recommends that the following definition of a postdoctoral appointment be universally adopted and consistently applied by all universities, government agencies, and private foundations involved in postdoctoral education:

Definition of a Postdoctoral Appointment

- The appointee was recently awarded a Ph.D. or equivalent doctorate (e.g., Sc.D., M.D.) in an appropriate field; and
- the appointment is temporary; and
- the appointment involves substantially full-time research or scholarship; and
- the appointment is viewed as preparatory for a full-time academic and/or research career; and
- the appointment is not part of a clinical training program; and
- the appointee works under the supervision of a senior scholar or a department in a university or similar research institution (e.g., national laboratory, NIH, etc.); and
- the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment.

The Committee recommends that each university act promptly to develop policies and practices for systematically incorporating postdoctoral education into its overall academic program. To assist in accomplishing this systematization of postdoctoral education, the Committee makes the following suggestions as a model for consideration by individual institutions:

1) Consistent with the definition above, the postdoctoral appointment should remain a temporary appointment with a

primary purpose of providing additional research or scholarly training for an academic or research career.

2) A central administrative officer should be assigned responsibility for monitoring postdoctoral policies to assure consistent application of those policies across the institution.

3) The university should establish core policies applicable to postdoctoral appointments. These policies should cover such matters as employment or student category; realistic institutional minimum stipends and benefits; fractional appointments; workers' compensation; publication rights; faculty responsibilities for mentoring and evaluation of postdoctoral appointees; career advising and job placement; misconduct; grievance procedures; and education in research protocol issues such as ethics, conflicts of interest, and outside consulting. In particular, all postdoctoral appointees should have access to a comprehensive health care plan for themselves and their families.

4) The university should establish explicit guidelines for recruitment and appointment of postdocs and for the duration of their appointments; such guidelines should take into account time spent in prior postdoctoral appointments at other institutions. Initial postdoctoral appointments should be no longer than two to three years in duration, and should be renewed only on the basis of career advancement and achievement by the postdoctoral appointee. As a general rule, the total time spent in postdoctoral appointments by a given individual should not exceed six years. Exceptions to such guidelines should be granted only after careful review by the department and an appropriate central administrative officer.

5) All postdoctoral appointees should receive a letter of appointment jointly signed by the faculty mentor and the department chair or other responsible university official; a statement of goals, policies, and responsibilities applicable to postdoctoral education should accompany the letter.

6) The university should periodically evaluate the balance of interests among postdoctoral appointees, their faculty mentors, their home departments, and the institution as a whole, in order to assure that the legitimate educational needs and career interests of postdocs are being fully met.

7) Departments and faculty mentors should provide career advising and job placement assistance appropriate to their postdoctoral appointees.

8) The university should provide a certificate or letter of completion for postdoctoral appointments to assist postdocs in securing subsequent employment.

In addition to the foregoing suggestions for consideration by individual institutions, the Committee recommends that each academic discipline consider the role of postdoctoral education in professional development in that discipline, and give careful attention to the extent to which postdoctoral education should be viewed as elective or obligatory by students for whom entry into that discipline is their primary professional goal.

Appendix
Postdoctoral Appointments in the U.S. Universities

Grand Totals-345 Universities	Total 35,379	Science 23,367	Engineering 2,628	Hea. Fields 9,384
First Fifty Institutions	**Total**	**Science**	**Engineering**	**Health Fields**
1. Harvard University	1,836	1,124	27	685
2. University of California, San Francisco	1,147	303	0	844
3. Stanford University	1,013	585	73	355
4. University of California, San Diego	995	562	62	371
5. University of Washington	901	551	29	321
6. Yale University	881	578	11	292
7. University of Pennsylvania	833	423	21	389
8. University of California, Berkeley	820	690	58	72
9. University of Michigan	724	317	120	287
10. The Johns Hopkins University	689	301	38	350
11. Univerisity of California, Los Angeles	687	339	32	316
12. University of Colorado	605	303	36	266
13. Washington University in St. Louis	564<	310	5	249
14. Cornell University	557	336	57	164
15. Univerisity of North Carolina, Chapel Hill	553	341	6	206
16. University of Wisconsin, Madison	540	321	60	159
17. Massachusetts Instititute of Technology	494	353	116	25
18. University of Minnesota	466	352	69	45
19. Duke University	438	260	5	173
20. University of Southern California	428	232	31	165
21. University of Iowa	359	128	15	216
22. Columbia University	354	268	27	59
23. University of Arizona	344	313	18	13
24. Case Western Reserve University	332	175	38	119
25. University of Alabama, at Birmingham	331	176	2	153
26. University of Texas SW Medical Center at Dallas	327	222	0	105

27. The Ohio State University	**323**	**234**	**52**	**37**
28. University of California, Irvine	**322**	**278**	**21**	**23**
29. University of Pittsburgh	**315**	**193**	**18**	**104**
30. Indiana University	**307**	**221**	**4**	**82**
31. Princeton University	**302**	**256**	**46**	**0**
32. California Institute of Technology	**300**	**259**	**41**	**0**
33. University of Rochester	**298**	**202**	**10**	**86**
34. Yeshiva University	**296**	**179**	**0**	**117**
35. Vanderbilt University	**287**	**220**	**5**	**62**
36. University of California, Davis	**282**	**172**	**11**	**99**
37. University of Virginia	**281**	**191**	**26**	**64**
38. Northwestern University	**280**	**220**	**58**	**2**
39. Tufts University	**279**	**111**	**4**	**164**
40. Thomas Jefferson University	**273**	**179**	**0**	**94**
41. University of Texas M.D. Anderson Cancer Center	**267**	**151**	**0**	**116**
42. University of Florida	**255**	**184**	**33**	**38**
43. University of Massachusetts	**250**	**181**	**5**	**64**
44. Rutgers, The State University of New Jersey	**248**	**176**	**43**	**29**
45. Texas A & M University	**248**	**220**	**24**	**4**
46. University of Illinois, Urbana-Champaign	**246**	**190**	**48**	**8**
47. Rockefeller University	**244**	**244**	**0**	**0**
48. SUNY-Buffalo	**243**	**192**	**17**	**34**
49. Michigan State University	**241**	**220**	**16**	**5**
50. Mayo Graduate School of Medicine	**239**	**96**	**0**	**143**
Total, First 50 institutions	***23,844***	***14.632***	***1,438***	***7,774***

Tab 6: Sample Appeals

Researcher 1

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-W-K

DATE: JUNE 13, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an industrial hygiene researcher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established 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. In March 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*.

In support of his appeal, the Petitioner submits additional documentation and argues that he is eligible for a national interest waiver under the new framework. Specifically, he notes his research examining the role of silica in industrial health, as well as his role as a mentor with a high school science specialty program.

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.

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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

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

[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*).

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.[2]

II. ANALYSIS

The Petitioner obtained a Ph.D. in environmental health sciences in 2010 from [redacted] Accordingly, the Director determined that the Petitioner qualified for classification as a member of the professions holding an advanced degree. The sole issue to be determined is 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.

A. Substantial Merit and National Importance of the Proposed Endeavor

In the initial filing, the Petitioner indicated that he is employed by [redacted] and he aims to continue research relating to "the anticipation, recognition, control, and prevention of the causes of silicosis" a disease described as "the most common occupational lung disease caused by inhalation of respirable crystalline silica (RCS)." The Petitioner explains that silicosis is the fibrotic pneumoconiosis that is caused by the inhalation of fine particles of crystalline silicon dioxide, and that exposure to large amounts of free silica can pass unnoticed because it is an odorless nonirritant that has no immediate noticeable effect. He describes how he aims to help protect the American worker from developing silicosis by improving the occupational health standards from silica exposure and continuing to expand his research applying [redacted] techniques to [redacted] sampling to influence worker safety policies.

We find that the Petitioner's proposed research, which aims to improve the industry safety standards of workers exposed to harmful materials, has substantial merit. The Petitioner provided letters from colleagues and professors discussing the critical need to develop methods to discern and combat cumulative exposure to environmental contaminants, particularly silica. The letters describe the importance of developing industrial hygiene detection and disposal methods and affirm that the Petitioner's proposed work stands to assist industries in controlling worker exposure to harmful irritants, and discussing the formidable health and financial costs of silica exposure to the industrial worker. For example, [redacted] associate service fellow at the [redacted], notes that the proposed research "will

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

offer protection against the deadly silicosis and will no doubt benefit the U.S. workers by saving countless lives."

In addition to his research activity, the Petitioner claims that he will continue his mentorship of students in the Emerging Scholars Program, Environmental Health Sciences Academy at [redacted] and that his work with these high school students also has substantial merit and national importance. The Petitioner provides a brochure describing the Emerging Scholars Program as an opportunity for high school students to "work alongside faculty in environmental health sciences to conduct environmental health research relevant to the community." Dr. [redacted] the faculty lead for the program and associate professor at [redacted] describes how the Petitioner is responsible for mentoring students and helping students appreciate industrial hygiene practices. Program literature describes the Petitioner as a "mentor/research scientist," working with students to research issues such as [redacted] analysis, silicosis, and air sampling. We find this proposed mentorship has substantial merit, as it provides valuable educational benefits to students involved in the program.

To evaluate whether the Petitioner's work satisfies the national importance requirement, we requested evidence documenting the "potential prospective impact" of his work. In his response, the Petitioner provides a more detailed explanation of his mentorship of high school students in the Emerging Scholars Program. The record, however, does not establish that his mentorship and instruction would impact environmental health education more broadly, as opposed to being limited to the students at the institution where he serves. Accordingly, without sufficient documentary evidence of their broader impact, the aforementioned teaching activities do not meet the "national importance" element of the first prong of the *Dhanasar* framework.[3]

Nonetheless, to the extent that the Petitioner proposes to conduct occupational hygiene research, we find the evidence sufficient to demonstrate that such research is of national importance. The record includes evidence that 2.3 million workers are exposed to respirable crystalline silica in their work places, including 2 million construction workers who drill, cut, or grind silica-containing materials such as concrete and stone. The Petitioner also states that, from 1968 until 2002, silicosis was recorded as the underlying or contributing cause of death for approximately 74 million workers in the United States. In addition, the Petitioner has offered documentation indicating that the proposed benefit of his industrial hygiene research has broader implications for the field, as the results are disseminated to others through education journals and conferences. As the Petitioner has documented both the substantial merit and national importance of his proposed research, he meets the first prong of the *Dhanasar* framework.

[3] Similarly, in *Dhanasar*, we determined 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. *Id.* at 893.

B. Well Positioned to Advance the Proposed Endeavor[4]

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications. The Petitioner previously provided evidence of his published work, professional memberships, and academic credentials. In response to our RFE, the Petitioner additionally submits his CV and an updated report from [redacted] As discussed below, we find the Petitioner has not demonstrated a record of success or progress in his field, or a degree of interest in his work from relevant parties, rising to the level of rendering him well positioned to advance his proposed research endeavor of developing industrial hygiene solutions to harmful particulates. *See Dhanasar*, 26 I&N Dec. at 890.

As evidence that he meets this prong, the Petitioner points to his participation in two research studies: "[redacted]" and "[redacted]" and he provides a copy of each study's protocol. Both protocols list the Petitioner as one of six research scientists and state that his duties are to "assist Dr. [redacted] in assessing and assigning exposures to respirable crystalline silica for the study cohort." While the record includes letters of recommendation emphasizing the importance of the Petitioner's role in these studies, these statements are not supported by the information in the protocols. Beyond assisting Dr. [redacted], the Petitioner's role in spearheading or developing the study or in furthering the research has not been sufficiently explained. Also, many of the statements refer to the potential future benefits of the Petitioner's work, yet they do not address how his role in either of these research projects represents a record of success in the field of industrial hygiene. For example, Dr. [redacted] a consulting scientist with [redacted] writes that the Petitioner developed a matrix that he used to calculate yearly average and cumulative exposure for the participating industrial [redacted] workers and that his work on the industrial [redacted] workers silicosis study and the [redacted] pneumoconiosis study "could be helpful to improve the occupational health of U.S. workers and the U.S. economy by supporting new or updated OSHA health standards for silica." He does not, however, discuss whether the work has already yielded such results nor does he indicate whether the Petitioner's matrix has been replicated in other studies or has otherwise garnered interest in the field.[5]

Additionally, the Petitioner maintains that his work in the above studies has assisted in the [redacted] development of a final rule protecting workers from exposure to respirable crystalline silica. While he submits a copy of the final rule, he does not document his role in its development and the report does not reference the Petitioner, nor does it

[4] As the Petitioner's proposed mentorship activities do not satisfy the "national importance" element of the *Dhanasar* framework's first prong, we will limit the remainder of our analysis to his proposed research.

[5] As additional evidence regarding one of the above studies, on appeal, the Petitioner provides a copy of the [redacted]" However, he has not demonstrated how the report reflects a record of success or a level of interest in his work rendering him well positioned to advance the proposed endeavor.

include documentation showing that the aforementioned studies were used in its development. Overall, the Petitioner's participation in these studies does not establish a record of success or progress in the field. The Petitioner has not submitted evidence establishing that this contribution to the projects served as an impetus for progress or generated positive interest among relevant parties in the broader academic community, industry, or government. Furthermore, the Petitioner has not established the significance of his role in either of these studies to the extent that he should be credited with the success of the overall projects or any interest that they generated.

The Petitioner also contends that he played an important role in research evaluating automotive workers' exposure to hazardous materials, and provides a copy of a presentation which he co-authored examining the exposure control matrix in the automotive body industry. The Petitioner notes that this poster was presented at the entitled " but he does not explain his specific role in the research or the significance of the study. Dr. a professor of industrial hygiene at and the Petitioner's supervisor, discussed this research method for assessing surface contamination in automotive body repair shops noting that the Petitioner's work "could help to reduce health risk for painters in automotive body shops." He did not explain whether the Petitioner's research, presented in 2003, has already had such an effect, has garnered interest from relevant parties, or otherwise demonstrates a record of success in the field. Dr. expectation regarding the possible future impact of the Petitioner's work is not evidence of his eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1).

As another example of his past success, the Petitioner refers to his master's thesis work concerning treatment and treatment in South Korea. He refers to his research published in the which he claims was utilized to stabilize a large municipal treatment plant; however, he does not offer evidence to support his statements.

The record also includes letters of support from the Petitioner's colleagues discussing his work in the area of industrial hygiene and attesting that he has played a role in advancing industrial hygiene and environmental safety practices. For example, professor and vice chair at stated that the Petitioner's work is "important for the determination of causes of various occupational diseases, and that his findings demonstrated that "exposures to microbial contaminants during the restoration of affected area had adverse effects on the restoration workers' health." However, Dr. did not provide specific examples of how the Petitioner's research has impacted occupational disease prevention, treatment protocols, or environmental or industrial processes or otherwise constituted a record of success or progress, or how it has garnered interest in the field. Similarly, , industrial hygienist with attested that the Petitioner's findings "have the potential of influencing future treatment of the problem of silicosis," yet he did not explain the basis for his opinion or offer evidence confirming his statements.

The Petitioner additionally claims that he has demonstrated a record of success through his application of the DRIFTS infrared spectroscopy technique to measure the amount of in in the presence of other particulate contaminates. Several letters describe the Petitioner's work as part of a group that used the DRIFTS technique to measure workers' exposure to potentially harmful wood dust. For example, Dr. , researcher in the exposure management branch of , explained that, in 2005, she worked on a team at responsible for developing a method for determining in the presence of other particulate contaminants. She noted that she became aware of the 2005 article " " co-authored by the Petitioner and published in She indicated that she met with the Petitioner several years later to discuss collaboration on a joint project. This led her team to test and verify the method for determining in a coordinated research endeavor between and the Petitioner's laboratory during which he was responsible for preparing samples. The results of this study were published in two journals: the in 2013 and the in 2015. Dr. did not explain the significance of the Petitioner's role in sample preparation or provide further detail about the importance of the study's findings.[6] Overall, Dr. did not sufficiently explain how the Petitioner's individual role in these joint laboratory projects has generated positive interest in his work among relevant parties or reflects a record of success in his area of research. Finally, Dr. stated that the Petitioner's research, published in 2005, is in "the process of becoming widely recognized," but she did not elaborate on the recognition it is receiving nor does the record include sufficient documentation to support her assertion.

Similarly, a chartered chemist with the and an associate service fellow with the , both describe working with the Petitioner on a DRIFTS project measuring However, they do not provide sufficient detail regarding the Petitioner's individual role in the study, or its significance to the field of industrial hygiene, to establish that this experience renders the Petitioner well positioned to advance his proposed endeavor.

Finally, on appeal, the Petitioner contends that he "found a software inconsistency" between two spectrometers which resulted in different conversion equations in DRIFTS studies, and reported it to their manufacturer, He does not explain why this finding is significant or whether it impacted subsequent studies. While the record includes a letter explaining the calibration issue from addressed to the Petitioner's supervisor, Dr. the Petitioner is not mentioned.

While we recognize that research must add information to the pool of knowledge in some way in order to be accepted for publication, presentation, funding, or academic credit, not every individual who has performed original research will be found to be well positioned to advance his or her

[6] The record does not reflect that the journal articles have been frequently cited, nor has the Petitioner provided other evidence demonstrating the success of the research.

proposed research. Rather, we examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed research, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. The evidence discussed above is insufficient to demonstrate a record of success or progress or a degree of interest from relevant parties that render the Petitioner well positioned to advance his proposed endeavor. For this reason, the Petitioner has not established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

Third and finally, we conclude that on balance, the Petitioner has not established that it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[7] While some of the Petitioner's knowledge and experience may exceed the minimum requirements for his occupation and therefore could not be easily articulated on an application for labor certification, he has not demonstrated, as claimed, that he presents benefits to the United States through his proposed endeavor that outweigh those inherent in the labor certification process.

On appeal, the Petitioner maintains that granting the waiver would serve the national interest because his presence would help to ameliorate a shortage of industrial hygiene professionals. We note, however, that the U.S. Department of Labor addresses worker shortages through the labor certification process and the Petitioner has not demonstrated that obtaining a labor certification would be impractical, nor has he shown an urgent national interest in his research. In addition, the Petitioner has not shown that he offers contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were available. In sum, the Petitioner has not established 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 Petitioner, therefore, has not met the third prong of the *Dhanasar* framework.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of C-W-K-*, ID# 330051 (AAO June 13, 2017)

[7] The labor certification process is designed to certify that the foreign worker will not displace, nor adversely affect the wages and working conditions of, U.S. workers who are similarly employed. Job requirements must adhere to what is customarily required for the occupation in the United States and may not be tailored to the foreign worker's qualifications or unduly restrictive, unless adequately documented as arising from business necessity.

Researcher 2

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-

DATE: MAY 11, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a computational mathematics researcher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established 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. In February 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*.

In support of his appeal, the Petitioner submits additional documentation and argues that he is eligible for a national interest waiver due to his "interdisciplinary contributions" and the "highly selective" nature of the aerospace engineering field.

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.

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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* clarifies that, after EB-2 eligibility as an advanced degree professional or individual of exceptional ability has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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

[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*).

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.[2]

II. ANALYSIS

The Petitioner holds a PhD in aerospace engineering from [redacted] Accordingly, the Director determined that the Petitioner qualified for classification as a member of the professions holding an advanced degree. The sole issue to be determined is 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.

A. Substantial Merit and National Importance of the Proposed Endeavor

In the initial filing, the Petitioner described his educational credentials and research interests, commenting that he wished to continue his research in quantitative analysis and mathematical statistical modeling. In response to our RFE, the Petitioner maintains that he intends to continue his work studying failure mechanisms of "large scale, complex, interconnected engineered systems such as the electricity grid and transportation systems such as the air traffic system, road traffic networks." He describes how his work aims to develop "simple but elegant models to capture and analyze failure mechanisms of these safety and economically critical infrastructure systems" using concepts of physics known as self-organizing systems. He specifically intends to investigate whether engineered systems exhibit the properties and behaviors of self-organizing systems and, if so, "how this knowledge can be leveraged and designed to improved performance and safety of organized systems."

On appeal, the Petitioner supplements the record with several job postings for potential positions in his field for which he has interviewed.[4] These include openings for research scientists or research

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[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] We also note that the Petitioner earned a master of science degree in aeronautics in 2007 and a master of science degree in computational and mathematical engineering in 2005 from [redacted]

[4] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for him to have a job offer from a specific employer. However, we will consider information about these prospective positions to illustrate the type

engineers for private companies developing machine intelligence to solve infrastructure problems such as air traffic control procedures and traffic safety. We find that the Petitioner's proposed work, in which he aims to use statistics and mathematical theory to develop solutions for failure mechanisms in large-scale transportation and infrastructure systems, has substantial merit.

With respect to the national importance of the Petitioner's proposed endeavor, our RFE asked for evidence documenting the "potential prospective impact" of his work. In response, the Petitioner again points to the three potential private sector positions indicating that the employers are "seeking, in common, to leverage and utilize my skills and advanced knowledge in linear and nonlinear controls, systems, mathematical modeling, machine learning, optimization, numerical methods and computational mathematics." Although the Petitioner contends that these job offers are evidence that his research is nationally important, he has not explained how job offers in his field demonstrate his potential prospective impact.

We note that the Petitioner has not explained whether he intends to accept any of the researcher positions described, what his proposed duties may be, or whether his proposed endeavor would change if he moved from academia to the private sector. Nonetheless, to the extent that the Petitioner proposes to conduct engineering research related to transportation and infrastructure systems, we find the evidence sufficient to demonstrate that such research is of national importance. The Petitioner submits an article from the [redacted] describing the need for a redesign of the U.S. air traffic management system, several articles applauding the technological advances in developing self-driving cars, and explaining the critical need for new and improved models in air and traffic transportation systems. He also offers several newspaper articles reporting on transportation and electric grid disruptions on the Eastern seaboard. We find that his intended research stands to have broader implications beyond any one company or organization, whether through the applied development of engineering solutions for infrastructure problems or through research for dissemination to others in the field through professional journals and conferences. As the Petitioner has documented both the substantial merit and national importance of his proposed research, he meets the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications. The Petitioner previously sent evidence of his published work, professional memberships, and academic credentials. In response to our RFE, the Petitioner additionally submits his CV, an updated report from [redacted] and download statistics from the [redacted] indicating that his PhD dissertation has been viewed 113 times.

As discussed below, we find the Petitioner has not demonstrated a record of success or progress in his field, or a degree of interest in his work from relevant parties, rising to the level of rendering him well

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of position the Petitioner seeks and the capacity in which he intends to work.

positioned to advance his proposed research endeavor of developing models to capture and analyze failure mechanisms of safety and economically critical infrastructure systems. *See Dhanasar*, 26 I&N Dec. at 890. The Petitioner maintains that his graduate research is indicative of his "proven record of success in his field," however, the record does not sufficiently support his contention. He states that while he was a graduate student at he developed software tools that were used by cancer researchers in a study of RNA/DNA sequence alignment, and he provides a copy of the acknowledgment section of the article published in the journal in 2007 recognizing his contribution. He has not explained, however, how his development of software tools for a cancer research project relates to his stated goal of developing engineering solutions for infrastructure problems.

The Petitioner also maintains that his PhD dissertation was published in a prestigious physics journal, reflecting his "interdisciplinary contribution." He contends that his PhD in aerospace engineering "is of great national interest to the United States providing national, global, and strategic advantage to the United States," and that the field is "highly selective and restrictive." The Petitioner does not offer evidence that his degree in aerospace engineering "strategically advantages" the United States, nor has he documented that his doctoral research has been frequently cited by independent educational scholars or otherwise served as an impetus for progress in the field, or that it has generated positive interest among relevant parties in the broader academic community, industry, or government.

On appeal, the Petitioner contends that his work has not been cited extensively because he publishes in a "narrow segment of the field" and due to the "young age of the publications." He does not, however, offer comparative statistics explaining how often other engineering researchers are cited to support his assertion that his field is too narrow to be frequently cited. Nor does the record otherwise demonstrate that his graduate research constitutes a record of success to meet this prong. While the Petitioner points to the fact that his dissertation has been viewed 113 times, he has not presented evidence illustrating the significance of this number, or establishing that the research has been implemented, utilized, or applauded by those viewing it. Moreover, the record does not indicate that his findings have been employed by government or private sector entities, or that his work has affected specific infrastructure development or failure mechanism projects.

The evidence discussed above is insufficient to demonstrate a record of success or progress or a degree of interest from relevant parties that render the Petitioner well positioned to advance his proposed endeavor, and the record does not include evidence of another factor satisfying this prong. For this reason, the Petitioner has not established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

Third and finally, we conclude that on balance, the Petitioner has not established that it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[5] While we recognize the likelihood that some of the Petitioner's knowledge and experience may exceed the minimum requirements for his occupation and therefore could not be easily articulated on an application for labor certification, he has not demonstrated, as claimed, that he presents benefits to the United States through his proposed endeavor that outweigh those inherent in the labor certification process. With respect to development of engineering solutions to infrastructure failure mechanisms, the Petitioner has not shown an urgent national interest in his own efforts to achieve this aim, nor has he demonstrated that he offers contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were available. In sum, the Petitioner has not demonstrated 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 Petitioner therefore has not established that he meets the third prong of the *Dhanasar* framework.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of J-M-C-*, ID 119901 (AAO May 11, 2017)

[5] The labor certification process is designed to certify that the foreign worker will not displace, nor adversely affect the wages and working conditions of, U.S. workers who are similarly employed. Job requirements must adhere to what is customarily required for the occupation in the United States and may not be tailored to the foreign worker's qualifications or unduly restrictive, unless adequately documented as arising from business necessity.

Researcher 3

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-S-M-K-

DATE: MAY 30, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a fluid mechanics and heat transfer researcher, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1]

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The Petitioner appealed the matter to us, and we dismissed the appeal.[2]

The matter is now before us on a motion to reconsider. The Petitioner initially offered a brief in support of the motion contending that she was eligible for a national interest waiver under the framework identified in *NYSDOT*. While the motion was pending, we issued *Dhanasar*, our precedent decision modifying the analytical framework for national interest waivers. We subsequently reopened the matter on our own motion and issued a request for evidence (RFE) asking the Petitioner to provide proof satisfying the new three-part framework set forth in *Dhanasar*. In response, the Petitioner submits a letter from counsel and additional documentation, asserting that she is eligible for a national interest waiver under the *Dhanasar* framework. Upon review, we will deny the motion to reconsider. In addition, as the record does not establish eligibility for the

[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 Matter of N-S-M-K-*, ID# 77881 (AAO Sept. 29, 2016).

discretionary national interest waiver under the framework set forth in *Dhanasar*, the petition will remain denied.

I. LAW

A motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

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.

While neither the statute nor the pertinent regulations define the term "national interest," *Dhanasar* stated that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

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.[3]

II. ANALYSIS

The record indicates that the Petitioner intends to work as a researcher and teacher in the department of mechanical and aerospace engineering at [redacted] In his support letter, [redacted] chair of [redacted] department of mechanical and aerospace engineering, explained that the Petitioner's responsibilities would include teaching three courses per semester, collaborating on "fire safety research and interactive [redacted] education and training," studying properties of nano and ferrofluids "such as optical and thermal properties," and "supervising graduate students and/or post-doctoral fellows."

A. Motion to Reconsider Under the *NYSDOT* Framework

The Petitioner filed the current motion to reconsider prior to the publication of *Dhanasar*, contending that our appellate decision under the *NYSDOT* framework was erroneous. In our appellate decision, we acknowledged that the Petitioner satisfied the first two prongs of the *NYSDOT* framework but determined she had not met the third prong requiring a petitioner to justify projections of future benefit to the national interest by establishing a past history of demonstrable achievement with some degree of influence on the field as a whole. *Id.* at 219, n.6. We found the Petitioner had not established by a preponderance of the evidence that she had such a record of achievement or that she would serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

On motion, the Petitioner asserted that we improperly compared her accomplishments to those of the individuals who wrote her letters of support and dismissed the appeal because her qualifications were "not as great as those of the senior references." One of the projects through which the Petitioner asserted she influenced the field was the [redacted] training module, a web-based training program for [redacted] While our appellate decision discussed the involvement of two of the Petitioner's references with that program, our decision was not based on a finding that their accomplishments and qualifications exceeded those of the Petitioner. Rather, we found that, although the record indicated the Petitioner may have provided support and assistance to the development of [redacted] it did not support the claimed significance of her particular role in the development of the training module or demonstrate that her work on that project had influenced the field of fluid mechanics and heat transfer.[4]

The Petitioner further states that the "value of her contributions has been affirmed by her collaborators, including [redacted] and [redacted], and that their letters "should be afforded significant evidentiary weight." Our decision addressed and thoroughly considered the information offered in these letters. The Petitioner's motion does not point to any specific errors in our discussion and analysis of their statements.

In addition, the Petitioner mentions our analysis of the letters from [redacted] professor of physics and pharmaceutical sciences at [redacted] and [redacted] professor of biomedical engineering at the [redacted] indicated that he collaborated with the Petitioner "on developing [a] new system of imaging and treating the brain tumor by using [redacted] With regard to their collaboration, [redacted] stated that "society will benefit from this research in the future." Similarly, [redacted] asserted: "[The Petitioner's] research methodologies and findings could be applied to my work, with the potential to yield results to improve biomedical imaging systems or develop new instrumentations." In addressing their comments, our decision stated:

> While [redacted] and [redacted] attested to the potential impact of the Petitioner's work, they did not offer any examples indicating that her work already has been utilized in any thermal systems, has altered diagnostic or treatment protocols for brain tumors, has improved biomedical imaging systems, has affected the development of new medical instrumentation, or has otherwise influenced the field as a whole. A petitioner cannot successfully file a petition under this classification based on the expectation of future eligibility. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12) . . . .

[4] For example, we noted that although the record included various articles about [redacted] that were written or contributed to by her references, the Petitioner was not listed as an author or acknowledged in the articles. In addition, we observed that the Petitioner provided a copy of [redacted] résumé listing the [redacted] copyright ([redacted] February 2013) among his research accomplishments, but did not offer intellectual property documentation identifying herself as [redacted] developer or inventor. *See Matter of N-S-M-K-*, ID# 77881 at 4-5.

The Petitioner contends that our language in the first sentence of the above paragraph "suggests that a standard far stricter than 'some degree of influence' has been applied in this case." Our analysis, however, was based on the assertions of [redacted] and [redacted] regarding the prospective impact of the Petitioner's research aimed at utilizing [redacted] in medical imaging systems. In our decision, we explained why the references' statements were insufficient to demonstrate the Petitioner's eligibility at filing by showing that she had a past record of achievement with a degree of influence on the field as a whole.

The arguments the Petitioner offers on motion do not establish that our appellate findings were based on an incorrect application of the *NYSDOT* framework, law, regulation, or USCIS policy, nor does the motion demonstrate that our latest decision was erroneous based on the evidence before us at the time of the decision.

B. Eligibility Under the *Dhanasar* Framework

As the relevant framework changed while this matter remained pending, we will now consider whether the record, including new evidence submitted in response to our RFE, demonstrates the Petitioner's eligibility under the *Dhanasar* framework. As stated previously, she intends to work as a researcher and teacher in the department of mechanical and aerospace engineering at [redacted] In response to our RFE, the Petitioner offers a letter from [redacted] affirming that his institution has continued its "collaboration with [her] through our [redacted] campus" since 2016, and that his department wishes "to have [her] rejoin our team in the United States in the future, specifically in a position that would allow her to continue instructing our engineering students and would also facilitate her continued research in the areas of nanofluids and fire safety."[5]

1. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner previously stated her work will focus on behaviors of nanofluids and ferrofluids, and fire safety research. She indicated that her "work with ferrofluids has a broad range of potential applications that are meritorious for their medical applications and their prospective benefit to the national economy." In addition, she asserted that her fire safety research will have an "impact on the safety and welfare of [redacted] across the country." The Petitioner's response to our RFE maintains that she will continue to perform research in the areas of "fluid mechanics and heat transfer." She contends that her proposed endeavor has "a significant impact on fire safety research and has potentially significant implications for ongoing biomedical and bioengineering research." The record includes letters of support and published articles discussing the benefits of these areas of research. Accordingly, we find that the Petitioner's proposed work as a fluid mechanics and heat transfer researcher has substantial merit.

[5] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for her to have a job offer from a specific employer. Nevertheless, we will consider information about this prospective position to illustrate the capacity in which she intends to work.

To evaluate whether the Petitioner's work satisfies the national importance requirement, we requested evidence documenting the "potential prospective impact" of her work. In response, the Petitioner asserts that her research and collaborations with the have a "national impact on the study of fire safety in the United States – as well as on the training throughout the country receive." In addition, she contends that her research in the area of ferrofluids and nanofluids contributes to "the development of advanced medical treatments, therapies, and drug delivery systems."

We also find the evidence sufficient to demonstrate that the proposed research is of national importance. For example, in his latest letter, a senior research scientist at cites data from the concerning fatalities in the United States. In addition, a professor of mechanical engineering at and the Petitioner's Ph.D. advisor, states that her "work with can be very useful not only in biomedical engineering devices, but also in medical diagnostics and therapy." He further indicates that the proposed research could offer "improvements in medical devices and drug delivery technologies" that "have the potential to improve and save the lives of millions of Americans and others around the world." In addition, the Petitioner has submitted documentation indicating that the benefit of her proposed fluid mechanics, heat transfer, and fire safety research has broader implications, as the results are disseminated to others in the field through engineering journals and conferences. As the Petitioner has documented both the substantial merit and national importance of her proposed research, she meets the first prong of the *Dhanasar* framework.

Regarding the Petitioner's proposed teaching duties at we find that they have substantial merit. The record, however, does not establish that her course instruction would impact her endeavor more broadly, as opposed to being limited to the students at the institution where she teaches. Accordingly, without sufficient documentary evidence of their broader impact, the teaching activities do not meet the "national importance" element of the first prong of the *Dhanasar* framework. Similarly, in *Dhanasar*, we determined 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. *Id.* at 893. We note that the Petitioner's RFE response does not maintain that her proposed endeavor is teaching. Rather, she specifies that her endeavor is research in the fields of fluid mechanics and heat transfer.[6]

2. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications.[7] The Petitioner submitted documentation of her published work, conference presentations, peer

[6] As the Petitioner's proposed teaching activities as an instructor do not satisfy the "national importance" element of the *Dhanasar* framework's first prong, we will limit the remainder of our analysis to her proposed research.

[7] Under this prong of *Dhanasar*, the Petitioner must go beyond showing expertise in her particular field. A petitioner "cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in [her] field of expertise." *Id.* at 886, n.3.

review activities, research projects, and academic credentials (including a bachelor's degree, master's degree, and Ph.D. in mechanical engineering). She also offered various reference letters discussing her research projects at [redacted][3] In response to our RFE, the Petitioner provided her CV; further research articles and presentations; and emails inviting her to publish and present her work, and to perform peer review. Her evidence also included copies of nine [redacted] test reports (2008-2011), a [redacted] technical report ([redacted] 2009), information about [redacted] and its [redacted] and updated letters of support from previous references. As discussed below, we find that the Petitioner has not demonstrated a record of success or progress in her field, or a degree of interest in her work from relevant parties, that rises to the level of rendering her well positioned to advance her proposed research endeavor. *See Dhanasar*, 26 I&N Dec. at 890.

The Petitioner maintains that her education, knowledge, and skills in fluid mechanics and heat transfer; research background at [redacted] publications; and presentations show that she is well positioned to advance the study of fire safety, nanofluids, and ferrofluids. The record contains letters from [redacted] engineering faculty members discussing her fire research activities, which has included work on projects funded by the [redacted] and on the [redacted] web-based training program. For example, [redacted] stated that she "assisted the [redacted] team to successfully complete three projects" funded by the [redacted] program. In addition, [redacted] explained that the Petitioner's "ability to statistically analyze and interpret the data helped the team to scientifically validate the efficacy of [redacted]' which "is currently in beta-testing with several fire departments." Our RFE requested additional information and evidence to demonstrate her specific roles and contributions to the [redacted] program and [redacted] grant projects.

In letters responding to our RFE, the Petitioner's colleagues discuss her participation in the [redacted] fire safety projects. For instance, [redacted] indicates that when she was a graduate student in February 2008, the Petitioner "participated in, and was a leading member of, the research team during [redacted]'[10] Similarly, [redacted] asserts that the Petitioner "lead the research team during [redacted] conducted on [redacted] . . ." For perspective on the Petitioner's role in this project, the RFE response includes a [redacted] technical report entitled '[redacted]'[11] The "Acknowledgements" section of the [redacted]

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[8] The record reflects that the Petitioner performed graduate and postdoctoral research at [redacted] from June 2008 to January 2014. In addition, from January 2014 until July 2014, she was employed as an adjunct professor at [redacted] Subsequently, from July 2014 to January 2015, she worked as a consultant and research and development scientist for [redacted] in New Jersey. In September 2014, she returned to [redacted] as a visiting assistant professor until December 2014.

[9] The Petitioner submits information indicating that [redacted] became '[redacted]' in 2015.

[10] In his initial letter, [redacted] stated that the Petitioner "assisted the [redacted] team during [redacted]'

[11] The authors of the [redacted] report, [redacted] and [redacted] stated: '[redacted]

report lists several organizations and fifty individuals who played a role in the experiments. It identifies as "[t]he key organization to making this happen," and mentions for its "role in documenting the structure and monitoring the weather and wind conditions during the experiments." The third paragraph under "Acknowledgments" states that led efforts, and that the principal members of his team included the Petitioner, and three others. While the report shows that she was a member of the team that assisted in documenting the structure and monitoring the weather and wind conditions, it does not establish her role as a substantial contributor to the extent that she should be credited with the success of the overall project or any interest that it generated.

In his letter, notes that the Petitioner recently published an article based on her follow-up research relating to the aforementioned experiments.[12] He states that in 2017, she published a paper on tactics to create safer conditions for entitled in We note that this article, written by and the Petitioner, was published well after she filed the Form I-140 on May 11, 2015.[13] The Petitioner's RFE response includes additional research articles she coauthored, but they have not yet been published or presented. Regardless, the record does not include sufficient evidence to demonstrate that her recent and forthcoming publications have generated positive interest among relevant parties or reflect a record of success in her area of research.

Similarly, the Petitioner offers a ' 2017 paper; a 2016 ' speaking engagement; and emails from 2016 and 2017 inviting her to publish and present her work, and to perform peer review, all of which post-date the filing of the Form I-140. While the regulation at 8 C.F.R. § 103.2(b)(1), (12) requires that eligibility be established at the time of filing, we will consider the additional post-filing evidence of the Petitioner's accomplishments in evaluating whether she meets this second prong. In this case, however, we find the Petitioner has failed to establish that these presentations and invitations are reflective of a level of success, or interest in her work, that renders her well positioned to advance her proposed research endeavor.

With regard to development of the module, and contend that the Petitioner assisted in conceptualizing and developing the training methodology. maintains that the Petitioner's "teaching experience and leadership assisted the group in conceptualizing [the] web-based interactive training methodology for He states that

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" The authors further noted that the experiments were conducted by multiple organizations, including and and required "the assistance of many individuals and cooperation of many organizations to plan and execute."

[12] The RFE response included copies of nine test reports confirming the Petitioner was one of the individuals who conducted the experiments, which were conducted jointly by the and the from May 2008 until October 2011.

[13] The record does not indicate that the Petitioner published any previous fire safety research studies.

she "completed critical statistical analysis and data interpretation to support development of the module." As noted in our appellate decision, while the record includes various articles about that were written or contributed to by and they do not mention the Petitioner or discuss her specific contributions to corroborate the references' claims that she conceptualized or developed the training methodology. Although the Petitioner's colleagues at contend that she "helped the team to scientifically validate the efficacy of ' the record does not indicate that she has contributed to their published research articles relating to the project. For example, and authored an article about in entitled ' The Petitioner is not listed as an author or identified anywhere in the acknowledgements section of the aforementioned article, and the record does not include any work that she has published regarding her development of the training tool.[14]

While the Petitioner may have provided support and assistance to the projects and the training tool, the record does not support the claimed significance of her role in these endeavors. Instead, the record reflects her participation as a graduate student in certain phases of the research process (such as monitoring experimental conditions, testing, and performing statistical analysis and data interpretation). She has not shown, however, that this work with the amounts to a record of success in her field, that her contributions generated interest among relevant parties, or that this research experience otherwise renders her well positioned to advance her proposed endeavor.

In addition to her fire safety research, several references mentioned the Petitioner's nanofluids and ferrofluids research at For instance, professor of physics at stated that the Petitioner's "research articles are excellent and make important contributions to the technically important field of ferrofluids," but did not further describe these contributions. Furthermore, associate professor of mathematics at asserted that the Petitioner "has extended theoretical models of ferrofluids and made measurements of their essential properties" and that her work "has important applications for the construction of sensors." In his initial letter, indicated that the Petitioner's research findings "have advanced understanding of enhancement in heat transfer rate of ferrofluids that can be used in thermal systems." The letters from and do not, however, provide specific examples of how the Petitioner's findings have generated positive interest among relevant parties, have affected sensor construction methodologies, have been utilized in the development of thermal systems, or otherwise reflect a record of success in this area of research.

In response to our RFE, points to the Petitioner's articles about ferrofluids in and He attests that her studies "advanced our field's comprehensive knowledge regarding the process of assembling

[14] In his initial letter, noted that is "a registered copyrighted computer program," but the record identifies rather than the Petitioner, as the copyright author.

particles in response to the magnetic field for a weak dipolar ferrofluid by means of concentration and field strength." Similarly, [redacted] contends that the Petitioner's findings "offer a substantial improvement towards fundamental understanding of colloidal magnetic fluids' behavior." In addition, [redacted] notes that the Petitioner's work adds "a new set of data about the in-field behavior of ferrofluids to the existing body of literature" and "indicates an integration of promising efforts to develop a fundamental understanding of ferrofluids and their characterization."

While we recognize that research must add information to the pool of knowledge in some way in order to be accepted for publication, funding, or academic credit, not every individual who has performed original research will be found to be well positioned to advance her proposed research. Rather, we examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed research, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. In this case, the record demonstrates that the Petitioner has conducted and published some research during her career at [redacted] She has not shown, however, that her work has been frequently cited by independent researchers or otherwise served as an impetus for progress in the field, that it has affected engineering practices, or that it has generated substantial positive discourse in the broader research community. Nor does the evidence demonstrate that the Petitioner's work otherwise constitutes a record of success in her area of research. As the record is insufficient to demonstrate that the Petitioner is well positioned to advance her proposed endeavor, she has not established that she satisfies the second prong of the *Dhanasar* framework.

3. Balancing Factors to Determine Waiver's Benefit to the United States

The Petitioner states that her "continued work in the United States in the field of fluid mechanics and heat transfer warrants approval." She asserts that "it is highly unlikely that other workers in the United States would share [her] unique combination of skills, and . . . that any such labor market could be effectively tested through the labor certification process." The Petitioner also contends that her research in two areas, fluid mechanics and heat transfer, "is analogous to a combination of jobs that would render labor certification highly impractical in her case" and that it would be difficult "to articulate the requirements of such a position in a labor certification."[16]

While some of the Petitioner's knowledge and experience may exceed the minimum requirements for her occupation and therefore could not be easily articulated on an application for labor certification, she has not demonstrated, as claimed, that she presents benefits to the United States through her proposed endeavor that outweigh those inherent in the labor certification process. The Petitioner has not shown an urgent national interest in her research, nor has she demonstrated that she offers

[15] For instance, her CV listed six publications she authored while at [redacted] from 2006 until the petition's filing date in May 2015.

[16] The labor certification process is designed to certify that a foreign worker will not displace nor adversely affect the wages and working conditions of U.S. workers who are similarly employed. Job requirements must adhere to what is customarily required for the occupation in the United States and may not be tailored to the foreign worker's qualifications or unduly restrictive, unless adequately documented as arising from operational necessity.

contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were available. In sum, the Petitioner has not demonstrated 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 Petitioner therefore has not established that she meets the third prong of the *Dhanasar* framework.

III. CONCLUSION

The Petitioner has not demonstrated error in our previous decision. Further, she has not established that she meets the framework set forth in *Dhanasar* to show eligibility for the discretionary national interest waiver, nor do we find that an exercise of discretion would be warranted in this instance.

ORDER: The motion is denied and the petition remains denied.

Cite as *Matter of N-S-M-K-*, ID# 262667 (AAO May 30, 2017)

Physician / Researcher I

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-D-

DATE: MAY 19, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a physician and researcher specializing in neonatology, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The matter is now before us on appeal.

In March 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*. In response, the Petitioner submits additional documentation and contends that he is eligible for a national interest waiver under the *Dhanasar* framework.

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.

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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* clarifies that, after EB-2 eligibility as an advanced degree professional or individual of exceptional ability has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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

[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*).

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.[2]

II. ANALYSIS

The Director found that the Petitoner qualifies as a member of the professions holding an advanced degree. The sole issue to be determined is 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.

The Petitioner stated that he is seeking a national interest waiver "based upon the prospective benefit of [his] research" rather than his clinical services. At the time of filing, the Petitioner was pursuing postgraduate medical training as a second-year pediatric resident at [redacted] a component of [redacted] In response to our RFE, he submits an [redacted] 2016 email notifying him of his "appointment to the Professional Staff" at the [redacted][4]

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner indicates that his research addresses illnesses afflicting premature infants in Neonatal Intensive Care Units (NICUs). He has explained that his work aims to improve conditions in NICUs through focusing on alleviating problems such as sepsis in newborns, parent and caregiver mental health issues, and a lack of oxygen for newborns. In her letter, [redacted] a pediatrician and neonatologist at [redacted] noted that the Petitioner's research "promises to improve the care of premature neonates and their outcomes not only by improving how we perceive the disease and manage it, but also by improving the mental health of caregivers of these

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.
[3] The record reflects that he previously completed a fellowship in neonatal-perinatal medicine at [redacted]
[4] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for him to have a job offer from a specific employer. However, we will consider information about this prospective position to illustrate the capacity in which he intends to work.

complicated infants. His work is also improving the lives of the underprivileged in our society." We find that the Petitioner's proposed work as a neonatal researcher has substantial merit.

To evaluate whether the Petitioner's work satisfies the national importance requirement, we requested evidence documenting the "potential prospective impact" of his work. The Petitioner's response explains that his research is aimed at "dealing with late-onset sepsis in the NICU," "determining which children are at the greatest risk," and understanding predictors of sepsis such as apnea and hypothermia. The Petitioner continues: "Saving children's lives in this situation is a national problem and the national interest. . . . Caring for premature infants is costly; improving the chances of success saves lives and money." The record also includes letters from physicians and professors of medicine discussing his research concerning neonatal care improvements and its potential benefit to our nation's healthcare system. The record also establishes that the proposed benefit of his research has broader implications, as the results from his work are disseminated to others in the field through medical journals and conferences. We find the evidence sufficient to demonstrate that the Petitioner's neonatology research is of national importance. As the Petitioner has documented both the substantial merit and national importance of his proposed research, he meets the first prong of the *Dhanasar* framework.

While the Petitioner's care and treatment of patients has substantial merit, the record does not establish that his clinical work would impact the neonatology field and healthcare industry more broadly, as opposed to being limited to the patients he serves. Accordingly, without sufficient documentary evidence of its broader impact, the Petitioner's clinical work as a physician and neonatologist does not alone meet the "national importance" element of the first prong of the *Dhanasar* framework. Similarly, in *Dhanasar*, we determined 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. *Id.* at 893.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications. The Petitioner submitted documentation of his published work, professional memberships, academic credentials, and an internal award from [redacted] He also offered four reference letters discussing his medical training and research projects. In response to our RFE, the Petitioner provided evidence of his peer review activities, a poster presentation, and an article that cites to his work.

The Petitioner maintains that he is employed at "one of the top research hospitals in the United States," that he has presented his findings at international conferences, and that his published work has been cited by others. In letters supporting the petition, medical professors discussed the Petitioner's research aimed at improving conditions in NICUs. For example, [redacted] professor of pediatrics at [redacted] described the Petitioner's work to improve "the mental health outcomes of the mothers of infants admitted to the Neonatal Intensive Care Unit." [redacted] stated that the Petitioner authored a study that "showed that there is a high prevalence of mental health problems, like Depression, Anxiety and Stress, in the family members of the infants

admitted to the NICU." While noted that the Petitioner "established a peer to peer support group" composed of parents whose infants were admitted to the NICU at he did not offer specific examples of how the Petitioner's findings have generated positive interest among relevant parties, have been implemented in other medical centers' NICUs, or otherwise reflect a record of success in his area of research.

In addition, associate professor of pediatrics at stated that the Petitioner's findings in the "revealed that apnea and hypothermia were the key risk factors for actual life-threatening neonatal infections." further indicated that "[a]s a result of this ground-breaking research, neonatologists can initiate essential and potentially life-saving antibiotic treatment earlier in its course, potentially reducing both significant morbidity and mortality in these tiny babies." Furthermore, professor of pediatrics and neonatology at discussed how the Petitioner's research "showed that there is a significant difference between manually and automatically recorded pulse oximetry values in preterm infants who are requiring oxygen." added: "This is an important finding in the context of how we manage patients in the NICU, because it suggests that the use of automated oxygen administering systems for infants on oxygen might be able to change the survival and disease burden of those patients."

The record demonstrates that the Petitioner has conducted, published, and presented research during his medical training. While we recognize that research must add information to the pool of knowledge in some way in order to be accepted for publication, presentation, funding, or academic credit, not every individual who has performed original research will be found to be well positioned to advance his or her proposed research. Rather, we examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed research, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. The Petitioner has not shown that his research has been frequently cited by independent neonatologists or otherwise served as an impetus for progress in the field, that it has affected clinical practice, or that it has generated substantial positive discourse in the broader medical community. For instance, the record includes only one article that cites to the Petitioner's work. Specifically, the article references his finding that "[a]n acute increase in central apnea is one of the most common signs of late-onset septicemia in preterm infants in the NICU." Nor does the evidence otherwise demonstrate that his work otherwise constitutes a record of success in his area of research.

With respect to the Petitioner's peer review activities, his response to our RFE includes a letter and emails confirming that he reviewed manuscripts in 2016 and 2017 for and In addition, he submits a 2017 letter appointing him as an "Academic Editor" for The Petitioner's peer review activities and editorial appointment post-date the filing of the Form I-140 on June 26, 2015. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12). Regardless, the Petitioner has not documented the reputation of the aforementioned journals or offered other evidence demonstrating that his past history of peer review

rises to the level of rendering him well positioned to advance his proposed research endeavor. The record does not show that the Petitioner's occasional participation in the widespread peer review process represents a record of success in his field or that it is otherwise an indication that he is well positioned to advance neonatology research.

In sum, the Petitioner has not demonstrated a record of success or progress in his field, or a degree of interest in his work from relevant parties, that rise to the level of rendering him well positioned to advance his proposed endeavor of researching conditions that afflict premature infants in NICUs. As the record is insufficient to demonstrate that the Petitioner is well positioned to advance his proposed endeavor, he has not established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

The Petitioner asserts that the labor certification process would not produce "an adequate substitute" with his level of professional qualifications. He contends that "[a] labor certification tests the U.S. labor market for a minimally qualified employee" and that such an individual "is not going find new solutions to existing problems."[5] The Petitioner further maintains that "[w]hen human lives are at stake, the best and the brightest are needed."

We note that the [redacted] recently filed a Form ETA 9089, Application for Permanent Employment Certification, on the Petitioner's behalf and that the form was certified by the U.S. Department of Labor on September 26, 2016.[6] Accordingly, the record does not demonstrate that obtaining a labor certification would be impractical, nor does it support the claim that in his case it is necessary, and beneficial to the United States, to waive the requirement of a job offer, and thus of a labor certification. While some of the Petitioner's knowledge and experience may exceed the minimum requirements for his occupation and therefore could not be easily articulated on an application for labor certification, he has not demonstrated, as claimed, that he presents benefits to the United States through his proposed endeavor that outweigh those inherent in the labor certification process. The Petitioner has not shown an urgent national interest in his research, nor has he demonstrated that he offers contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were available. In sum, the Petitioner has not demonstrated 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 Petitioner therefore has not established that he meets the third prong of the *Dhanasar* framework.

[5] The labor certification process is designed to certify that a foreign worker will not displace nor adversely affect the wages and working conditions of U.S. workers who are similarly employed. Job requirements must adhere to what is customarily required for the occupation in the United States and may not be tailored to the foreign worker's qualifications or unduly restrictive, unless adequately documented as arising from operational necessity.

[6] Subsequently, his employer filed a Form I-140 in his behalf that was approved by USCIS on October 27, 2016.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of A-D-*, ID# 287483 (AAO May 19, 2017)

Physician / Researcher 2

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-R-A-A-E-

DATE: MAY 10, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a physician and researcher specializing in cardiology, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The matter is now before us on appeal.

In February 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*. In response, the Petitioner submits additional documentation and contends that he is eligible for a national interest waiver under the *Dhanasar* framework.

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.

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. . . . the 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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* clarifies that, after EB-2 eligibility as an advanced degree professional or individual of exceptional ability has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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

[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*).

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.[2]

II. ANALYSIS

The Director found that the Petitoner qualifies as a member of the professions holding an advanced degree. The sole issue to be determined is 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.

At the time of filing, the Petitioner was pursuing postgraduate medical training as a general cardiology fellow at the [redacted] In response to our RFE, he submits a June 2016 letter offering him "a position as a fellow in our [redacted] at [redacted] This letter states that the Petitioner's "fellowship is one year in length, and your training will begin on July 1, 2017 and be completed on June 30, 2018."

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner previously stated that his clinical work offering quality healthcare "has an effect on the health care system of the United States as a whole" and that his "medical research is having a widespread impact on the quality of medical care across the United States." In a letter of support, [redacted] professor of cardiology at [redacted] stated "As a cardiologist, [the Petitioner] treats and does research on a wide range of heart conditions, including systolic heart failure, which constitutes about 50% of heart failure cases. This amounts to 2.5 million patients in the United States . . . and it is a major cause of morbidity and mortality." Whether as a physician or researcher, we find that the Petitioner's proposed work as a cardiologist has substantial merit.

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[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] He previously completed an advanced heart failure and transplant cardiology fellowship at the [redacted] and [redacted] Prior to that, he served as an internal medicine resident at [redacted]

[4] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for him to have a job offer from a specific employer. However, we will consider information about this prospective position to illustrate the capacity in which he intends to work.

With respect to the national importance of the Petitioner's proposed endeavor, our RFE asked for evidence documenting the "potential prospective impact" of his work. The Petitioner's response states that "[a]s a share of the nation's Gross Domestic Product [GDP], health spending accounted for 17.8 percent of U.S. GDP, so [the Petitioner's] contributions as both a clinician and a researcher are undoubtedly of national importance." He further indicates that his clinical work "saving the lives of sick patients" offers such a valuable contribution to the nation "that it cannot be statistically quantified, as he is responsible for the precious health and lives of countless U.S. citizens." While the Petitioner's care and treatment of patients have substantial merit, the record does not establish that his clinical work would impact the cardiology field and healthcare industry more broadly, as opposed to being limited to the patients he serves. Accordingly, without sufficient documentary evidence of its broader impact, the Petitioner's clinical work as a physician and cardiologist does not meet the "national importance" element of the first prong of the *Dhanasar* framework.[5]

Nonetheless, the Petitioner's response attests that the national importance of his work "is primarily demonstrated by the research he has done and is continuing to do, as evidence [*sic*] by his multiple publications . . . ." To the extent that the Petitioner proposes to conduct cardiology research, we find the evidence sufficient to demonstrate that such research is of national importance. For example, the record includes letters from physicians and professors of medicine discussing his research concerning heart conditions and its potential benefit to our nation's healthcare system. In addition, the Petitioner has submitted documentation indicating that the proposed benefit of his cardiology research has broader implications, as the results from his work are disseminated to others in the field through medical journals and conferences. As the Petitioner has documented both the substantial merit and national importance of his proposed research, he meets the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications. The Petitioner previously submitted documentation of his published work, conference presentations, professional memberships, academic credentials, and internal awards from [redacted] He also offered various reference letters discussing his medical training and research projects. In response to our RFE, the Petitioner additionally provides his curriculum vitae (CV), further publications and presentations, medical credentials, and emails inviting him to publish and present his work.

As discussed below, the Petitioner has not demonstrated a record of success or progress in his field, or a degree of interest in his work from relevant parties, that rises to the level of rendering him well positioned to advance his proposed research endeavor of understanding unique heart conditions and identifying proper methods of diagnosis and treatment.[6] *See Dhanasar*, 26 I&N Dec. at 890. The

[5] Similarly, in *Dhanasar*, we determined 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. *Id.* at 893.

[6] As noted above, the Petitioner has not demonstrated that his proposed clinical activities as a physician meet the "national importance" element of the *Dhanasar* framework's first prong. Accordingly, we will limit our analysis under

Petitioner maintains that he has "provided substantial evidence of [his] achievements, including letters of support" and that the record shows his work "is having a substantial impact on medical care in the United States."

In letters supporting the petition, various medical professors discussed the Petitioner's research aimed at understanding rare cardiac conditions. For example, professor of pediatrics at stated that the Petitioner "was able to demonstrate, by coronary angiography, for the first time in the medical literature that coronary flow impairment can be secondary to not only atherosclerosis, but also compression from the outside such as pericardial effusion."[7] indicated that the Petitioner's findings provided his peers "with a better understanding of effusive constrictive pericarditis so that they could put this valuable knowledge to practice in their own institutions across the United States and around the world." Similarly assistant professor of medicine at indicated that the Petitioner performed "a very interesting study on cardiac catheterization and coronary angiography that addresses the differences between performing these procedures by assessing the heart via the femoral artery . . . and the radial artery . . . ." He further noted that this study "produced a wealth of data and some very promising conclusions about the trans-radial approach, which has been shown to have higher patient satisfaction, less bleeding, and shorter hospital stays." The letters from and do not, however, provide specific examples of how the Petitioner's findings have generated positive interest among relevant parties, have been implemented at medical institutions, or otherwise reflect a record of success in his area of research.

assistant professor at discussed two of the Petitioner's recent medical case reports. He noted that the Petitioner's first paper described a case involving an endomyocardial biopsy with a coronary-cameral fistula and that his second paper reported on a case involving left main coronary artery spasm. In addition, asserted that the Petitioner's reports will offer useful guidelines to physicians faced with similar medical cases. While the record reflects that the aforementioned case reports were submitted for publication, the evidence does not show that they had been published at the time of filing the Form I-140 on June 18, 2015, or that his findings had drawn the interest of relevant individuals or entities prior to publication. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12).

Two references from offer further examples of the Petitioner's research that was published or presented after the petition's filing date. For instance, professor and chief of cardiology, indicated that the Petitioner recently performed a study that examined "the mortality and cost of hospitalized patients with acute and chronic diastolic heart failure in the United States."[8] Additionally, the response to our RFE includes a March 2017 letter from

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this prong to his proposed research.

[7] The Petitioner's research was presented at the (2012).

[8] According to his CV, the Petitioner presented this work at the in 2016.

professor and chief of the division of cardiovascular medicine, stating that the Petitioner "recently submitted a paper for publication to [redacted] in which he "reported a unique way to treat prosthetic valve malfunction in preparation for pump deactivation in a patient with LVAD" (left ventricular assist device). As the research discussed in [redacted] and [redacted] letters was published or presented long after the petition was filed, it does not establish the Petitioner's eligibility at the time of filing.

Other medical faculty discussed the Petitioner's cardiovascular disease research. With respect to the Petitioner's study concerning [redacted] professor of internal medicine at [redacted] indicated the Petitioner found that, "contrary to commonly accepted assumptions," [redacted] "does not occur in females during the last month of gestation or first few months of delivery, but that it affects a wider range of patients." [redacted] contended that the Petitioner's work provides his "his peers with a greater understanding of the condition." Furthermore, [redacted] associate professor of medicine at [redacted] stated that the Petitioner performed a study in which "he reviewed over three years of outcomes" of percutaneous coronary intervention (PCI) and concluded that "patients who had more complex and lengthy procedures experience more bleeding."[9] [redacted] indicated that the Petitioner's "promising results require further study" and have "potential" to lead to advances in acute coronary syndrome treatment.

While we recognize that research must add information to the pool of knowledge in some way in order to be accepted for publication, funding, or academic credit, not every individual who has performed original research will be found to be well positioned to advance his or her proposed research. Rather, we examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed research, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. In this case, the record demonstrates that the Petitioner has conducted and published research during his medical training. He has not shown, however, that his research has been frequently cited by independent cardiologists or otherwise served as an impetus for progress in the field, that it has affected clinical practice, or that it has generated substantial positive discourse in the broader medical community. Nor does the record demonstrate another factor that renders the Petitioner well positioned to advance his proposed endeavor. Accordingly, he has not established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

The Petitioner asserts that it would be impractical for him "to secure a job offer or obtain a labor certification." He states that "[b]ecause he is engaged in a training program that does not amount to an offer of permanent employment, he is not eligible for labor certification." Additionally, he contends

[9] PCI is a live saving measure for patients with acute coronary syndrome "involving the placement of a stent in the acutely occluded artery."

that he has performed "valuable research" as part of his fellowship and that "he intends to continue this important research that he could not otherwise complete in another position."

While we acknowledge that the Petitioner's participation in an interventional cardiology training program makes obtaining a labor certification impractical at this stage of his career, he has not demonstrated, as claimed, that he presents benefits to the United States through his proposed endeavor that outweigh those inherent in the labor certification process. With respect to his cardiology research, the Petitioner has not shown an urgent national interest in his own efforts, nor has he demonstrated that he offers contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were available. In sum, the Petitioner has not demonstrated 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 Petitioner therefore has not established that he meets the third prong of the *Dhanasar* framework.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of A-R-A-A-E-*, ID# 279893 (AAO May 10, 2017)

Plastic Surgeon

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-C-C-

DATE: JULY 26, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a plastic surgeon, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he 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 submits additional documentation and argues that he is eligible for a national interest waiver due to his work aimed at developing new techniques in the areas of breast augmentation, rhinoplasty, and ophthalmoplasty. In May 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*. In response, the Petitioner provides further evidence and contends that he is eligible for a national interest waiver under the *Dhanasar* framework.

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.

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.
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> (B) Waiver of job offer –
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> (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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

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

[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*).

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.[2]

II. ANALYSIS

The Director found that the Petitoner qualifies as a member of the professions holding an advanced degree.[3] The sole issue to be determined is 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.

The Petitioner stated that he is a "researcher in the field of cosmetic surgery" and that his "target employment is in the field of cosmetic and reconstruction plastic surgery." At the time of filing, he was serving as the chief executive officer and director of the [redacted] in Korea. In addition, he was working as "a visiting professor at both [redacted] and [redacted]."

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner indicates that he seeks to perform plastic surgery procedures on U.S. patients and to share his surgical innovations with other U.S. practitioners. He states that his research "is directed toward improving techniques and processes . . . in not only cosmetic plastic surgery cases, but in medically necessary cases." The Petitioner further attests that his "achievements in research advance broad interests related to the application of plastic surgery techniques." He also contends that his innovative methods "are helping to improve not only cosmetic but reconstructive plastic surgery techniques, as well as minimize suffering from these techniques." We find that the Petitioner's proposed work assisting patients as a clinician and researcher in plastic surgery has substantial merit.

To evaluate whether the Petitioner's work satisfies the national importance requirement, we requested evidence documenting the "potential prospective impact" of his work. In response, he maintains that "he will continue to make major innovations and improvements to the [plastic surgery] field in the U.S." His response includes a "Personal Statement" addressing his "future research plans" involving studies and research concerning facial cosmetic surgery. In addition, the Petitioner provides letters from surgical faculty discussing his proposed research aimed at plastic

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[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] The Petitioner provided graduation certificates from the [redacted] and [redacted] stating that he received a Master of Medicine (1996) and a Doctor of Philosophy (2000). In response to our RFE, he offers an academic credentials evaluation indicating that his degrees are "the equivalent of a Master of Science degree in Medical Science and a Doctor of Philosophy degree in Anatomy from an accredited institution of higher education in the United States."

surgery improvements and its potential benefit to our nation's healthcare system. For example, an associate professor in the department of plastic and reconstructive surgery at in Korea, asserted that the Petitioner's innovative surgical techniques "will bring significant relief to many American patients." The record establishes that the proposed benefit of his research has broader implications, as the results are disseminated to others in the field through medical journals and conferences. Accordingly, we find the evidence sufficient to demonstrate that the Petitioner's proposed research to improve plastic surgery techniques is of national importance. As the Petitioner has documented both the substantial merit and national importance of his proposed research, he meets the first prong of the *Dhanasar* framework.[4]

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications.[5] The Petitioner submitted documentation of his published work, membership in the medical certifications, appreciation awards, and academic credentials. He also offered reference letters from four colleagues in Korea discussing his surgical experience and research projects. In response to our RFE, the Petitioner provided an academic credentials evaluation, additional professional memberships, a photograph from a conference presentation, and another reference letter.

The Petitioner maintains that his work "has already resulted in several major contributions that have significantly benefited his field" and "has already had a significant impact that has benefited numerous facets of his industry." In letters supporting the petition, surgical faculty discussed the Petitioner's development of several plastic surgery methods. For example, professor in the department of plastic and reconstructive surgery at in Korea, indicated that the Petitioner "developed a brilliant new method of breast augmentation surgery" that involves "inserting an endoscope through the navel and inserting breast prostheses." further noted that the advantages of the Petitioner's method include no outward scarring and eliminating the need for insertion of a suction pipe during surgery. In addition, director of the in Korea, explained that the Petitioner "developed a new technique of breast augmentation" involving transplantation of "analogous fat tissue to the breast, instead of using common method of inserting breast implant." asserted that this technique offers advantages such as speedy surgery and painless recovery. The record does not include supporting documentation to establish that the Petitioner was responsible for developing the claimed techniques.

[4] Unlike his proposed research, the Petitioner has not established that his clinical work would impact the plastic surgery field and healthcare industry more broadly, as opposed to being limited to the patients he serves. Accordingly, without sufficient documentary evidence of its broader impact, the Petitioner's clinical work as a plastic surgeon does not alone meet the "national importance" element of the first prong of the *Dhanasar* framework. Similarly, in *Dhanasar*, we determined 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. *Id.* at 893.

[5] As noted above, the Petitioner has not demonstrated that his proposed clinical activities as a plastic surgeon meet the "national importance" element of the *Dhanasar* framework's first prong. Accordingly, we will limit our analysis under this prong to his proposed research.

Regardless, while [redacted] and [redacted] claimed that the Petitioner's methods will encourage American patients to undergo mammoplasty, they did not offer specific examples of how his techniques have generated positive interest among relevant parties, have been implemented in other surgical clinics, or otherwise reflect a record of success in his area of research.

Furthermore, [redacted] professor in the department of plastic and reconstructive surgery at [redacted] in Korea, stated that the Petitioner has "been practicing ophthalmoplasty through a new method, 'shortening of aponeurosis of levator muscle' on the basis of his extensive experience in ptosis surgery." [redacted] added that this method avoids scarring, offers a natural look, does not require a thigh muscle autograft procedure, and prevents movement disorder of the lower body. He did not identify any surgical centers that have adopted the technique nor does the record include supporting evidence to demonstrate that the Petitioner developed it. Lastly, [redacted] an associate professor in the department of biomedical engineering at [redacted] contends that the Petitioner "is an outstanding surgeon who has extensive surgical experiences" and that "his plastic and reconstructive surgery may affect the U.S. commerce [*sic*] significantly."

The record demonstrates that the Petitioner has conducted, published, and presented research during his medical career. While we recognize that research must add information to the pool of knowledge in some way in order to be accepted for publication, presentation, funding, or academic credit, not every individual who has performed original research will be found to be well positioned to advance his or her proposed research. Rather, we examine the factors set forth in *Dhanasar* to determine whether, for instance, the individual's progress towards achieving the goals of the proposed research, record of success in similar efforts, or generation of interest among relevant parties supports such a finding. *Id.* at 890. The Petitioner has not shown that his plastic surgery research has been frequently cited by other medical professionals or otherwise served as an impetus for progress in the field, that it has affected clinical practice, or that it has generated substantial positive discourse in the broader medical community. Nor does the evidence otherwise demonstrate that his work otherwise constitutes a record of success in his area of research.

With respect to the Petitioner's professional memberships, his response to our RFE includes a certificate from the [redacted] reflecting that he became an international member in March 2015. In addition, he provides documentation of his 2016 membership in the [redacted] Lastly, he offers a photograph reflecting that he presented his work at a [redacted] meeting in 2016. However, the Petitioner has not documented the reputation of the aforementioned societies or offered other evidence demonstrating that his memberships render him well positioned to advance his proposed research endeavor. Further, he has not demonstrated that his memberships required a record of success in his field, that his [redacted] presentation garnered substantial interest, or that he is otherwise well positioned to advance plastic surgery research.

Finally, we note that the Petitioner has not offered sufficient information or evidence regarding how he is positioned to carry out and fund his proposed research in the United States. As the Petitioner is

applying for a waiver of the job offer requirement, he need not have a job offer from a specific employer. However, information about the nature of the proposed endeavor, such as the capacity in which he will work, is necessary for us to evaluate whether the Petitioner is well positioned to advance the endeavor.

In sum, the Petitioner has not demonstrated a record of success or progress in his field, or a degree of interest in his work from relevant parties, that rise to the level of rendering him well positioned to advance his proposed endeavor of improving cosmetic and reconstructive plastic surgery techniques. As the record is insufficient to demonstrate that the Petitioner is well positioned to advance his proposed endeavor, he has not established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, 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. Here, the Petitioner claims that he is eligible for a waiver due to accomplishments that are greater than those of his peers. However, as the Petitioner has not established that he is well positioned to advance his proposed endeavor as required by the second prong of the *Dhanasar* framework, he is not eligible for a national interest waiver and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of H-C-C-*, ID# 433104 (AAO July 26, 2017)

Forensic Scientist

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-R-W-

DATE: JULY 13, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a forensic scientist, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she 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 submits additional documentation and argues that she is eligible for a national interest waiver due to her work as a forensic scientist. In May 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*. She responded to the RFE and provided additional evidence.

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.

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.
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> (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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

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

[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*).

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.[2]

II. ANALYSIS

The Director found that the Petitoner qualifies as a member of the professions holding an advanced degree.[3] The sole issue to be determined is 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.

At the time of filing, the Petitioner was employed as a forensic DNA analyst by [redacted] a full-service crime laboratory. She explained that the lab specializes in forensic DNA analysis for law enforcement agencies, attorneys, and government forensic labs in Florida and around the world. Her duties include conducting preliminary testing, preparing evidence items for analysis, and conducting relevant procedures for the purpose of solving crimes.

In April 2017, we issued an RFE seeking, in part, additional evidence and information regarding the Petitioner's proposed endeavor in the United States. Specifically, we asked the Petitioner to clarify her plans for future work in the field, particularly as it relates to her work as a forensic scientist and/or researcher. In response, the Petitioner offers a personal statement that is dated and signed under penalty of perjury. With respect to the nature of her proposed endeavor, she states, '[redacted] would like to continue my employment as a Forensic DNA analyst at their Forensic Laboratory and if my green card status is approved I plan to continue my employment with them."[4] She also explains that she is not "concentrating on furthering" her prior research because her "practical skills are much more needed in the U.S. as a Forensic DNA Analyst than as a researcher."[5]

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[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] The record includes evidence that, in August 2011, the Petitioner earned a Master of Science degree in forensic science from [redacted]

[4] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for her to have a job offer from a specific employer. However, we will consider information about this prospective position to illustrate the capacity in which she intends to work.

[5] Also in response to our RFE, counsel provides a brief in which she states that the Petitioner intends to "continue her research in association with [redacted] Counsel does not provide details as to how she intends to continue her research or the percentage of her time she intends to devote to such activities and her comments conflict with the personal statement offered by the Petitioner. Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. As such, we will evaluate the national importance of the Petitioner's proposed endeavor working as a forensic scientist in a laboratory setting, as she described in her sworn statement.

A. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner maintains that her proposed endeavor of testing and analyzing DNA evidence assists law enforcement officials in solving crimes including homicide and sexual assault, and that her proposed work at benefits law enforcement agencies and government forensic labs throughout the United States. In support of the Petitioner's eligibility, chief forensic officer with in Jamaica, noted that her work performing DNA analysis has assisted government agencies by "solving crimes, providing justice to victims, and exonerating innocent individuals." Accordingly, we find that the Petitioner's proposed work as a forensic scientist has substantial merit.

To evaluate whether the Petitioner's work satisfies the national importance requirement, we requested evidence documenting the "potential prospective impact" of her work. The Petitioner's response has not offered sufficient evidence demonstrating that her proposed endeavor is of national importance. While she contends that her role providing DNA analysis to aids the U.S. interests of solving crime, she has not offered support for the claim that her individual work would have national implications. She also asserts that her endeavor is of national importance because she will not be limited to one geographic area because performs DNA analysis for law enforcement agencies, attorneys, and government forensic labs located in Florida and throughout the United States. However, the geographic diversity of her clientele does not, by itself, establish that her work stands to impact the broader field or otherwise have implications rising to the level of national importance.

Additionally, the Petitioner asserts that her work is of national importance because it aims to reduce a backlog of DNA samples awaiting testing in criminal proceedings. She provides copies of several research reports from the Department of Justice outlining DNA evidence backlogs and discussing initiatives to increase the capacity of public crime labs, but she does not explain how her DNA analysis work stands to eliminate these accumulations. The Petitioner has not offered sufficient evidence to demonstrate that her prospective role as forensic scientist with has implications beyond her laboratory and its clients at a level sufficient to demonstrate the national importance of her endeavor.[6] For example, she does not show that the specific work she proposes to undertake offers original innovations that contribute to advancements in DNA analysis, or otherwise has broader implications in the field of forensic science. As the Petitioner has not established that her endeavor's prospective impact supports a finding of national importance, she has not met the first prong of the *Dhanasar* framework.

[6] In *Dhanasar*, we determined 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. *Id.* at 893. Similarly, while the Petitioner emphasizes the national need for DNA sample backlog reduction, she has not demonstrated that her proposed work performing DNA analysis in a private lab necessarily equates to a broader impact on the forensic science field.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications. In response to our RFE, she provides evidence of her membership in the [redacted] and her prior experience analyzing DNA samples for the [redacted] in Jamaica. She provides a copy of the [redacted] membership requirements and claims that her selection as a member in this organization reflects a level of expertise that renders her well positioned to advance the proposed endeavor. The requirements state that associate member status, in part, is granted to individuals who have made a significant contribution to the literature of forensic sciences or advanced the cause in some other significant manner. The Petitioner's recognition and acceptance by [redacted] is reflective of her position as an experienced forensic scientist and DNA analyst.

Regarding her prior experience, the Petitioner indicates that she has worked on a variety of case types ranging from property crimes to sexual assault and murder, analyzing over 5,000 DNA samples over the course of her career. She further maintains that she specializes in using Y-STR analysis for sexual assault cases where the amount of female DNA would normally suppress any potential male DNA in a sample, along with mini-STR analysis used to obtain full profiles on contact DNA including low-level and degraded samples, spent shell casings, bones, and cold cases.

The record contains several reference letters attesting that the Petitioner is a skilled analyst and expert in forensic DNA typing. For example, [redacted] a professor and director of the forensic science program at [redacted] writes that the Petitioner has "helped to serve justice by working on hundreds of cases including sexual assault, murder, and robbery." [redacted] assistant director of the [redacted] comments that the Petitioner is a "seasoned professional with advanced skills." As such, we find that the Petitioner has provided evidence that she is well positioned to advance her proposed endeavor of conducting DNA analysis and find that she satisfies the second prong of the *Dhanasar* framework.[7]

C. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, 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. Here, the Petitioner claims that she is eligible for a waiver due to the shortage of qualified forensic scientists able to analyze a growing backlog of DNA samples in jurisdictions throughout Florida and the United States. She notes that recent changes in Florida criminal statutes require expedited processing of DNA samples in sexual assault cases.

[7] The record includes letters of support from colleagues discussing the Petitioner's research in the area of forensic science and DNA analysis. However, we will not evaluate whether the Petitioner is well positioned to conduct such research because, as noted above, she indicates in response to our RFE that she does not intend to further her research activities and aims to focus exclusively on analyzing DNA samples at [redacted]

However, as the Petitioner has not established that her proposed endeavor is of national importance as required by the first prong of the *Dhanasar* framework, she is not eligible for a national interest waiver and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that she has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of M-R-W-*, ID# 421383 (AAO July 13, 2017)

Prongs 1+3

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-A-

DATE: JUNE 14, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an automation and optimization supervisor for business applications and processes, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Texas Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The matter is now before us on appeal.

In March 2017, we issued a request for evidence (RFE) asking the Petitioner to provide evidence satisfying the three-part framework set forth in *Dhanasar*. In response, the Petitioner submits additional documentation and contends that he is eligible for a national interest waiver under the *Dhanasar* framework.

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.

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.
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> (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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* clarifies that, after EB-2 eligibility as an advanced degree professional or individual of exceptional ability has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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

[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*).

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.[2]

II. ANALYSIS

The Director found that the Petitoner qualifies as a member of the professions holding an advanced degree. The sole issue to be determined is 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.

A. Substantial Merit and National Importance of the Proposed Endeavor

At the time of filing, the Petitioner identified his endeavor as global systems, applications, and products (SAP) project management for [redacted] and his job title as "Project Manager for the Cost to Serve (CTS) project for [redacted]." His responsibilities included "the analysis, design, and construction of SAP solutions for CTS though collaborating with the business process manager and IT [information technology] architects to define processes and ensure that the defined requirements are designed, developed, tested, and implemented in accordance with [redacted] global IT standards and corporate vision."

Our RFE asked the Petitioner to provide updated information and evidence regarding his employment and his plans for future work. In response, the Petitioner states that in 2016 he "left [redacted] to join the Testing Enterprise Services Team (TEST) at [redacted]' as an automation and optimization supervisor.[3] He indicates that his current responsibilities include "supervising all efforts to automate and optimize [redacted] business applications and processes, including the development of tests, standards, and best practices to

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[3] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for him to have a job offer from a specific employer. However, we will consider information about this prospective position to illustrate the capacity in which he intends to work.

support the execution of automation and optimization." The Petitioner submits an April 2017 letter from TEST manager at stating that he performs "a key role in the organization's endeavor to integrate, build, and test global business applications to increase cohesion and automation across all platforms."[4] In addition, Ms. contends that although the Petitioner's "title has changed, he continues to deliver the values of global SAP project management, and is in fact even better positioned to contribute to the endeavor as a provider due to his extensive knowledge and insight of processes and requirements from a customer perspective." Similarly, the Petitioner maintains that, despite his new job title, "the objective of [his] endeavor is still to improve global operations through developing processes that optimize data and enable test automation to ensure software solutions provide sustainable benefits to the operating organizations."

The Petitioner provided studies and online information indicating that effective SAP management drives efficiency, generates cost savings, and improves operational performance. Furthermore, the record includes letters of support from the Petitioner's current and former colleagues attesting to the benefits of SAP project management. For example, managing partner at a data engineering and business management consultant company, asserted that "research and practice repeatedly show that proper management of SAP can lead to considerable cost savings, reduced risk, and enhanced data insight, while improving service quality, efficiency and compliance." We find that the Petitioner's proposed work as an automation and optimization supervisor, which helps identify and execute its enterprise resource planning (ERP) needs, has substantial merit.

To evaluate whether the Petitioner's work satisfies the national importance requirement, we requested evidence documenting the "potential prospective impact" of his work. The Petitioner's response states that " is the United States top tax payer and investor, and SAP projects have played a strategic role in business success." We note, however, that the Petitioner has not offered sufficient evidence to demonstrate his proposed work at has implications beyond the company at a level sufficient to demonstrate the national importance of his endeavor. In *Dhanasar*, we determined 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. *Id.* at 893. While the Petitioner emphasizes the size and scope of business operations, tax payments, and investments, he has not demonstrated that his particular work for this single company and its SAP projects stands to have a broader impact on the IT field, petroleum industry, or U.S. economy.

Citing a phrase from *Dhanasar*, the Petitioner contends that because his endeavor offers "substantial positive economic effects," it "may well be understood to have national importance." *Id.* at 890.[5]

[4] Specifically, Ms. notes that the Petitioner is responsible for creating all test automation, defining the automated/regression testing approach, integrating automation tools with test management tools, testing change management/optimization, supervising staff, providing opportunities to gain expertise with testing tools, and managing a two million dollar project to transform testing practices through automation.

[5] A complete reading of our description of national importance in *Dhanasar* indicates that "we look for broader implications" in considering an endeavor's potential prospective impact, and that "substantial positive economic effects"

While the Petitioner notes that [redacted] paid $27.3 billion in U.S. income taxes and distributed $145 billion to its shareholders, the scope of his employer's business activities alone is not sufficient to demonstrate his proposed endeavor's national importance. Rather, we must examine the prospective impact of the Petitioner's specific endeavor rather than the scale of the company's entire operations. In that regard, Ms. [redacted] asserts that the Petitioner's SAP project offers "potential savings that are expected to be between $2M and $5M per annum." There is no indication, however, that the economic benefits of his proposed work extend beyond [redacted] and its operations at a level sufficient to demonstrate the national importance of his endeavor.

The Petitioner also refers to our recent non-precedent decision concerning a metallurgical engineer whose proposed endeavor was found to have national importance. *Matter of F-E-*, ID# 46885 (AAO Mar. 20, 2017). This decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Moreover, our national importance finding in *Matter of F-E-* is significantly discernable from the present matter. For example, the petitioner in the cited matter showed how his "work improves mining processes, advances metallurgical research, and ameliorates critical environmental problems." Specifically, he pointed to his development of a novel method to utilize activated carbon to reduce yield losses during the extraction of gold" and "his identification of the effects of carbon particle size and magnetic activated carbon." Because the petitioner's proposed endeavor involved "developing safer and more productive mining processes" and offered environmental consequences reaching "beyond his employer to affect the mining industry more broadly," we found the record sufficiently established that his proposed endeavor was of national importance.

In the present matter, the record does not sufficiently demonstrate that the Petitioner's software testing and SAP projects stand to impact his industry, field, or the nation's economy more broadly. As the Petitioner has not established that his endeavor's prospective impact supports a finding of national importance, he has not met the first prong of the *Dhanasar* framework.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the Petitioner's qualifications. Our RFE requested the Petitioner to submit documentation showing that he is well positioned to advance his proposed endeavor. In response, he provides the aforementioned letter from Ms. [redacted] discussing his business knowledge, IT expertise, and work on various SAP projects at [redacted] The Petitioner also offers emails showing his participation in "Max Attention Work Stream" meetings. As discussed below, we find that the Petitioner's past experience as a SAP project manager renders him well positioned to advance his proposed endeavor.

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may qualify as such. *Id.* at 889-90.

Several of the letters submitted with the initial filing attest that the Petitioner has played a role in various IT projects for [redacted] For example, [redacted], a process improvement advisor and [redacted] consultant, described the Petitioner's work as data architect for fuels marketing for [redacted] the company's SAP ERP version of business management software used in its downstream business. Mr. [redacted] noted that the Petitioner increased effectiveness of operational and controls reports, led the design and use of a data management issue log, implemented an access database tool, improved customer master data preparation and loading processes, aligned project resources on common dual maintenance plans, and introduced a customer master field tracker.

In addition, [redacted] a global strategy program manager with [redacted] indicated that the Petitioner worked as the Cost to Serve (CTS) SAP project manager for [redacted] Mr. [redacted] stated that the Petitioner was charged with delivering "strategic SAP enhancements in response to business requirements" and that his responsibilities involved "the analysis, design, and construction of SAP solutions for the project." Furthermore, Mr. [redacted] noted that the Petitioner leveraged "in-depth knowledge of [redacted] proprietary IT practices and expertise of the company's SAP project methodologies to reach significance milestones in the project."

The evidence discussed above is sufficient to demonstrate that the Petitioner is well positioned to advance his proposed endeavor of SAP project management for [redacted] including supervising efforts to automate and optimize the company's business applications and processes. Accordingly, he has established that he satisfies the second prong of the *Dhanasar* framework.

C. Balancing Factors to Determine Waiver's Benefit to the United States

The Petitioner asserts that he "possesses a rare combination of business, technical, and cultural intelligence" and that it would be impractical for him to obtain a labor certification. For instance, Ms. [redacted] contends that because of "the institution-specific requirements of his role, it would be impractical for [redacted] to go through the labor certification process, especially since [the Petitioner's] unique experience and insight make him significantly more impactful in this critical position that benefits the company . . . ."[6] The Petitioner maintains that "[r]equiring his employer to test the U.S. labor market would deprive [redacted] and hence the United States, of the full extent of the benefits of SAP projects."

While some of the Petitioner's knowledge and experience may exceed the minimum requirements for his occupation and therefore could not be easily articulated on an application for labor certification, he has not demonstrated, as claimed, that he presents benefits to the United States through his proposed endeavor that outweigh those inherent in the labor certification process. The Petitioner has not shown an urgent national interest in proposed work, nor has he demonstrated that he offers contributions of such value that, over all, they would benefit the nation even if other qualified U.S. workers were

[6] The labor certification process is designed to certify that a foreign worker will not displace nor adversely affect the wages and working conditions of U.S. workers who are similarly employed. Job requirements must adhere to what is customarily required for the occupation in the United States and may not be tailored to the foreign worker's qualifications or unduly restrictive, unless adequately documented as arising from business necessity.

available. In sum, the Petitioner has not demonstrated 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 Petitioner therefore has not established that he meets the third prong of the *Dhanasar* framework.

IV. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of V-A-*, ID# 353734 (AAO June 14, 2017)

Unclear Field of Endeavor

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF J-K-S-

DATE: MAY 15, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a public administration policy professor and the director of a development institute in Korea, seeks second preference immigrant classification as a member of the professions holding an advanced degree, 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). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the Form I-140, Immigrant Petition for Alien Worker, finding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that he had not established that a waiver of a job offer, and thus of a labor certification, would be in the national interest. The matter is now before us on appeal.

In February 2017, we issued a request for evidence (RFE) asking the Petitioner to provide additional documentation of his qualifications as a member of the professions holding an advanced degree, and evidence pertaining to his eligibility for the underlying visa classification and satisfying the three-part framework set forth in *Dhanasar*. In response, the Petitioner submits additional documentation and contends that he is eligible for a national interest waiver under the *Dhanasar* framework.

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.

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. . . . the 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.

While neither the statute nor the pertinent regulations define the term "national interest," we recently set forth a new framework for adjudicating national interest waiver petitions. *See Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* clarifies that, after EB-2 eligibility as an advanced degree professional or individual of exceptional ability has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence: (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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

[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*).

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.[2]

II. ANALYSIS

A. Advanced Degree

The Petitioner previously provided "Certificate(s) of Graduation" from (Korea) stating that he received a Doctor of Public Administration (1998) and a Master of Public Administration (1991). In response to our RFE, he offers an academic credentials evaluation indicating that his university degrees are the "foreign equivalent" of a U.S. doctorate and a U.S. master's degree in public administration. *See* 8 C.F.R. § 204.5(k)(3)(i)(A). Accordingly, the Petitioner qualifies as a member of the professions holding an advanced degree.

B. National Interest Waiver

The next issue to be determined is 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. At the time of filing, the Petitioner was employed as a professor of public policy, public administration, and social welfare at in South Korea. Additionally, he was serving as director of the an organization focused on enhancing social systems in the region. He stated that he is "[a] scholar, public administration figurehead, and community developer deeply involved with the challenging and critical subject matter of social welfare." In Part 6 of the Form I-140, under "Basic Information about the Proposed Employment," the Petitioner listed a job title of "Public Administration Policy Professor," but did not offer a further description of his proposed work.

In a letter accompanying the petition, vice chancellor of in , offered the Petitioner a professorship at his school contingent upon his obtaining U.S. lawful permanent residence. In response to the Director's April 2016 RFE, the

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

Petitioner submitted a June 2016 letter from chief executive officer of a rehabilitation and assistive technology company in Korea, indicating intentions to have the Petitioner assist in establishing the first American branch of The Petitioner also offered a memorandum entitled "Appointing an advisor and marketing plans to proceed with setting up a corporation in the USA."[3] In addition, the RFE response included letters of support from representatives of of and (Missouri) expressing their interest in future collaborations with the Petitioner.

With respect to his intended employment in the United States, the Petitioner stated that "as depicted in the letters submitted by potential future employers," he would work in the following capacities:

> i) administering the establishment of socially progressive programs and assisted living product companies in America by benefitting special needs individuals, and/or ii) working as an instructional or academic research professor at a U.S. university within the subject matters of social welfare, social justice, public administration, and municipal planning.

In our RFE, we requested that the Petitioner provide "clarification as to which one or more of these endeavors" he intended to pursue in the United States.[4] We further stated: "If your intention is to follow multiple endeavors, you should provide information and evidence regarding your specific plans for each undertaking and explain how your time will be divided among them." Furthermore, we asked for documentation of any progress in establishing corporate entity in the United States and a copy of the "2016 Business Plan" that was listed as "Attachment 1" at the bottom of the memorandum.

In response, the Petitioner resubmits June 2016 letter and the memorandum. Additionally, he provides what he characterizes as a "Memorandum Attachment: 2016 Business Plan for The submitted attachment, however, is not business plan for setting up a corporation in the United States. Rather, the Petitioner has offered a document entitled This proposal discusses a collaborative project between and students from to provide rehabilitative devices to disabled children in the Philippines. The record lacks sufficient evidence detailing the Petitioner's intent to establish "an American subsidiary branch of ' in and providing specific information about

[3] The memorandum briefly references the company's "action plan" for "setting up a local corporation" in At the bottom of the memorandum, a "2016 Business Plan" is listed as "Attachment 1," but the record did not include a copy of this plan.

[4] As the Petitioner is applying for a waiver of the job offer requirement, he need not have a job offer from a specific employer. Nevertheless, information about the nature of his proposed endeavor is necessary for us to determine whether it has substantial merit and national importance.

the intended business, such as projected staffing levels, the nature of the services it will provide, and the client pool it will serve.

In addition, the Petitioner's response states that he will enter into a partnership and collaborations with [redacted] in [redacted] to create "opportunities to educate, support, and employ thousands of special needs individuals." The Petitioner also indicates that he will collaborate with [redacted] of [redacted] in providing educational literacy programs, shelter, job training, medical care, and wheelchairs and other aids for special needs individuals. Lastly, as a research professor at [redacted] in Missouri, the Petitioner claims that "he will become a valuable asset to the University and [redacted] municipality."

Despite our request for further clarification, the Petitioner does not provide sufficient information and evidence regarding his specific plans for each undertaking, or explain how his time will be divided among them. In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." *Id.* at 889. The record does not clearly explain the Petitioner's proposed endeavor such that we are able to determine, without additional information and evidence, that his proposed work will have both substantial merit and national importance and that he is well positioned to advance his proposed endeavor. Furthermore, the Petitioner has not established 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.

III. CONCLUSION

As the Petitioner has not met the requisite three prongs set forth in the *Dhanasar* analytical framework, we find that he has not established eligibility for or otherwise merits a national interest waiver as a matter of discretion.

ORDER: The appeal is dismissed.

Cite as *Matter of J-K-S-*, ID# 288787 (AAO May 15, 2017)

Tab 7: ECHO Templates

NIW RFE ECHO Standards

NIW RFE Standard Paragraphs:

Introduction: NIW Self-Petitioner

Reference is made to this Form I-140, Immigrant Petition for Alien Worker, seeking XXXInsertClassificationSnippetXXX for [[[LETTER_PETITIONER_FIRM_NAME_TX]]] (petitioner and beneficiary), filed on his/her own behalf. The priority date for this petition is XXXDATEXXX.

The beneficiary intends to work as XXXa or anXXX XXXOCCUPATIONXXX in the field of XXXFIELDXXX.

In order to establish eligibility, the petitioner must establish that:

- The beneficiary qualifies for the requested classification; and
- An exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

USCIS has designated *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) ("Dhanasar") as a precedent decision. That decision rescinded the earlier precedent decision, *Matter of New York State Dep't of Transp.* ("NYSDOT"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), regarding national interest waivers under Section 203(b)(2)(B)(i) of the Immigration and Nationality Act, and introduced a new three-prong test for determining eligibility. Under *Dhanasar*, USCIS may grant a national interest waiver as a matter of discretion if the petitioner demonstrates by a preponderance of the evidence that:

- The beneficiary's proposed endeavor has both substantial merit and national importance;
- The beneficiary is well positioned to advance the proposed endeavor; and
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

The evidence does not establish that XXXStateWhichOfTheAboveIsNotEstablishedXXX. Therefore, USCIS requests additional evidence.

Introduction: NIW Other Petitioner

You, [[[LETTER_PETITIONER_FIRM_NAME_TX]]] (the petitioner), filed an Immigrant Petition for Alien Worker (Form I-140) on [[[LETTER_CASE_RECEIPT_DT]]]. On the Form I-140, you sought to classify [[[LETTER_BENEFICIARY_FIRST_NAME_TX]]] [[[LETTER_BENEFICIARY_LAST_NAME_TX]]] (the beneficiary) as XXXInsertClassificationSnippetXXX. The priority date for this petition is XXXDATEXXX.

The beneficiary intends to work as XXXa or anXXX XXXOCCUPATIONXXX in the field of XXXFIELDXXX.

In order to establish eligibility, you must establish that:

- The beneficiary qualifies for the requested classification; and
- An exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

USCIS has designated *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) ("Dhanasar") as a precedent decision. That decision rescinded the earlier precedent decision, *Matter of New York State Dep't of Transp.* ("NYSDOT"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), regarding national interest waivers under Section 203(b)(2)(B)(i) of the Immigration and Nationality Act, and introduced a new three-prong test for determining eligibility. Under *Dhanasar*, USCIS may grant a national interest waiver as a matter of discretion if the petitioner demonstrates by a preponderance of the evidence that:

- The beneficiary's proposed endeavor has both substantial merit and national importance;
- The beneficiary is well positioned to advance the proposed endeavor; and
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

The evidence does not establish that XXXStateWhichOfTheAboveIsNotEstablishedXXX. Therefore, USCIS requests additional evidence.

NIW: Establishing the Proposed Endeavor's Substantial Merit

Please submit evidence to establish that the beneficiary's proposed endeavor has substantial merit. XXXInsertEvidenceSnippetXXX

Evidence to establish that the beneficiary's proposed endeavor has substantial merit consists of, but is not limited to, the following:

- A detailed description of the proposed endeavor and why it is of substantial merit; and
- Documentary evidence that supports the petitioner's statements and establishes the endeavor's merit.

NIW: Establishing the Proposed Endeavor's National Importance

Please submit evidence to establish that the beneficiary's proposed endeavor has national importance. This evidence must demonstrate the endeavor's potential prospective impact. XXXInsertEvidenceSnippetXXX

Evidence to establish that the beneficiary's proposed endeavor has national importance consists of, but is not limited to, the following:

- A detailed description of the proposed endeavor and why it is of national importance,
- Documentary evidence that supports the petitioner's statements and establishes the endeavor's national importance. Such evidence must demonstrate the endeavor's potential prospective impact, and may consist of, but is not limited to, evidence showing that the proposed endeavor:
  - Has national or even global implications within a particular field;
  - Has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area;
  - Will broadly enhance societal welfare or cultural or artistic enrichment; and
  - Impacts a matter that a government entity has described as having national importance or is the subject of national initiatives.

NIW: Establishing the Beneficiary is Well Positioned to Advance the Proposed Endeavor

Please submit evidence to establish that the beneficiary is well positioned to advance the proposed endeavor. XXXAcknowledgeIfTheProposedEndeavorHasBothSubstantialMeritAndNationalImportanceXXX

XXXInsertEvidenceSnippetXXX

Evidence which best establishes that the beneficiary is well positioned to advance the proposed endeavor will document the beneficiary's qualifications (skills, experience and track record), support (financial and otherwise) and commitment (plans and progress) to drive the endeavor forward, and will support projections of future work in the proposed endeavor. USCIS may consider factors including, but not limited to, the following: XXXDELETE A BULLET BELOW IF THE EVIDENCE LISTED ABOVE IN THE EVIDENCE SNIPPET ADDRESSES THE FACTOR, OR IF THE FACTOR IS NOT READILY APPLICABLE TO THE BENEFICIARY OR ENDEAVORXXX

- The beneficiary's education, skills, knowledge, and record of success in related or similar efforts:
  - XXXInsertEducationSkillsKnowledgeRecordOfSuccessSnippetXXX;
- A model or plan for future activities:
  - XXXInsertModelOrPlanForFutureActivitiesSnippetXXX;
- Any progress towards achieving the proposed endeavor:
  - XXXInsertProgressTowardsAchievingProposedEndeavorSnippetXXX;

- The interest of potential customers, users, investors, or other relevant entities or individuals:
  - XXXInsertInterestOfPotentialCustomersUsersInvestorsOthersSnippetXXX.
- Other evidence that the beneficiary is well-positioned to advance the endeavor.

Note: The beneficiary may be well positioned to advance the endeavor even if there is no certainty that the proposed endeavor will be a success. However, unsubstantiated claims are insufficient and would not meet the petitioner's burden of proof.

NIW: Establishing 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

Please submit evidence to establish 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. This balance was described in Dhanasar as on one hand protecting the domestic labor supply through the creation of the labor certification process, while on the other hand recognizing that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. XXXACKNOWLEDGE IF THE PROPOSED ENDEAVOR HAS BOTH SUBSTANTIAL MERIT AND NATIONAL IMPORTANCE, AND THE BENEFICIARY IS WELL POSITIONED TO ADVANCE THE PROPOSED ENDEAVORXXX

XXXInsertEvidenceSnippetXXX

USCIS may evaluate factors including, but not limited to, the following:

- Whether, in light of the nature of the beneficiary's qualifications or proposed endeavor, it would be impractical either for the beneficiary 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 beneficiary's contributions;
- Whether the national interest in the beneficiary's contributions is sufficiently urgent to warrant forgoing the labor certification process;
- Whether the beneficiary's endeavor may lead to potential creation of jobs; and
- Whether the beneficiary is self-employed in a manner that generally does not adversely affect U.S. workers.

NIW-Related RFE/NOID Snippet Groups:

NIW (SCOPS)

EducationSkillsKnowledgeRecordof:

To show a beneficiary's education, skills, knowledge, and record of success in related or similar efforts, the petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Degrees, certificates, or licenses in the field;
- Patents, trademarks, or copyrights owned by the beneficiary;
- Letters from experts in the beneficiary's field, describing the beneficiary's past achievements and providing specific examples of how the beneficiary is well positioned to advance his or her endeavor;
- Published articles and/or media reports about the beneficiary's achievements or current work;
- Documentation demonstrating a strong citation history;
- Evidence that the beneficiary's work has influenced his or her field of endeavor;
- Evidence demonstrating the beneficiary has a leading, critical or indispensable role in the endeavor or similar endeavors; and
- Evidence showing that the beneficiary's past inventions or innovations have been used or licensed by others in the field.

ModelorPlanforFutureActivities:

To show a model or plan for future activities, the petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- A plan describing how the beneficiary intends to continue his or her work in the United States;
- A detailed business model, when appropriate;
- Correspondence from prospective/potential employers, clients or customers; and
- Documentation reflecting feasible plans for financial support.

ProgressTowardsAchievingProposed:

To show progress towards achieving the proposed endeavor, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Evidence of grants the beneficiary has received listing the amount and terms of the grants, as well as the grantees;

- Copies of contracts, agreements, or licenses resulting from the proposed endeavor or otherwise demonstrating the beneficiary is well positioned to advance the proposed endeavor;

- Evidence of achievements that the beneficiary intends to build upon or further develop (including the types of documentation listed under "beneficiary's education, skills, knowledge, and record of success in related or similar efforts"); and

- Evidence demonstrating the beneficiary has a leading, critical or indispensable role in the endeavor.

InterestofPotentialCustomers,Use:

To show interest of potential customers, investors, or other relevant beneficiaries, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Letters from a government entity demonstrating its interest in the proposed endeavor;
- Evidence that the beneficiary has received investment from U.S. investors, such as venture capital firms, angel investors, or start-up accelerators, in amounts that are appropriate to the relevant endeavor;
- Evidence that the beneficiary has received awards, grants, or other indications of relevant non-monetary support (for e.g., using facilities free of charge, etc.) from Federal, State, or local government entities with authority over the field of endeavor;
- Evidence demonstrating how the beneficiary's work is being used by others, such as:
  - Contracts with companies using products, projects, or services that the beneficiary developed or assisted in developing;
  - Documents showing licensed technology or other procedural or technological advancements developed in whole or in part by the beneficiary and relied upon by others; and
  - Patents or licenses awarded to the beneficiary with documentation showing why the particular patent or license is significant to the field.

EVIDENCE:

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

NIW Denial ECHO Standards

NIW Denial Standard Paragraphs:

NIW Denial Intro

Section 203(b)(2)(A) of the INA states, in part, that 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 a U.S. employer.

However, under Section 203(b)(2)(B) of the INA, the Secretary of Homeland Security may, when the Secretary deems it to be in the national interest, waive the requirement that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

After the petitioner has established a beneficiary's eligibility for second preference classification under section 203(b)(2)(A) of the INA, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence that: (1) the foreign national's proposed endeavor has both substantial merit and national importance; (2) the foreign national is well positioned to advance the proposed endeavor; and (3), on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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. To establish that an endeavor has substantial merit, the petitioner should provide a detailed description of the endeavor and why it is meritorious. In determining whether the proposed endeavor has national importance, USCIS considers 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, USCIS considers 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.

XXXIndicateWhichProngsIfAnyHaveBeenMetXXX

Therefore, the beneficiary is not eligible for, and does not merit, a national interest waiver as a matter of discretion.

NIW Substantial Merit

The Proposed Endeavor's Substantial Merit

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXX The petitioner has not submitted a detailed description of the proposed endeavor and documentary evidence that demonstrates OR The documentary evidence submitted does not support the petitioner's statementsXXX that the proposed endeavor has substantial merit in an area such as business, entrepreneurialism, science, technology, culture, health, education, the arts, or social sciences. Therefore, it has not been established that the proposed endeavor is of substantial merit.

NIW National Importance

The Proposed Endeavor's National Importance

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXXThe petitioner has not submitted documentary evidence that demonstrates OR The evidence submitted does not support the petitioner's statementsXXX that the proposed endeavor will have potential prospective impact, such as evidence that the endeavor:

- Will have broader implications, or national or global implications within a particular field;
- Has significant potential to employ U.S. workers;
- Will have substantial positive economic effects, particularly in an economically depressed area;
- Will broadly enhance societal welfare; or
- Will broadly enhance cultural or artistic enrichment.

Therefore, the petitioner has not established that the proposed endeavor is of national importance.

NIW Second Prong

Whether the Beneficiary is Well Positioned to Advance the Proposed Endeavor

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXXThe petitioner has not submitted documentary evidence that demonstrates OR The evidence submitted does not support the petitioner's statements XXX that, after consideration of the following non-exhaustive list of factors, among others, the beneficiary is well positioned to advance the proposed endeavor:

- 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; or
- The interest of potential customers, users, investors or other relevant entities or individuals.

Therefore, the petitioner has not established that the beneficiary is well positioned to advance the proposed endeavor.

NIW Third Prong

Whether, On Balance, It Would be Beneficial to the United States to Waive the Requirements of a Job Offer, and Thus of a Labor Certification

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXXThe petitioner has not submitted documentary evidence that demonstrates OR The evidence submitted does not support the petitioner's statementsXXX 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 the balancing analysis of the national interest in protecting the domestic labor supply through the labor certification process, on the one hand, and on the other hand, national interest factors that may outweigh it, USCIS considers one or more of the following factors, among others:

- The impracticality of a labor certification;
- The benefit to the United States from the beneficiary's prospective contributions, even if other U.S. workers are also available; or
- The national interest in the individual's contributions is sufficiently urgent.
- Whether the beneficiary's endeavor may lead to potential creation of jobs; or
- Whether the beneficiary is self-employed in a manner that generally does not adversely affect U.S. workers.

XXXInsertAnalysisOfTheFactorsAndConsiderationsClaiedAndWhyTheyDidNotOutweighTheNationalIntere stInProtectingTheDomesticLaborSupplyThroughTheLaborCertificationProcessXXX

Therefore, the petitioner has not established 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.

NIW Labor Certification

To apply for a national interest waiver, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien. See 8 C.F.R. § 204.5(k)(4)(ii).USCIS notes that the petitioner did not submit a properly completed Application for Alien Employment Certification (Form ETA-750B) or Application for Permanent Employment Certification (ETA Form 9089), Parts J, K, and L.

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

Therefore, since the petitioner did not submit this required evidence, USCIS must deny the Form I-140 for this additional reason.

NIW-Related Denial Snippet Groups:

E21 Exceptional Ability Intro

NIW:

The petitioner also seeks to waive the requirement that the beneficiary's services in the sciences, arts, professions, or business be sought by an employer in the United States under INA Section 203(b)(2)(B).

NIW Denial

Publication alone not contrib:

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgment that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report shows that publication of scholarly articles is not automatically evidence of influential contributions; the research community's reaction to those articles must be considered.

Advanced Degree Met:

The regulations at 8 CFR 204.5(k)(2) defines "advanced degree" as:

> . . . 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 customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner seeks employment in the United States as a XXXoccupationXXX. The evidence establishes that the petitioner holds the requisite U.S. advanced degree or foreign equivalent degree.

Exceptional Ability met:

Title 8, Code of Federal Regulations, Part 204.5(k)(2) defines "exceptional ability in the sciences, arts, or business" as:

> . . . a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The petitioner seeks employment in the United States as a XXXoccupationXXX. The evidence establishes that the petitioner has a degree of expertise that rises to the level of exceptional ability.

Matter of DHANASAR, Petitioner

Decided December 27, 2016

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office

USCIS may 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 he or she is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), vacated.

ON BEHALF OF PETITIONER: Gerard M. Chapman, Esquire, Greensboro, North Carolina

In this decision, we have occasion to revisit the analytical framework for assessing eligibility for "national interest waivers" under section 203(b)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(B)(i) (2012). The self-petitioner, a researcher and educator in the field of aerospace engineering, filed an immigrant visa petition seeking classification under section 203(b)(2) of the Act as a member of the professions holding an advanced degree. The petitioner also sought a "national interest waiver" of the job offer otherwise required by section 203(b)(2)(A).

The Director of the Texas Service Center denied the petition under the existing analytical framework, concluding that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that a waiver of the job offer requirement would not be in the national interest of the United States. Upon de novo review, and based on the revised national interest standard adopted herein, we will sustain the appeal and approve the petition.

I. LEGAL BACKGROUND

Subparagraph (A) of section 203(b)(2) of the Act makes immigrant visas 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." Under subparagraph (A), immigrant visas are available to such individuals only if their "services in the sciences, arts, professions, or business are sought by an employer in the United States."

Before hiring a foreign national under this immigrant classification, an employer must first obtain a permanent labor certification from the United States Department of Labor ("DOL") under section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i) (2012). *See also* 8 C.F.R. § 204.5(k)(4)(i) (2016). A labor certification demonstrates that DOL has determined that there are not sufficient workers who are able, willing, qualified, and available at the place where the alien is to perform such skilled or unskilled labor, and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. In its labor certification application, the employer must list the position's job requirements consistent with what is normally required for the occupation. *See* 20 C.F.R. § 656.17(h)(1) (2016). Moreover, the job requirements described on the labor certification application must represent the actual minimum requirements for the job opportunity. *See* 20 C.F.R. § 656.17(i)(1). That is, the employer may not tailor the position requirements to the foreign worker's qualifications; it may only list the position's minimum requirements, regardless of the foreign worker's additional skills that go beyond what is normally required for the occupation. The employer must then test the labor market to determine if able, willing, or qualified U.S. workers are available with the advertised minimum qualifications. If such U.S. workers are found, the employer may not hire the foreign worker for the position, even if the foreign worker clearly has more skills (beyond the advertised qualifications). If the employer does not identify such U.S. workers and DOL determines that those workers are indeed unavailable, DOL will certify the labor certification. After securing the DOL-approved labor certification, the employer may then file a petition with DHS requesting the immigrant classification.

Under subparagraph (B) of section 203(b)(2), however, the Secretary of Homeland Security may waive the requirement of a "job offer" (namely, that the beneficiary's services are sought by a U.S. employer) and, under the applicable regulations, of "a labor certification." 8 C.F.R. § 204.5(k)(4)(ii).[1] That subparagraph states, in pertinent part, that the

[1] While appearing to limit national interest waivers to only aliens possessing exceptional ability in the sciences, arts, or business, 8 C.F.R. § 204.5(k)(4)(ii) was superseded in part by section 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1743 (continued . . .)

Secretary "may, when the [Secretary] 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."[2] Section 203(b)(2)(i) of the Act.

USCIS may grant a national interest waiver as a matter of discretion if the petitioner satisfies both subparagraphs (A) and (B). Thus, a petitioner who seeks a "national interest waiver" must first satisfy subparagraph (A) by demonstrating that the beneficiary qualifies as a member of the professions holding an advanced degree or as an individual of exceptional ability. *See* 8 C.F.R. § 204.5(k)(1)–(3) (providing definitions and considerations for making such determinations); *see also* section 203(b)(2)(C) of the Act (providing that possession of requisite academic degree or professional license "shall not by itself be considered sufficient evidence of exceptional ability"). The petitioner must then satisfy subparagraph (B) by establishing that it would be in the national interest to waive the "job offer" requirement under subparagraph (A).[3] *See* 8 C.F.R. § 204.5(k)(4)(ii). This two-part statutory scheme is relatively straightforward, but the term "national interest" is ambiguous. Undefined by statute and regulation, "national interest" is a broad concept subject to various interpretations.

In 1998, under the legacy Immigration and Naturalization Service, we issued a precedent decision establishing a framework for evaluating national interest waiver petitions. *Matter of New York State Dep't of Transp.* ("*NYSDOT*"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998).

("MTINA"). Section 302(b)(2) of MTINA amended section 203(b)(2)(B)(i) of the Act by inserting the word "professions" after the word "arts," and thereby made the national interest waiver available to members of the professions holding advanced degrees in addition to individuals of exceptional ability.

[2] Pursuant to section 1517 of the Homeland Security Act ("HSA") of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

[3] To do so, a petitioner must go beyond showing the individual's expertise in a particular field. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, individuals of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given petitioner seeks classification as an individual of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his field of expertise.

The *NYSDOT* framework looks first to see if a petitioner has shown that the area of employment is of "substantial intrinsic merit." *Id.* at 217. Next, a petitioner must establish that any proposed benefit from the individual's endeavors will be "national in scope." *Id.* Finally, the petitioner must demonstrate that the national interest would be adversely affected if a labor certification were required for the foreign national. *Id.*

Based on our experience with that decision in the intervening period, we believe it is now time for a reassessment. While the first prong has held up under adjudicative experience, the term "intrinsic" adds little to the analysis yet is susceptible to unnecessary subjective evaluation.[4] Similarly, the second prong has caused relatively few problems in adjudications, but occasionally the term "national in scope" is construed too narrowly by focusing primarily on the geographic impact of the benefit. While *NYSDOT* found a civil engineer's employment to be national in scope even though it was limited to a particular region, that finding hinged on the geographic connections between New York's bridges and roads and the national transportation system. Certain locally or regionally focused endeavors, however, may be of national importance despite being difficult to quantify with respect to geographic scope.

What has generated the greatest confusion for petitioners and adjudicators, however, is *NYSDOT*'s third prong. First, this prong is explained in several different ways within *NYSDOT* itself, leaving the reader uncertain what ultimately is the relevant inquiry. We initially state the third prong as requiring a petitioner to "demonstrate that the national interest would be adversely affected if a labor certification were required." *NYSDOT*, 22 I&N Dec. at 217. We then alternatively describe the third prong as requiring the petitioner to demonstrate that the individual "present[s] a national benefit so great as to outweigh the national interest inherent in the labor certification process." *Id.* at 218. Immediately thereafter, we restate the third prong yet again: the petitioner must establish that the individual will "serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications."[5] *Id.* Finally, in what may be construed as either a fourth restatement of prong three or as an explanation of how to satisfy it, we state that "it clearly must be established that the alien's past record justifies projections of future benefit to the national interest." *Id.* at 219. A footnote

[4] *Cf., e.g., 24/7 Records, Inc. v. Sony Music Entm't, Inc.*, 514 F. Supp. 2d 571, 575 (S.D.N.Y. 2007) ("'Intrinsic value' is an inherently subjective and speculative concept.").

[5] Other, slight variations of the third prong emerge later in the decision. *See NYSDOT*, 22 I&N at 220 ("to a greater extent than U.S. workers"); *see also id.* at 221 ("considerably outweigh").

to this statement clarifies that USCIS seeks "a past history of demonstrable achievement with some degree of influence on the field as a whole." *Id.* at 219 n.6. Although residing in footnote 6, this "influence" standard has in practice become the primary yardstick against which petitions are measured.[6]

Second, and a more fundamental challenge than parsing its several restatements, *NYSDOT*'s third prong can be misinterpreted to require the petitioner to submit, and the adjudicator to evaluate, evidence relevant to the very labor market test that the waiver is intended to forego. The first iteration of prong three, that the national interest would be adversely affected if a labor certification were required, implies that petitioners should submit evidence of harm to the national interest. The third iteration, that the individual will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications, suggests that petitioners should submit evidence comparing foreign nationals to unidentified U.S. workers. These concepts have proven to be difficult for many qualified individuals to establish or analyze in the abstract. It has proven particularly ill-suited for USCIS to evaluate petitions from self-employed individuals, such as entrepreneurs. In *NYSDOT*, we even "acknowledge[d] that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification." *Id.* at 218 n.5. Nonetheless, we did not modify the test to resolve this scenario, which continues to challenge petitioners and USCIS adjudicators. Lastly, this concept of harm-to-national-interest is not required by, and unnecessarily narrows, the Secretary's broad discretionary authority to grant a waiver when he "deems it to be in the national interest."

II. NEW ANALYTICAL FRAMEWORK

Accordingly, our decision in *NYSDOT* is ripe for revision. Today, we vacate *NYSDOT* and adopt a new framework for adjudicating national interest waiver petitions, one that will provide greater clarity, apply more flexibly to circumstances of both petitioning employers and self-petitioning

[6] While this "influence" standard rests upon the reasonable notion that past success will often predict future benefit, our adjudication experience in the years since *NYSDOT* has revealed that there are some talented individuals for whom past achievements are not necessarily the best or only predictor of future success.

individuals, and better advance the purpose of the broad discretionary waiver provision to benefit the United States.[7]

Under the new framework, and after eligibility for EB-2 classification has been established, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence:[8] (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. If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.[9]

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. Evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required, as an endeavor's merit may be established without immediate or quantifiable economic impact. For example, endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States.

In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. An undertaking may have national importance for example, because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. But we do not evaluate prospective impact solely in geographic terms. Instead, we look for broader implications. Even ventures and undertakings that have as their focus one geographic area of the United States may properly be considered to have national importance. In modifying this prong to assess "national

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[7] Going forward, we will use "petitioners" to include both employers who have filed petitions on behalf of employees and individuals who have filed petitions on their own behalf (namely, self-petitioners).

[8] Under the "preponderance of the evidence" standard, a petitioner must establish that he or she more likely than not satisfies the qualifying elements. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). We will consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.*

[9] Because the national interest waiver is "purely discretionary," *Schneider v. Chertoff*, 450 F.3d 944, 948 (9th Cir. 2006), the petitioner also must show that the foreign national otherwise merits a favorable exercise of discretion. *See Zhu v. Gonzales*, 411 F.3d 292, 295 (D.C. Cir. 2005); *cf. Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002).

importance" rather than "national in scope," as used in *NYSDOT*, we seek to avoid overemphasis on the geographic breadth of the endeavor. An 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.

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.

We recognize that forecasting feasibility or future success may present challenges to petitioners and USCIS officers, and that many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed. But notwithstanding this inherent uncertainty, in order to merit a national interest waiver, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.

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. On the one hand, Congress clearly sought to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. On the other hand, by creating the national interest waiver, Congress recognized that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. Congress entrusted the Secretary to balance these interests within the context of individual national interest waiver adjudications.

In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or 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;[10]

[10] For example, the labor certification process may prevent a petitioning employer from hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor certification. *See generally* 20 C.F.R. § 656.17(i). Likewise, because of the nature of the proposed endeavor, it may be impractical for an entrepreneur or (continued . . .)

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. We emphasize that, 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.

We note that this new prong, unlike the third prong of *NYSDOT*, does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner's field. As stated previously, *NYSDOT*'s third prong was especially problematic for certain petitioners, such as entrepreneurs and self-employed individuals. This more flexible test, which can be met in a range of ways as described above, is meant to apply to a greater variety of individuals.

III. ANALYSIS

The director found the petitioner to be qualified for the classification sought by virtue of his advanced degrees. We agree that he holds advanced degrees and therefore qualifies under section 203(b)(2)(A). The remaining issue before us is whether the petitioner has established, by a preponderance of the evidence, that he is eligible for and merits a national interest waiver.

The petitioner proposes to engage in research and development relating to air and space propulsion systems, as well as to teach aerospace engineering, at North Carolina Agricultural and Technical State University ("North Carolina A&T"). The petitioner holds two master of science degrees, in mechanical engineering and in applied physics, as well as a Ph.D. in engineering, from North Carolina A&T. At the time of filing the instant petition, he also worked as a postdoctoral research associate at the university. The record reflects that the petitioner's graduate and postgraduate research has focused on hypersonic propulsion systems (systems involving propulsion at speeds of Mach 5 and above) and on computational fluid dynamics. He has developed a validated computational model of a high-speed air-breathing propulsion engine, as well as a novel numerical method for accurately calculating hypersonic air flow. The petitioner intends to continue his research at the university.

The extensive record includes: reliable evidence of the petitioner's credentials; copies of his publications and other published materials that

self-employed inventor, when advancing an endeavor on his or her own, to secure a job offer from a U.S. employer.

cite his work; evidence of his membership in professional associations; and documentation regarding his research and teaching activities. The petitioner also submitted several letters from individuals who establish their own expertise in aerospace, describe the petitioner's research in detail and attest to his expertise in the field of hypersonic propulsion systems.

We determine that the petitioner is eligible for a national interest waiver under the new framework. First, we conclude that the petitioner has established both the substantial merit and national importance of his proposed endeavor. The petitioner demonstrated that he intends to continue research into the design and development of propulsion systems for potential use in military and civilian technologies such as nano-satellites, rocket-propelled ballistic missiles, and single-stage-to-orbit vehicles. In letters supporting the petition, he describes how research in this area enhances our national security and defense by allowing the United States to maintain its advantage over other nations in the field of hypersonic flight. We find that this proposed research has substantial merit because it aims to advance scientific knowledge and further national security interests and U.S. competitiveness in the civil space sector.

The record further demonstrates that the petitioner's proposed endeavor is of national importance. The petitioner submitted probative expert letters from individuals holding senior positions in academia, government, and industry that describe the importance of hypersonic propulsion research as it relates to U.S. strategic interests. He also provided media articles and other evidence documenting the interest of the House Committee on Armed Services in the development of hypersonic technologies and discussing the potential significance of U.S. advances in this area of research and development. The letters and the media articles discuss efforts and advances that other countries are currently making in the area of hypersonic propulsion systems and the strategic importance of U.S. advancement in researching and developing these technologies for use in missiles, satellites, and aircraft.

Second, we find that the record establishes that the petitioner is well positioned to advance the proposed endeavor. Beyond his multiple graduate degrees in relevant fields, the petitioner has experience conducting research and developing computational models that support the mission of the United States Department of Defense ("DOD") to develop air superiority and protection capabilities of U.S. military forces, and that assist in the development of platforms for Earth observation and interplanetary exploration. The petitioner submitted detailed expert letters describing U.S. Government interest and investment in his research, and the record includes documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space

Administration ("NASA") and the Air Force Research Laboratories ("AFRL") within DOD.[11] Thus, the significance of the petitioner's research in his field is corroborated by evidence of peer and government interest in his research, as well as by consistent government funding of the petitioner's research projects. The petitioner's education, experience, and expertise in his field, the significance of his role in research projects, as well as the sustained interest of and funding from government entities such as NASA and AFRL, position him well to continue to advance his proposed endeavor of hypersonic technology research.

Third and finally, we conclude 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. As noted above, the petitioner holds three graduate degrees in fields tied to the proposed endeavor, and the record demonstrates that he possesses considerable experience and expertise in a highly specialized field. The evidence also shows that research on hypersonic propulsion holds significant implications for U.S. national security and competitiveness. In addition, the repeated funding of research in which the petitioner played a key role indicates that government agencies, including NASA and the DOD, have found his work on this topic to be promising and useful. Because of his record of successful research in an area that furthers U.S. interests, we find that this petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available.

In addition to conducting research, the petitioner proposes to support teaching activities in science, technology, engineering, and math ("STEM") disciplines. He submits letters favorably attesting to his teaching abilities at the university level and evidence of his participation in mentorship programs for middle school students. While STEM teaching has substantial merit in relation to U.S. educational interests, the record does not indicate by a preponderance of the evidence that the petitioner would be engaged in activities that would impact the field of STEM education more broadly. Accordingly, as the petitioner has not established by a preponderance of the evidence that his proposed teaching activities meet the "national importance" element of the first prong of the new framework, we do not address the remaining prongs in relation to the petitioner's teaching activities.

[11] Although the director of North Carolina A&T's Center for Aerospace Research ("CAR") is listed as the lead principal investigator on all grants for CAR research, the record establishes that the petitioner initiated or is the primary award contact on several funded grant proposals and that he is the only listed researcher on many of the grants.

IV. CONCLUSION

The record demonstrates by a preponderance of the evidence that: (1) the petitioner's research in aerospace engineering has both substantial merit and national importance; (2) the petitioner is well positioned to advance his research; and (3) on balance, it is beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. We find that the petitioner has established eligibility for and otherwise merits a national interest waiver as a matter of discretion.

In visa petition 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 (2012). The petitioner has met that burden.

ORDER: The appeal is sustained and the petition is approved.

Form I-140
E21 -National Interest Waiver

Created April 2013

Latest Update: December 2017

U.S. Citizenship
and Immigration
Services

Objectives

- To learn about adjudicating I-140 petitions in which the National Interest Waiver (NIW) is requested.
- To learn to apply the *Kazarian* analysis in adjudicating I-140 National Interest Waiver cases when the petitioner is claiming that the beneficiary is an Alien of Exceptional Ability.
- Upon completion of the training, you will be able to adjudicate both types of regular NIW cases (not including NIW Physicians).

Agenda

Is petition for a “regular” NIW or a “physician” NIW?

Does petitioner/bene meet 2nd preference requirements?

- Advanced Degree
- Alien of Exceptional Ability

Does petitioner/bene meet the criteria for this waiver?

U.S. Citizenship and Immigration Services

Identifying the Type of NIW

- This training is for “regular” NIW cases.
- There is a completely distinct type of NIW petition that is for physicians working in a medically underserved area.
- Those cases are usually much thinner and mention “HSPA,” “underserved area,” or “Veterans Administration facility”.
- You will send any NIW physician cases to EX0524, located in Maggie Davis’s office.
- Not all physicians are applying under the NIW Physician program.

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INA § 203(b)(2)(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.

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Second Preference Possibilities

AND

Advanced degree
(including Bachelor's + 5)

or

Exceptional Ability

Approved labor certification

or

Schedule A designation-
Group I or II

or

National Interest Waiver

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INA § 203(b)(2)(B)(i)

- …the 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.

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Filing Eligibility

- If the alien seeks an exemption from the requirement of a job offer in the United States, then the alien or anyone on the alien's behalf may file the I-140. 8 CFR § 204.5(k)(1)

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Waiver of the Job Offer Requirement

- The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, professions, or business if exemption would be in the national interest.
  - To apply for the exemption, the petitioner must submit Form ETA-750B*, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest. 8 CFR. § 204.5(k)(4)(ii)

**Or ETA Form 9089 (Parts J, K, and L)*

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Initial Evidence

- The I-140 must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, arts or business. 8 CFR § 204.5(k)(3)
- This portion of NIW adjudication can be very similar to the Labor Cert petitions you have been adjudicating.
- One major difference is that beneficiary/self-petitioner may claim eligibility for class E21 based on exceptional ability.

Advanced Degree Professionals

- An advanced degree is a 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.

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Advanced Degree Professionals, cont'd

- "Profession" is defined in 8 CFR § 204.5(k)(2) as "one of the occupations listed in INA § 101(a)(32), 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."
- INA § 101(a)(32) defines the term "profession" as including, but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

Advanced Degree Professionals, cont'd

- The petition must be accompanied by an official academic record showing that:
  - the alien has a U.S. advanced degree or a foreign equivalent degree; or
  - the alien has a U.S. baccalaureate degree or a foreign equivalent degree with 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 CFR § 204.5(k)(3)(i)(B)

Advanced Degree Professionals, cont'd

- Sometimes, the petitioner will provide an analysis of the beneficiary's credentials which relies on work experience alone or a combination of multiple lesser degrees in an attempt to equate to the "equivalent" of a Bachelor's degree.
- However, in order to have experience and education equating to an advanced degree under *INA* § 203(b)(2), the beneficiary must have a single degree that is a foreign equivalent degree to a U.S. baccalaureate degree or a U.S. baccalaureate degree followed by 5 years of progressive, post-baccalaureate experience.

Definition of Exceptional Ability

- Exceptional ability in the sciences, arts or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. 8 CFR § 204.5(k)(2)

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Exceptional Ability

- The alien must substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States because of his or her exceptional ability in the sciences, arts, or business. INA § 203(b)(2)(A)
- Mere possession of a degree, diploma, certificate or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. INA § 203(b)(2)(C)

Exceptional Ability Criteria

- A successful claim to exceptional ability must demonstrate, by preponderance of evidence, that the bene (or self-petitioner) meets *three* of six criteria:

1. An official academic record showing that the alien has degree, diploma, certificate or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
2. Evidence in the form of letter(s) from current of former employer(s) showing that the alien has at least ten years of full-time experience in the occupation;

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Exceptional Ability Criteria (Cont'd)

3. A license to practice the profession or certification for a particular profession or occupation;
4. Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
5. Evidence of membership in professional associations; or
6. Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

- Preceding criteria are at 8 CFR § 204.5(k)(3)(ii)

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Comparable Evidence

- If the above standards do not readily apply to the beneficiary's occupation, 8 CFR § 204.5(k)(3)(iii) provides that the petitioner may submit "comparable evidence" to establish the beneficiary's eligibility.
- This is a two-part analysis:
  - Do the criteria readily apply to the beneficiary's occupation? For example, does the occupation require a license or certification?
  - Is the evidence submitted comparable to the type of evidence described by the plain language of the criteria? For example, is membership on a national sports team comparable to a professional association?

The *Kazarian* Decision

- In 2010, the Ninth Circuit Court of Appeals ruled that USCIS erred in its adjudication of an E11 I-140 petition.
  - See *Kazarian v. USCIS*, 596 F.3d 1115, C.A.9 (Cal.), March 04, 2010 (NO. 07-56774).
- The Ninth Circuit found that the AAO had imposed requirements beyond those set forth in the regulations.
- The court posited a separate "Final Merits Determination" to adjudicate overall eligibility.
  - First step is to "…count the…evidence provided…[.]"
  - Second step is to conclude whether regulatory requirements met.

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The *Kazarian* Decision (Cont'd)

- The E11 regulations, like those for E21 Exceptional Ability, include both an overall standard and a list of criteria. The court ruled in *Kazarian* that USCIS must use a two-step analysis, instead of the combined approach that had been used, when adjudicating E11 petitions. Because of the similarities to the E11 regulations, USCIS also adopted this approach for E12 Outstanding Professor or Researcher and E21 Exceptional Ability petitions.
- On December 22, 2010, USCIS issued PM-602-0005.1.
  - USCIS formally adopted the *Kazarian a*pproach.
  - Updated *Adjudicator's Field Manual (AFM)* to reflect *Kazarian.*

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Kazarian Analysis Part One

- Determine whether the submitted evidence, by a preponderance of the evidence, meets the plain language of the regulatory criteria.
  - For example, does the beneficiary have a membership in a professional association in his or her field?
  - The quality and caliber of the evidence is only considered within the context of the evidence meeting the plain language of the regulations. For example, how high should salary or remuneration be to demonstrate exceptional ability? An average salary would not be sufficient.

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Kazarian Analysis Part Two

- If the beneficiary meets at least three of the six criteria, then it must be determined whether the totality of the evidence establishes, by a preponderance of the evidence, **that the beneficiary has a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business.**
- Part Two analysis is not done unless Part One has already been met.

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Kazarian Analysis Part Two (Cont'd)

- In Part Two of analysis, the Officer moves to the Final Merits Determination.
  - The Officer weighs, evaluates, and discusses the evidence entered and noted in Part One.
  - Does the *totality of the evidence* establish that the beneficiary possesses the "degree of expertise" needed for E.A.?
  - Standard of proof is preponderance of evidence.
- Objectively meeting at least three of the six criteria listed at 8 CFR § 204.5(k) alone does not establish that the beneficiary has exceptional ability.
  - Officer must consider the content, quality, and relevance of evidence.

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Correspondence and *Kazarian*

- When to issue an RFE and when to issue a NOID?
- Beneficiary fails to meet Part One.
  - If the beneficiary does not initially meet at least 3 of the 6 criteria, then the Officer should generally issue an RFE.
  - At present, we also RFE for "skeletal" filings – subject to change.
- Beneficiary meets Part One, fails to meet Part Two
  - On original submission, beneficiary meets at least 3 of the criteria; *but*
  - Petitioner has not established that the beneficiary "has a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business" required in the final merits analysis, then the Officer should issue a NOID.

Criterion One

- An official academic record showing that the alien has degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability.
  - The statute specifically states that possession of a degree alone is not, by itself, sufficient evidence of exceptional ability. But it does meet the plain language of this criterion.
  - For Part Two of the analysis, you may consider whether this level of degree or certification is common in the field, or whether the degree was earned at a prestigious school.

Criterion Two

- Evidence in the form of letters from current of former employer(s) showing that the alien has at least ten years of full-time experience in the occupation.
  - These should meet the same standard as employment verification letters for labor certification cases; dates of employment, description of duties, signed and dated, company letterhead, etc.
  - For Part Two analysis, do the letters just establish his employment, or do they indicate that his work was significantly above that of his peers? If the latter, is there evidence to support those claims?

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Criterion Three

- A license to practice the profession or certification for a particular profession or occupation.
  - Is a license required to practice this profession?
  - For the Part Two Analysis, does the beneficiary have licenses or certifications that go beyond what is normally required in the profession?

Criterion Four

- Evidence that the alien has commanded a salary or other remuneration for services which demonstrates exceptional ability.
  - Again, the plain language suggests a salary or remuneration that is at least higher than average, but not necessarily at the top for that occupation.
  - We will want to see W-2s, 1099s, or foreign tax forms, as well as salary surveys or other evidence to establish the range of salaries for the occupation. Median wages for occupations and locations can be found here http://www.bls.gov/oes/.
  - Part Two analysis essentially built in to this criterion.

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Criterion Five

- Evidence of membership in professional associations.
  - Academic honor societies would not qualify under this criterion, nor would vanity press such as “Who’s Who” publications.
  - In a Part Two analysis, evidence of the association’s criteria for membership at the beneficiary’s membership level is important. Payment of annual dues alone is not indicative that the beneficiary has a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business.

Criterion Six

- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.
  - Reference letters alone would generally not serve to meet this criterion.
  - Formal recognition (certificates and other documentation) contemporaneous with the beneficiary's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing the alien's achievements." AFM, Chapter 22.2.
  - Other evidence of recognition could include awards, media about the beneficiary and his/her accomplishments, or evidence that the beneficiary's work has been implemented by others.

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Adjudication

- When adjudicating an I-140 filed as an Alien of Exceptional Ability requesting a National Interest Waiver, keep in mind that the petitioner must demonstrate that the beneficiary meets **both** standards. Any RFE or Denial must fully address both the classification and the NIW request.
- If the beneficiary has met three of the six Exceptional Ability criteria but the evidence does not establish that he or she has a degree of expertise significantly above that ordinarily encountered, you must issue a NOID.

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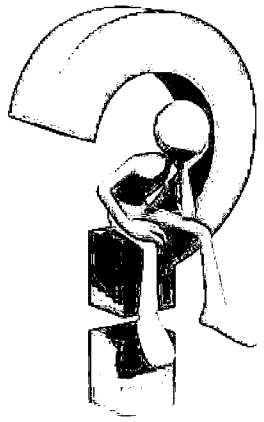
Interim Review



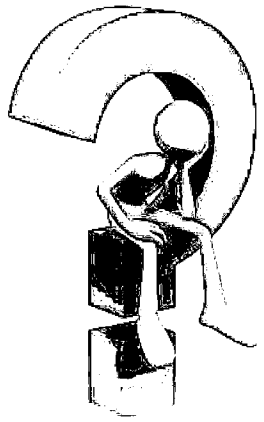
What are the two types of NIW petitions?

- "Regular" NIW petitions
- NIW Physician Petitions (Medically Underserved Area)

Name some possible combinations for 2nd preference filings. (Hint: There are six possible.)

- Could be: Advanced Degree / Labor Cert; Advanced Degree / NIW; Exceptional Ability / Schedule A; etc.

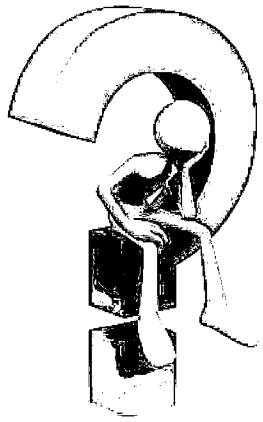
Interim Review



- What is the *overall* criterion of achievement required of persons seeking E21 through exceptional ability?
  - Degree of expertise significantly above that ordinarily encountered

- Briefly describe the two parts of the *Kazarian* analysis.
  - Does the submitted evidence, by a preponderance of the evidence, meet the plain language of the regulatory criteria?
  - Does the totality of the evidence establish that the beneficiary possesses the degree of expertise required for exceptional ability?

Interim Review:



- How many criteria must be met in Part One of the *Kazarian* analysis in order to continue to Part Two?
  - Three criteria must be met.

- What would be a good example of comparable evidence?
  - A professional athlete's membership on a national sports team.

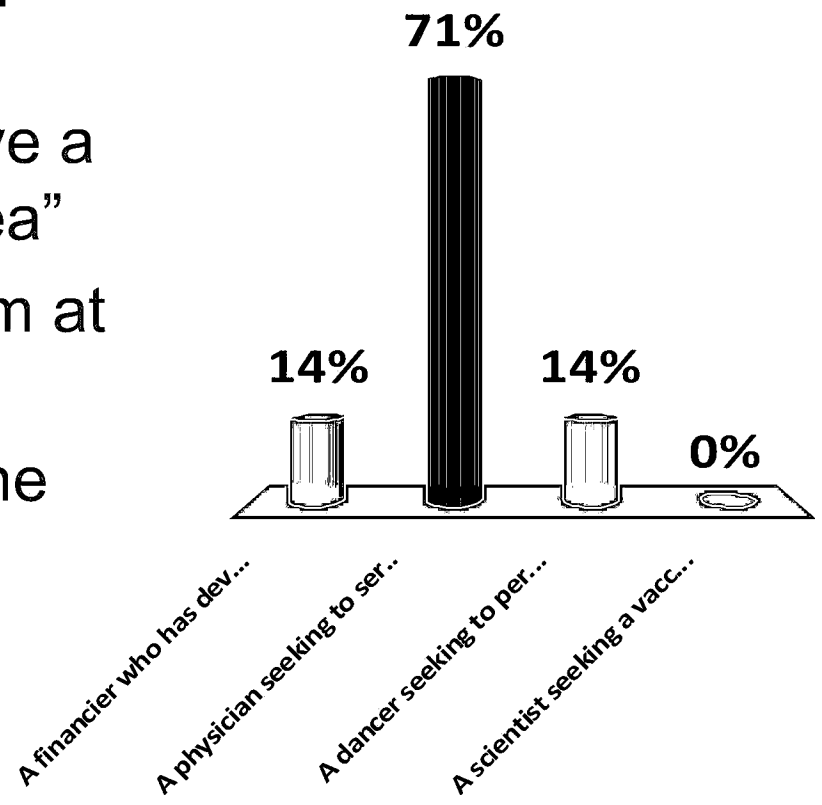
Which type of beneficiary is not provided for in the National interest Waiver (NIW) statute at INA 203(b)(i)(1)?.

A. A financier who has developed a new financial product

★ B. A physician seeking to serve a "medically-underserved area"

C. A dancer seeking to perform at Ballet Chicago

D. A scientist seeking a vaccine for the Zika virus



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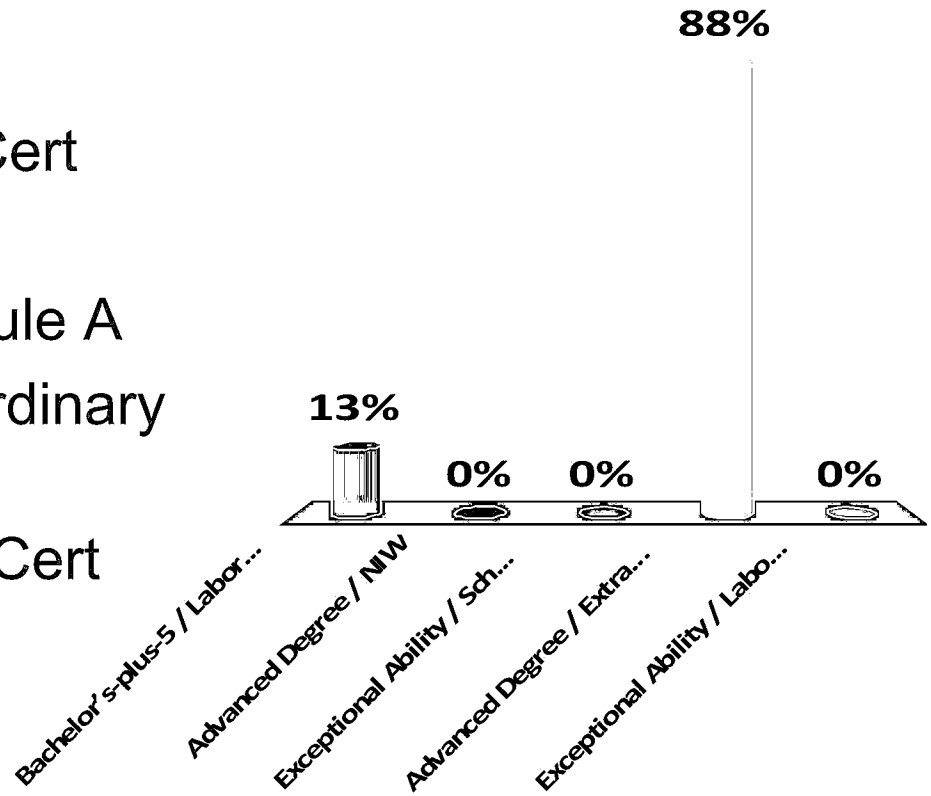
Second-preference I-140 petitions can have nine (9) possible combinations of the bene's qualifications, and the petitioner's "avenue" for seeking the beneficiary.

Which of the following is not one of the nine possibilities?

A. Bachelor's-plus-5 / Labor Cert
B. Advanced Degree / NIW
C. Exceptional Ability / Schedule A
★ D. Advanced Degree / Extraordinary Ability
E. Exceptional Ability / Labor Cert



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National Interest Waiver Criteria

- Neither the *INA* nor the regulations governing this category mention any substantive criteria for a national interest waiver.
  - No definition for "in the national interest".
- USCIS has relied on guidance from precedent decisions to determine eligibility for a national interest waiver.
  - From 1998-2016, NIW petitions were adjudicated based on *Matter of New York State Department of Transportation* ("*NYSDOT*"), 22 I&N Dec. 215 (Act. Assoc. Programs, 1998).
  - Effective December 27, 2016, *NYSDOT* was vacated and *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) was designated as precedent.

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NYSDOT and *Dhanasar*

- *NYSDOT* was the guiding precedent for NIW adjudication for approximately eighteen years.
- There was a two month period after the adoption of *Matter of Dhanasar* where all NIW adjudication was halted while awaiting implementation guidance.
- As such, you will likely still have to adjudicate cases that were initially filed under *NYSDOT* or which refer to *NYSDOT*.
- Even if the I-140 was filed under *NYSDOT*, you will need to adjudicate under the current precedent of *Matter of Dhanasar*.
  - If not approvable under *Dhanasar*, an RFE will have to be issued based on the *Dhanasar* standard.

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NYSDOT vs. *Dhanasar*

- *NYSDOT* initially set forth a three-pronged test to be satisfied in demonstrating that the request for a national interest waiver was satisfied.
- *Dhanasar* sought to reassess these prongs, particularly the third prong.
- *Dhanasar* also sought to clarify the standard by which a national interest waiver could be granted, in particular to foreign investors, researchers, and founders of start-up enterprises to benefit the US economy, pursuant to a November 20, 2014 directive from President Obama.
- *Dhanasar* retained the three-prong approach from NYSDOT.

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Important Points

- The test of whether a waiver of the job offer requirement, and thus a labor certification, is in the national interest should be as flexible as possible.
  - Each case is to be judged on its own merits
  - No blanket waivers for entire fields of specialization

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Dhanasar's Three Prongs

- After eligibility for the second preference classification has been established, the petitioner must demonstrate:
  - That the beneficiary's proposed endeavor has both substantial merit and national importance;
  - That the beneficiary is well-positioned to advance the proposed endeavor; and
  - 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.

First Prong – Substantial Merit

- Focuses on the specific endeavor that the foreign national proposes to undertake.
- Substantial merit of an endeavor can be shown in any of a number of areas, including, but not limited to, business, entrepreneurialism, science, technology, culture, health, education, arts or the social sciences.
- Substantial merit factors may include, but are not limited to:
  - Potential to create a significant economic impact.
  - Endeavor related to research or the pursuit of knowledge.
  - Potential to create a significant cultural impact.

First Prong – National Importance

- Again look at potential impact, and whether the endeavor has national or global implications within a particular field.
- Not solely evaluated in geographic terms. Even endeavors focused on a certain geographic area may have national importance.
- Examples where a "local" endeavor might have national importance:
  - Improved manufacturing processes.
  - Medical advances.
  - Significant job growth, particularly in an economically depressed area.

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First Prong – Evidence

- An NIW petition must include a detailed description of the endeavor and the reasons why it should be considered meritorious and of national importance, which should be supported by documentary evidence of the substantial merit and national importance of the proposed endeavor. This evidence may include, but is not limited to:
  - Reports from government agencies, industry groups or NGOs describing the field of endeavor;
  - Letters from officials representing the above; or
  - Articles in professional or scientific journals, or media.

Second Prong

- The foreign national must be well-positioned to advance the proposed endeavor.
- The focus here is on whether the foreign national has the qualifications (skills, experience, track record), support (financial and otherwise) and commitment (plans, progress) to drive the endeavor forward.

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Second Prong – Factors

- Unlike the first prong, the second prong focuses on the foreign national.
- Factors to consider:
  - Education, skills, knowledge, and record of success in similar or related endeavors.
  - Model or plan for future activities.
  - Progress towards achieving the proposed endeavor.
  - Interest from potential customers, users, investors or other relevant entities.
- No requirement that the petitioner establish that the endeavor is more likely than not to succeed, only that the beneficiary is well-positioned to advance the endeavor.

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Second Prong – Factor 1

- Depending upon the beneficiary's endeavor, evidence of education, skills, knowledge, and a record of success might include:
  - Degrees, certificates or licenses in the field;
  - Intellectual property owned or developed by the beneficiary;
  - Letters from experts in the field with knowledge of the beneficiary's past achievements and providing specific examples of how the petitioner is well-positioned to advance the endeavor; or
  - Published articles in professional journals or media reports about the beneficiary's achievements.

Second Prong – Factor 1 (Cont'd)

- Depending upon the beneficiary's endeavor, evidence of education, skills, knowledge and a record of success might also include:
  - Evidence showing that the beneficiary has played a leading, critical or indispensable role in similar endeavors
  - Use or licensing of the beneficiary's inventions or innovations by others in the field
  - Evidence of influence on the field of endeavor, such as a strong citation history.

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Second Prong – Factor 2

- Depending upon the beneficiary's endeavor, evidence of a model or plan for future activities might include:
  - A plan describing how the foreign national intends to continue his or her work in the United States;
  - Where appropriate, a detailed business model;
  - Correspondence from prospective or potential employers, clients or customers; or
  - Documentation reflecting feasible plans for financial support.
    - Evidence relating to financing for entrepreneurs is discussed later in the presentation.

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Second Prong – Factor 3

- Depending upon the beneficiary's endeavor, evidence of progress towards achieving the proposed endeavor might include:
  - Grants received by the foreign national, including the amount and terms of the grant and the identity of the grantees;
  - Copies of contracts, agreements or licenses resulting from the endeavor;
  - Evidence of achievements the foreign national will build upon in advancing the endeavor, including types of evidence submitted to show the individual's record of success; or
  - Evidence demonstrating that the individual has a leading, critical or indispensable role in the endeavor.

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Second Prong – Factor 4

- Depending upon the beneficiary's endeavor, evidence of the interest of potential customers, investors, or other relevant individuals might include:
  - Letters from a government entity demonstrating interest in the proposed endeavor, together with corroborating evidence;
  - Investment from venture capital firms, angel investors, or start-up accelerators, in amounts appropriate to the relevant endeavor; or
  - Awards, grants or other non-monetary support from government entities with authority over the field of endeavor.
    - Non-monetary support may include the free use of facilities, for example.

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Second Prong – Factor 4 (Cont'd)

- Depending upon the beneficiary's endeavor, evidence of the interest of potential customers, investors, or other relevant individuals might include:
  - Demonstrations of how the individual's work is being used by others in the field, such as:
    - Contracts with companies using products or services that the individual developed in whole or in part;
    - Evidence of the licensing of technology or other procedural or technological advancements developed in whole or in part by the individual; or
    - Patents or licenses awarded to the individual with documentation showing why the patent or license is significant to the field.

U.S. Citizenship and Immigration Services

Second Prong summary

- In *Dhanasar*, the individual was able to show that he was well-positioned to advance his proposed endeavor, thus meeting the second prong, by submitting evidence of peer and government interest in his work, and through the consistent federal funding of his research.
- Again, individuals are not required to establish that it is more likely than not that their proposed endeavor will succeed. However, claims must be substantiated through the submission of documentary evidence, and officers must review the totality of the evidence to determine whether the individual is well-positioned to advance the proposed endeavor.

Third Prong

- On balance, it would be beneficial to the United States to waive the requirements of a job offer, and thus of a labor certification.
  - National interest in protecting U.S. jobs balanced against other national interests that weigh in favor of granting a waiver.
  - Factors that may be considered, among others:
    - Whether a labor certification would be impractical.
    - Whether, even assuming that other qualified U.S. workers are available, the U.S. would benefit from the foreign national's contributions.
    - Whether the national interest in the foreign national's contributions is sufficiently urgent.
    - Whether the endeavor has the potential for job creation.
    - Whether the individual's employment does not adversely affect U.S. workers.

U.S. Citizenship and Immigration Services

Third Prong – Factor 1

- In what circumstances might the impracticality of obtaining a labor certification be a factor in the balancing of national interests?
  - DOL's regulations at 20 CFR 656.17(l) may limit the ability of a foreign national who has an ownership interest in a petitioning company, such as the founder of a startup company, from obtaining a labor certification.
  - A self-employed foreign national would also have difficulty in obtaining a labor certification.
  - A beneficiary with unique knowledge or skills that are not easily articulable in a labor certification.

U.S. Citizenship and Immigration Services

Third Prong – Factor 2

- In what circumstances might the availability of qualified U.S. workers be counterbalanced by the benefit from the foreign national's contributions?
  - A scientist with years of experience working on a particular research project.
  - An engineer with skills not possessed by the typical qualified U.S. worker.

U.S. Citizenship and Immigration Services

Third Prong – Factor 3

- In what circumstances might the national interest in the foreign national's contributions be sufficiently urgent?
  - An individual involved in a time-sensitive project of national interest.
  - An individual whose expertise is needed to advise on an urgent problem.

Basics of Scholarly Research

Grants

- Private companies, research institutes and universities seek funding for research projects.
- Many granting agencies are governmental, such as the National Institutes of Health (NIH), National Science Foundation (NSF), and the Department of Defense (DOD). Private granting organizations include the American Heart Association and the American Cancer Society.
- Principal Investigator (PI) is in charge of the scientific direction of the project, and is often a university professor with several grad students and postdoctoral researchers working under his or her direction.

Basics of Scholarly Research

Research and Publication

- Much of the actual research is conducted by grad students and postdoctoral researchers, who are supervised by the head of the laboratory, most likely an associate professor or higher.
- Researchers in academia publish the results of their research in peer-reviewed journals, or present at conferences.
  - Peer-review is important to ensure the quality of the research.
  - Presentations are typically done as either poster presentations or oral presentations, and are later published in conference "proceedings."
  - Researchers in academia depend upon publication to advance in their field, "publish or perish."
- Researchers in private industry are more focused on intellectual property and may not publish at all.

U.S. Citizenship and Immigration Services

Basics of Scholarly Research

Invention Disclosure and Patents

- Researchers in academia and private industry may also be listed as inventors on patent applications and granted patents.
  - Many universities will require researchers to submit an invention disclosure prior to filing for a patent to ensure that the benefits of patenting the research outweigh the time and cost of the patent application process.
  - Being listed as an inventor on a patent indicates that a researcher has made or discovered a novel process or product, but it does not, by itself, indicate that the researcher has made a contribution to his or her field.
  - Researchers employed by private industry may rely heavily on patent applications and grants as evidence of their accomplishments. The impact of the patent (i.e. commercialization) must be taken into account when determining the evidentiary weight of the accomplishment.

U.S. Citizenship and Immigration Services

Entrepreneurs

- SCOPS HQ is currently working on a memo which will provide guidance on the adjudication of NIW petitions under *Dhanasar*. The memo will include a section which describes the types of evidence that might be submitted by an entrepreneur seeking to advance a business endeavor. These types of evidence may be submitted to meet the requirements of one or more of the *Dhanasar* prongs.

Entrepreneurs

- What is an entrepreneur?
  - Someone who undertakes a proposed endeavor either individually (as a sole proprietor) or through a start-up entity based in the United States in which they typically:
    - Possess an ownership interest; and
    - Maintain an active and central role in the business such that knowledge, skills and experience would significantly advance the proposed endeavor.
  - May not follow a traditional career path.
- Start-up entities may be structured in a variety of different ways.

U.S. Citizenship and Immigration Services

Entrepreneurs (Cont'd)

- When reviewing evidence of investments, revenue, and job creation, officers should keep in mind the individual circumstances of each case. Evidence that might show that a beneficiary is well-positioned to advance the proposed endeavor in one case may not be sufficient for a different type of business endeavor, geographical area or field.
- In addition, while unsubstantiated claims cannot form the basis of a successful NIW petition, officers may encounter entrepreneurial endeavors that are not currently employing a significant amount of workers or generating a substantial amount of revenue, yet the petitioner may still be able to demonstrate, by a preponderance of the evidence, the beneficiary's eligibility for an NIW. Petitioners are not required to establish that the endeavor will ultimately succeed.

Entrepreneurs and Evidence

- Ownership and Role in U.S. Entity – the beneficiary's ownership and active role in the entity may show that he or she is well-positioned to advance the endeavor. Since this role may disqualify the entity from filing a labor certification on the beneficiary's behalf, this evidence could also be weighed in determining the national interest in granting a waiver.

- Degrees, Certifications, Licenses, Employment Letters, and Other Evidence of Experience – could be submitted to establish the second prong, but also the third prong to show that the beneficiary's skills could be difficult to represent on a labor certification, and that despite the possible presence of qualified U.S. workers, a balancing of the beneficiary's unique qualifications justify a waiver.

U.S. Citizenship and Immigration Services

Entrepreneurs and Evidence (Cont'd)

- Investments – evidence of an investment may be submitted to establish the substantial merit of the endeavor, such as a research grant from a federal agency, and may also be submitted to establish that the beneficiary is well-positioned to advance the entrepreneurial endeavor.
- Participation in Growth Accelerators and Incubators – the competitiveness of entry into these organizations may establish the beneficiary's record of success as well as demonstrating progress towards achieving the endeavor.

Entrepreneurs and Evidence (Cont'd)

- Awards or grants – Awards or grants from government entities, or from private entities such as research institutes and think tanks, may provide evidence that establishes the substantial merit and/or national importance of the endeavor, as well as the second prong.
- Intellectual Property – Patents and other types of intellectual property, combined with evidence of their significance (such as licenses) may show a prior record of success as well as progress towards achieving the endeavor.

Entrepreneurs and Evidence (Cont'd)

- Published materials about the beneficiary and entity – this evidence can help to document claims made under any of the three *Dhanasar* prongs.
- Job creation and revenue generation – evidence demonstrating that the entity already has produced significant job creation, or has the potential to, could establish the endeavor's substantial merit and national importance, as well as helping to establish the second prong by showing the stage of development of the entity.

Entrepreneurs and Evidence (Cont'd)

- Letters and other statements – Letters from government entities, outside investors or others with knowledge of the entity's research, intellectual property, business plan, products or services, or the beneficiary's skills and experience, may provide support for claims made under any of the *Dhanasar* prongs when supported by documentary evidence.

U.S. Citizenship and Immigration Services

Some Guidelines for Reviewing Evidence

- USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988).
  - However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought.
  - The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility.
  - USCIS may even give less weight to an opinion that is not corroborated, in accord with other information, or is in any way questionable.

Some Guidelines for Reviewing Evidence

- Evidence should indicate how the alien's work (such as publication, presentation, peer review, etc.) distinguishes the alien from others in the field.
- A gauge of an alien's influence in the field may be the reception of published research; citation may be strong evidence of the alien's impact and influence.
  - http://scholar.google.com

U.S. Citizenship and Immigration Services

Some Guidelines for Reviewing Evidence

- Evidence of patents, copyrights and other innovations are of little weight unless accompanied by proof of distribution or publication on a national scale.
- Recognition, professional memberships, large remuneration and tenure in the field may establish ‘exceptional ability’, but these alone do not justify a national interest waiver of the job offer requirement.

U.S. Citizenship and Immigration Services

National Interest Waiver Considerations

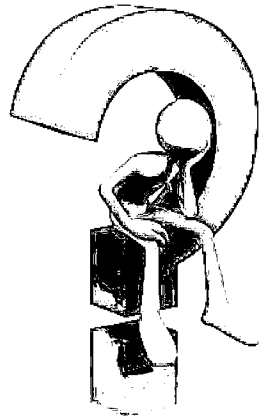
- A petitioner must establish the beneficiary's underlying eligibility for the classification by submitting proof of an advanced degree (or its equivalent) or exceptional ability.
- Eligibility for a national interest waiver under *Dhanasar* is a separate consideration. Eligibility for the classification does not by itself establish eligibility for a national interest waiver.
  - As noted in *Dhanasar*, the petitioner must go beyond showing the beneficiary's expertise in a particular field to establish eligibility for a national interest waiver. Whether the petitioner seeks classification of the beneficiary as an individual of exceptional ability or as a member of the professions holding an advanced degree, the beneficiary cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in the field of expertise.

U.S. Citizenship and Immigration Services

Dhanasar Summary

- *Dhanasar*'s first prong focuses on the merit and importance of the specific proposed endeavor, and de-emphasizes the geographic scope of the endeavor in place of a broader perspective.
- *Dhanasar*'s second prong focuses on the ability of the foreign national to advance the endeavor, and does not require a showing that the endeavor is more likely than not to succeed.
- The third prong balances the national interest in protecting U.S. jobs with the benefit to the national interest from the foreign national's proposed endeavor.

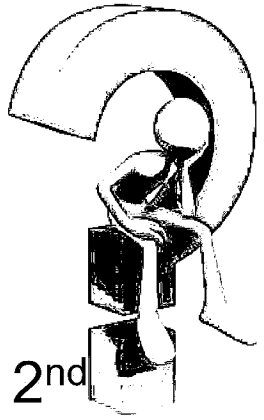
Final Review (Page 1)



- Which immigration precedent decision most influence adjudication of NIW petitions (apart from physicians)?
  - *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016)

- What are the 3 "prongs" of the *Dhanasar* test?
  - The proposed endeavor has both substantial merit and national importance.
  - The foreign national is well-positioned to advanced the proposed endeavor.
  - That, on balance, it would be beneficial to the US to waive the requirements of a job offer and thus of a labor certification.

Final Review (Page 2)



- What are some factors to consider when analyzing the 2nd prong of *Dhanasar*?
  - Education, skills, knowledge and record of success in similar or related endeavors.
  - Model or plan for future activities.
  - Progress towards achieving the proposed endeavor.
  - Interest from potential customers, users, investors or other relevant entities.

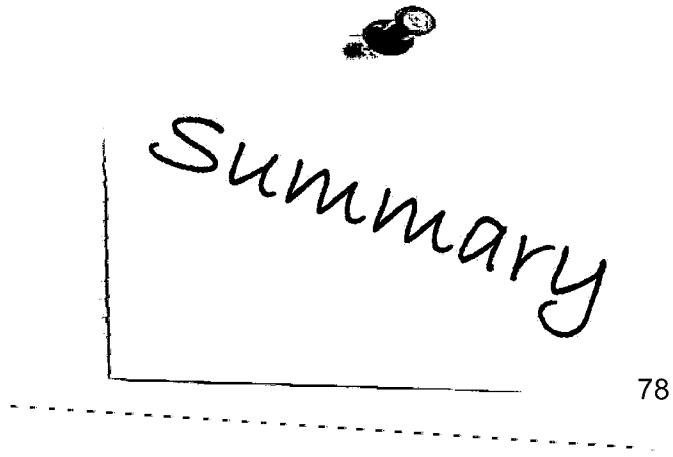
Final Review (Page 3)

- What are some factors to consider when analyzing the 3rd prong of *Dhanasar*?
  - Whether a labor certification would be impractical.
  - Whether, even assuming that other qualified U.S. workers are available, the U.S. would benefit from the foreign national's contributions.
  - Whether the national interest in the foreign national's contributions is sufficiently urgent.
  - Whether the endeavor has the potential for job creation.
  - Whether the individual's employment does not adversely affect U.S. workers.

U.S. Citizenship and Immigration Services

Summary

- In this module, we covered the following topics:
  - How to identify a regular NIW petition.
  - How to decide whether:
    - The self-petitioner or beneficiary meets 2nd preference; and
    - Whether a waiver is in the national interest.
- Any questions?



U.S. Citizenship and Immigration Services

Dhanasar NIW Case Summary Template

Classification:	NIW	**Decision:**	☐ Approved ☐ Denied

Field/Job	_____
Proposed Endeavor	_____

Did the petitioner/beneficiary meet prong 1 of the Dhanasar NIW analysis?	
1	Substantial Merit? Yes: ☐ No: ☐
	Describe Evidence:
2	National Importance? Yes: ☐ No: ☐
	Describe Evidence:

Did the petitioner/beneficiary meet prong 2 of the Dhanasar NIW analysis?
Well positioned to advance the endeavor? Yes: ☐ No: ☐
Which factor(s) showed that petitioner/beneficiary is or isn't well positioned? ☐ Education, skills, knowledge, record of success? ☐ Model or plan for future activities? ☐ Progress towards achieving the proposed endeavor? ☐ Interest of potential customers, users, investors or others? ☐ Other?
Describe Evidence:

Did the petitioner/beneficiary meet prong 3 of the Dhanasar NIW analysis?
Did balance favor other national interests over protection of U.S. job market? Yes: ☐ No: ☐
Which factor(s) tipped balance in favor of or against of waiver? ☐ Impractical for job offer or labor certification? ☐ Benefit despite availability of qualified U.S. workers? ☐ Urgency? ☐ Potential job creation? ☐ No adverse affect to U.S. workers?
Describe Evidence:

E21 NATIONAL INTEREST WAIVER

500 **Mandatory Introduction, Self or Other Petitioner (Chose one) (MUST BE INCLUDED)**

501 **Mandatory Introduction, Continued (MUST BE INCLUDED)**

502 **Beneficiary qualifies for the classification with an advanced degree**

503 **An exemption from the requirement of a job offer is in the national interest of the United States (MUST BE INCLUDED if addressing 504, 505, 506, or 507))**

504 **The proposed endeavor's substantial merit**

505 **The proposed endeavor's national importance**

506 **The beneficiary is well positioned to advance the proposed endeavor**

507 **On balance, it would be beneficial to the United States to waive the requirements of a job offer**

508 **ETA**

509 **Translations**

510 **Missing information on the petition**

511 **Select classification (when it appears the petitioner has made a clerical error)**

512 **Signature on petition**

513 **Petitioner must submit G-28**

514 **Attorney suspended**

515 **Resubmit RFE response**

516 **Request to withdraw appeal at AAO**

FOR HISTORICAL PURPOSES ONLY

MATTER OF NYSDOT

Please seek assistance before using the historic standards

517 **Has not established substantial intrinsic merit**
518 **Has not established national in scope**
519 **National Interest Waiver**

E21 NATIONAL INTEREST WAIVER

500 Introduction: Chose One (MUST BE INCLUDED IN ALL RFEs)

SELF PETITIONER

Reference is made to this Form I-140, Immigrant Petition for Alien Worker, filed on XXXDATEXXX, by XXXNAME PETITITIONER/BENEFICIARYXXX (petitioner and beneficiary). The petitioner, on XXXhis/herXXX own behalf, seeks to classify the beneficiary as a member of the professions holding an advanced degree in accordance with Section 203(b)(2)(A) of the Immigration and Nationality Act (INA). The petitioner also seeks to waive the requirement that XXXhis/herXXX services in the sciences, arts, professions, or business be sought by an employer in the United States under Section 203(b)(2)(B) of the INA. The priority date for this petition is XXXDATEXXX.

-OR-

OTHER PETITIONER

The petitioner, XXXNAME OF PETITIONERXXX, filed an Immigrant Petition for Alien Worker (Form I-140) on XXXDATEXXX. On Form I-140, the petitioner seeks to classify the beneficiary, XXXBENEFICIARY'S NAMEXXX, as a member of the professions holding an advanced degree in accordance with Section 203(b)(2)(A) of the Immigration and Nationality Act (INA). The petitioner also seeks to waive the requirement that the beneficiary's services in the sciences, arts, professions, or business be sought by an employer in the United States under Section 203(b)(2)(B) of the INA. The priority date for this petition is XXXDATEXXX.

501 Mandatory Introduction, Continued (MUST BE INCLUDED IN ALL RFEs)

The beneficiary intends to work as a/an XXXOCCUPATIONXXX in the field of XXXFIELDXXX.

In order to establish eligibility, the petitioner must establish that:

- The beneficiary qualifies for the requested classification; and
- An exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

The evidence does not establish that XXXSTATE WHICH OF THE ABOVE IS NOT ESTABLISHEDXXX. Therefore, USCIS requests additional evidence.

IF THE JOB REQUIRES EXCEPTIONAL ABILITY, SEE THE HQ-APPROVED RFE LANGUAGE

502 Beneficiary qualifies for the classification with an advanced degree

The petitioner must establish that the beneficiary holds an advanced degree as of the priority date. XXXSTATE SPECIFIC REQUIREMENTS, AND DISCUSS WHY ANY SUBMITTED EVIDENCE IS DEFICIENT OR IF PETITIONER FAILED TO SUBMIT ANY EVIDENCEXXX Therefore, please submit evidence to establish that the beneficiary is a professional holding an advanced degree in XXXFIELDXXX. This evidence may consist of the following documentation:

- A copy of the beneficiary's official academic record, showing that the beneficiary has a U.S. advanced degree (or a foreign equivalent degree), the dates of attendance, area of concentration of study, and the date the beneficiary received the degree. Please also submit a complete copy of the beneficiary's transcripts to show the major area of study; or
- A copy of the beneficiary's official academic record showing that the beneficiary has a U.S. baccalaureate degree (or a foreign equivalent degree), and evidence in the form of letters from current or former employer(s) showing that the beneficiary has at least five years of progressive post-baccalaureate experience in the specialty. The employer must issue the letter of experience on official letterhead and must list the employer's name and address, the date, the signer's name and title, and a description of the beneficiary's experience, including dates of employment and specific duties.

If the beneficiary completed XXXHIS OR HERXXX education outside the United States, in addition to the beneficiary's official academic record, please submit a detailed advisory evaluation of the beneficiary's credentials. This evaluation is necessary to determine the level and major field of the beneficiary's education in terms of equivalent education in the United States. An acceptable evaluation should:

- Consider formal education only, and not practical training or experience;
- State whether the beneficiary completed the United States equivalent of high school before entering college;
- Provide a detailed explanation of the evaluated material, rather than a simple conclusive statement; and
- Briefly state the evaluator's qualifications and experience.

503 An exemption from the requirement of a job offer is in the national interest of the United States (MUST BE INCLUDED IF MORE EVIDENCE IS NEEDED TO ESTABLISH ELIGIBILITY FOR A NATIONAL INTEREST WAIVER)

USCIS has designated *Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016)("Dhanasar") as a precedent decision. That decision rescinded the earlier precedent decision, *Matter of New York State Dep't of Transp.* ("NYSDOT"), 22 I&N Dec. 215 (Acting Assoc. Comm'r1998), regarding national interest waivers under Section 203(b)(2)(B)(i) of the INA, and introduced a new three-prong test for determining eligibility. USCIS may grant a national interest waiver as a matter of discretion if the petitioner demonstrates by a preponderance of the evidence that:

- The beneficiary's proposed endeavor has both substantial merit and national importance;
- The beneficiary is well positioned to advance the proposed endeavor; and
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

The evidence does not establish that XXXSTATE WHICH OF THE ABOVE IS NOT ESTABLISHEDXXX. Therefore, USCIS requests additional evidence.

504 The proposed endeavor's substantial merit

Please submit evidence to establish that the beneficiary's proposed endeavor has substantial merit. **(CHOSE ONE)**

- The petitioner did not submit any evidence to establish that the proposed endeavor meets this requirement.

-OR –

- The petitioner submitted XXXLIST EVIDENCEXXX to establish that the beneficiary's proposed endeavor meets this requirement. However, this is insufficient because XXXEXPLAIN DEFICIENCIESXXX.

Evidence to establish that the beneficiary's proposed endeavor has substantial merit consists of, but is not limited to, the following:

- A detailed description of the proposed endeavor and why it is of substantial merit; and
- Documentary evidence that supports the petitioner's statements and establishes the endeavor's merit.

505 The proposed endeavor's national importance

Please submit evidence to establish that the beneficiary's proposed endeavor has national importance. This evidence must demonstrate the endeavor's potential prospective impact. **(CHOSE ONE)**

- The petitioner did not submit any evidence to establish that the beneficiary's proposed endeavor meets this requirement.

-OR-

- The petitioner submitted XXXLIST EVIDENCEXXX to establish that the beneficiary's proposed endeavor meets this requirement. However, this is insufficient because XXXEXPLAIN DEFICIENCIESXXX.

Evidence to establish that the beneficiary's proposed endeavor has national importance consists of, but is not limited to, the following:

- A detailed description of the proposed endeavor and why it is of national importance,
- Documentary evidence that supports the petitioner's statements and establishes the endeavor's national importance. Such evidence must demonstrate the endeavor's potential prospective impact, and may consist of, but is not limited to, evidence showing that the proposed endeavor:
    - Has national or even global implications within a particular field;
    - Has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area;
    - Will broadly enhance societal welfare or cultural or artistic enrichment; and
    - Impacts a matter that a government entity has described as having national importance or is the subject of national initiatives.

506 The beneficiary is well positioned to advance the proposed endeavor

XXXACKNOWLEDGE IF THE PROPOSED ENDEAVOR HAS BOTH SUBSTANTIAL MERIT AND NATIONAL IMPORTANCE.XXX

Please submit evidence to establish that the beneficiary is well positioned to advance the proposed endeavor. **(CHOSE ONE)**

- The petitioner did not submit any evidence to establish that the beneficiary meets this requirement.

-OR-

- The petitioner submitted XXXLIST EVIDENCEXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXEXPLAIN DEFICIENCIESXXX.

Evidence which best establishes that the beneficiary is well positioned to advance the proposed endeavor will document the beneficiary's qualifications (skills, experience and track record), support (financial and otherwise) and commitment (plans and progress) to drive the endeavor forward, and will support projections of future work in the proposed endeavor. USCIS may consider factors including, but not limited to, the following: XXX DELETE A BULLET BELOW IF THE EVIDENCE LISTED ABOVE ADDRESSES THE FACTOR, OR IF THE FACTOR IS NOT READILY APPLICABLE TO THE BENEFICIARY OR ENDEAVORXXX

- To show a beneficiary's education, skills, knowledge and record of success in related or similar efforts, the petitioner may submit one or more pieces of evidence from the following non-exhaustive list:
  - Degrees, certificates or licenses in the field;
  - Patents, trademarks or copyrights owned by the beneficiary;
  - Letters from experts in the beneficiary's field, describing the beneficiary's past achievements and providing specific examples of how the beneficiary is well positioned to advance his or her endeavor. Testimonial letters should include information about the expert's own credentials, such as a curriculum vitae;
  - Published articles and/or media reports about the beneficiary's achievements or current work;
  - Documentation demonstrating a strong citation history;
  - Evidence that the beneficiary's work has influenced his or her field of endeavor;
  - Evidence demonstrating the beneficiary has a leading, critical or indispensable role in the endeavor or similar endeavors; and
  - Evidence showing that the beneficiary's past inventions or innovations have been used or licensed by others in the field.

- To show a model or plan for future activities, the petitioner may submit one or more pieces of evidence from the following non-exhaustive list:
  - A plan describing how the beneficiary intends to continue his or her work in the United States;
  - A detailed business model, when appropriate;
  - Correspondence from prospective/potential employers, clients or customers; and
  - Documentation reflecting feasible plans for financial support.

- To show progress towards achieving the proposed endeavor, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:
  - Evidence of grants the beneficiary has received listing the amount and terms of the grants, as well as the grantees;
  - Copies of contracts, agreements or licenses resulting from the proposed endeavor or otherwise demonstrating the beneficiary is well positioned to advance the proposed endeavor;
  - Evidence of achievements that the beneficiary intends to build upon or further develop (including the types of documentation listed under "beneficiary's education, skills, knowledge and record of success in related or similar efforts"); and

- Evidence demonstrating the beneficiary has a leading, critical or indispensable role in the endeavor.

- To show interest of potential customers, investors or other relevant beneficiaries, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:
  - Letters from a government entity demonstrating its interest in the proposed endeavor;
  - Evidence that the beneficiary has received investment from U.S. investors, such as venture capital firms, angel investors or start-up accelerators, in amounts that are appropriate to the relevant endeavor;
  - Evidence that the beneficiary has received awards, grants or other indications of relevant non-monetary support (e.g., using facilities free of charge, etc.) from Federal, State or local government entities with authority over the field of endeavor;
  - Evidence demonstrating how the beneficiary's work is being used by others, such as:
    - Contracts with companies using products, projects or services that the beneficiary developed or assisted in developing;
    - Documents showing licensed technology or other procedural or technological advancements developed in whole or in part by the beneficiary and relied upon by others; and
    - Patents or licenses awarded to the beneficiary with documentation showing why the particular patent or license is significant to the field.

  .
- Other evidence that may indicate that the beneficiary is well-positioned to advance the endeavor.

Note: The beneficiary may be well positioned to advance the endeavor even if there is no certainty that the proposed endeavor will be a success. However, unsubstantiated claims are insufficient and would not meet the petitioner's burden of proof.

507 On balance, it would be beneficial to the United States to waive the requirements of a job offer

XXXACKNOWLEDGE IF THE PROPOSED ENDEAVOR HAS BOTH SUBSTANTIAL MERIT AND NATIONAL IMPORTANCE, AND THE BENEFICIARY IS WELL POSITIONED TO ADVANCE THE PROPOSED ENDEAVORXXX

Please submit evidence to establish 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. This balance was described in *Dhanasar* as on one hand protecting the domestic labor supply through the creation of the labor certification process, while on the other hand recognizing that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest.

USCIS may evaluate factors including, but not limited to, the following:

- Whether, in light of the nature of the beneficiary's qualifications or proposed endeavor, it would be impractical either for the beneficiary 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 beneficiary's contributions;

- Whether the national interest in the beneficiary's contributions is sufficiently urgent to warrant forgoing the labor certification process;
- Whether the beneficiary's endeavor may lead to potential creation of jobs; and
- Whether the beneficiary is self-employed in a manner that generally does not adversely affect U.S. workers.

508 ETA

Please submit Form ETA-750B, "Statement of Qualifications of Alien," or Form ETA-9089, "Application for Permanent Employment Certification," Parts J, K and L.

509 Translations

If any document is in a foreign language, then it must be submitted along with a certified English translation. The translator must certify that he/she is competent to perform the translation and that the translation is accurate. Translations submitted without the related foreign document are not acceptable.

510 Missing information on the petition

The petitioner did not indicate [STATE WHAT WAS MISSING: PAGE 3, PART H, QUESTION 2] on the Form I-140 petition. Therefore, please complete the attached photocopied sections of the Form I-140 petition and submit the response. The petitioner should re-sign and date the photocopied sections of the I-140.

511 Select classification (when it appears the petitioner has made a clerical error)

The petitioner has selected the [XXX] classification on the petition. However, the supporting evidence indicates that the petitioner is seeking the [XXX] classification. Please clarify which classification the petitioner seeks.

512 Signature on petition

The petitioner did not sign the petition. [INSERT REASON FOR SENDING RFE: SIGNED BY WRONG PERSON, NOT SIGNED, ETC.] Therefore, an authorized official of the petitioner must sign and date the attached photocopy of the petition.

513 Petitioner must submit G-28

The petitioner [did not submit a valid G-28 OR submitted a copy of a G-28 OR submitted a G-28 without original signatures OR SPECIFY WHAT IS DEFICIENT WITH THE G-28]. If the petitioner wishes to be represented by an attorney or accredited legal representative, then the petitioner must submit a completed Form G-28 signed by the petitioner and the petitioner's attorney or accredited legal representative.

The G-28 will not be recognized if there is only a law firm and not a specific individual's name indicated directly below the representative signature block. The name of the individual representative must be clearly typed or printed.

514 Attorney suspended

[NAME OF ATTORNEY], the attorney who submitted a Notice of Entry of Appearance (Form G-28) to USCIS with the petition, has been suspended from the practice of law in the state of [NAME OF STATE]. USCIS has an obligation to ensure that only those attorneys and representatives who are authorized to practice before the agency are recognized in that manner. USCIS will communicate directly with the petitioner during the period of the individual's suspension from practice unless a Form G-28 signed by an authorized attorney or representative is filed with the agency.

515 Resubmit RFE response

USCIS records indicate that on [DATE], a request for additional evidence or documentation regarding the petitioner's Form I-140 Immigrant Petition for Alien Worker, was issued. A review of our electronic systems indicates a response was received from the petitioner by this office but has not been incorporated into the record. Please resubmit the documentation and evidence previously submitted. A copy of the original request for evidence has been enclosed.

516 Request to withdraw appeal at AAO

USCIS records show that the petitioner has previously filed for this beneficiary, based upon the same material issues and in the same classification. The prior petition was denied and is currently on appeal with the Administrative Appeals Office (AAO). USCIS cannot proceed with the adjudication of this new petition while the appeal is pending with AAO. The petitioner may choose to withdraw the pending appeal by notifying the AAO in writing of its decision to withdraw the pending appeal. Once the AAO acknowledges the withdrawal, the new petition can be adjudicated. Otherwise, the new petition must remain pending until the AAO reaches a decision on the pending appeal.

FOR HISTORICAL PURPOSES ONLY

MATTER OF NYSDOT

Please seek assistance before using the historic standards

517 Has Not Established Substantial Intrinsic Merit

The petitioner must establish that the beneficiary's proposed employment has substantial intrinsic merit. [STATE WHY SUBMITTED EVIDENCE IS DEFICIENT OR MISSING] Please submit evidence to establish that the beneficiary's activities are of substantial intrinsic merit. This evidence might show that the field of endeavor may:

- Benefit the U.S. economy;
- Improve wages and working conditions of U.S. workers;
- Improve education;
- Provide more affordable housing;
- Improve the environment of the U.S.;
- Make more productive use of natural resources; or
- Serve the interests of a U.S. government agency.

518 Has not established national in scope

The petitioner must establish that the beneficiary's proposed employment is national in scope. [STATE WHY SUBMITTED EVIDENCE IS DEFICIENT OR MISSING] Please submit evidence that the beneficiary's contributions will impart national-level benefits.

519 National Interest Waiver

The petitioner must establish that the national interest would not be served if the petitioner was required to obtain a labor certificate for the proposed employment. [STATE WHY SUBMITTED EVIDENCE IS DEFICIENT OR MISSING] Please submit evidence to establish that the beneficiary's past record justifies projections of future benefit to the nation.

The petitioner must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required. The petitioner must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the beneficiary's services by making the position available to U.S. workers.

The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole. The beneficiary's previous influence on the field as a whole must justify projections of future benefit to the national interest. The petitioner must establish, in some capacity, the beneficiary's ability to serve the national interest to a substantially greater extent than the majority of others in the field. For example, the petitioner may submit copies of the beneficiary's patents and copyrights; grant proposals; peer reviewed articles; performance evaluations for the last five to ten years; work that has been evaluated in independent journals; and awards for work in the field. Any awards for work in the field must be accompanied by a statement from the institution that granted the award, commenting on the number of awards given, the frequency of the award, the criteria for granting the award, and the number of individuals eligible to compete for the award.

The petitioner must establish that the beneficiary's skills or background are unique and innovative and serve the national interest. If the beneficiary possesses any special skills, knowledge or abilities that could not be articulated on an application for labor certification, the petitioner must submit evidence to demonstrate these special skills, knowledge or abilities.

I-140 E21 NIW CHECKLIST
ADVANCED DEGREE PROFESSIONALS OR ALIENS OF EXCEPTIONAL ABILITY

Who files I-140: The alien or anyone on the alien's behalf
Labor Certification: Not required

Evidence:

____ The beneficiary qualifies for the requested classification

- ____ A U.S. academic or professional degree or a foreign equivalent degree above that of baccalaureate.
- ____ A U.S. baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty.
- ____ Using the Kazarian two-step analysis, the alien must meet the plain language of at least 3 of the following six criteria. Next, the evidence must be considered in the context of a final merits determination to determine whether the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business.
  - ____ An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of **exceptional ability**; or
  - ____ Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought; or
  - ____ A license to practice the profession or certification for a particular profession or occupation;
  - ____ Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates **exceptional ability**;
  - ____ Evidence of membership in professional associations; or
  - ____ Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.
  - ____ If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

____ The beneficiary qualifies for a waiver of the job offer requirement

- ____ The beneficiary's proposed endeavor has both substantial merit and national importance;
- ____ The beneficiary is well positioned to advance the proposed endeavor; and
- ____ On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

____ A fully completed, signed, Form ETA-750, Part B, or Sections J, K and L of ETA Form 9089.

NIW Denial ECHO Standards

NIW Denial Standard Paragraphs:

NIW Denial Intro

Section 203(b)(2)(A) of the INA states, in part, that 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 a U.S. employer.

However, under Section 203(b)(2)(B) of the INA, the Secretary of Homeland Security may, when the Secretary deems it to be in the national interest, waive the requirement that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

After the petitioner has established a beneficiary's eligibility for second preference classification under section 203(b)(2)(A) of the INA, USCIS may grant a national interest waiver if the petitioner demonstrates by a preponderance of the evidence that: (1) the foreign national's proposed endeavor has both substantial merit and national importance; (2) the foreign national is well positioned to advance the proposed endeavor; and (3), on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

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. To establish that an endeavor has substantial merit, the petitioner should provide a detailed description of the endeavor and why it is meritorious. In determining whether the proposed endeavor has national importance, USCIS considers 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, USCIS considers 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.

XXXIndicateWhichProngsIfAnyHaveBeenMetXXX

Therefore, the beneficiary is not eligible for, and does not merit, a national interest waiver as a matter of discretion.

NIW Substantial Merit

The Proposed Endeavor's Substantial Merit

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXX The petitioner has not submitted a detailed description of the proposed endeavor and documentary evidence that demonstrates OR The documentary evidence submitted does not support the petitioner's statementsXXX that the proposed endeavor has substantial merit in an area such as business, entrepreneurialism, science, technology, culture, health, education, the arts, or social sciences. Therefore, it has not been established that the proposed endeavor is of substantial merit.

NIW National Importance

The Proposed Endeavor's National Importance

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXXThe petitioner has not submitted documentary evidence that demonstrates OR The evidence submitted does not support the petitioner's statementsXXX that the proposed endeavor will have potential prospective impact, such as evidence that the endeavor:

- Will have broader implications, or national or global implications within a particular field;
- Has significant potential to employ U.S. workers;
- Will have substantial positive economic effects, particularly in an economically depressed area;
- Will broadly enhance societal welfare; or
- Will broadly enhance cultural or artistic enrichment.

Therefore, the petitioner has not established that the proposed endeavor is of national importance.

NIW Second Prong

Whether the Beneficiary is Well Positioned to Advance the Proposed Endeavor

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXXThe petitioner has not submitted documentary evidence that demonstrates OR The evidence submitted does not support the petitioner's statements XXX that, after consideration of the following non-exhaustive list of factors, among others, the beneficiary is well positioned to advance the proposed endeavor:

- 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; or
- The interest of potential customers, users, investors or other relevant entities or individuals.

Therefore, the petitioner has not established that the beneficiary is well positioned to advance the proposed endeavor.

NIW Third Prong

Whether, On Balance, It Would be Beneficial to the United States to Waive the Requirements of a Job Offer, and Thus of a Labor Certification

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

XXXThe petitioner has not submitted documentary evidence that demonstrates OR The evidence submitted does not support the petitioner's statementsXXX 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 the balancing analysis of the national interest in protecting the domestic labor supply through the labor certification process, on the one hand, and on the other hand, national interest factors that may outweigh it, USCIS considers one or more of the following factors, among others:

- The impracticality of a labor certification;
- The benefit to the United States from the beneficiary's prospective contributions, even if other U.S. workers are also available; or
- The national interest in the individual's contributions is sufficiently urgent.
- Whether the beneficiary's endeavor may lead to potential creation of jobs; or
- Whether the beneficiary is self-employed in a manner that generally does not adversely affect U.S. workers.

XXXInsertAnalysisOfTheFactorsAndConsiderationsClaiedAndWhyTheyDidNotOutweighTheNationalIntere
stInProtectingTheDomesticLaborSupplyThroughTheLaborCertificationProcessXXX

Therefore, the petitioner has not established 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.

NIW Labor Certification

To apply for a national interest waiver, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien. See 8 C.F.R. § 204.5(k)(4)(ii).USCIS notes that the petitioner did not submit a properly completed Application for Alien Employment Certification (Form ETA-750B) or Application for Permanent Employment Certification (ETA Form 9089), Parts J, K, and L.

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.

Therefore, since the petitioner did not submit this required evidence, USCIS must deny the Form I-140 for this additional reason.

NIW-Related Denial Snippet Groups:

E21 Exceptional Ability Intro

NIW:

The petitioner also seeks to waive the requirement that the beneficiary's services in the sciences, arts, professions, or business be sought by an employer in the United States under INA Section 203(b)(2)(B).

NIW Denial

Publication alone not contrib:

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgment that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report shows that publication of scholarly articles is not automatically evidence of influential contributions; the research community's reaction to those articles must be considered.

Advanced Degree Met:

The regulations at 8 CFR 204.5(k)(2) defines "advanced degree" as:

> . . . 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 customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner seeks employment in the United States as a XXXoccupationXXX. The evidence establishes that the petitioner holds the requisite U.S. advanced degree or foreign equivalent degree.

Exceptional Ability met:

Title 8, Code of Federal Regulations, Part 204.5(k)(2) defines "exceptional ability in the sciences, arts, or business" as:

> . . . a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The petitioner seeks employment in the United States as a XXXoccupationXXX. The evidence establishes that the petitioner has a degree of expertise that rises to the level of exceptional ability.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Washington, DC 20529-2140

U.S. Citizenship and Immigration Services

[Date Applied by EXSO] **PM-XXX-XXXX**
Policy Memorandum

Comment [BLJ1]: 12.21 – will be issued as "interim" and take effect immediately.

SUBJECT: Guidance Relating to Processing National Interest Waivers for Form I-140, Immigrant Petition for Alien Worker under the Second Preference Employment-Based Category

Purpose

This Policy Memorandum (PM) provides guidance regarding the implementation of the Administrative Appeals Office's (AAO) precedent decision on national interest waivers (NIWs) under section 203(b)(2) of the Immigration and Nationality Act (INA), *Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016) and clarifies the eligibility criteria that U.S. Citizenship and Immigration Services (USCIS) Immigration Service Officers (officers) may consider when analyzing NIW petitions.

This PM also provides guidance for NIW petitions filed by self-petitioning entrepreneurs, and clarifies the pertinent evidence unique to such petitioners.[1]

Scope

This memorandum applies to all USCIS employees and shall be used to guide NIW determinations.

[1] Throughout this memorandum, "petitioners" refers to employers who have filed petitions on behalf of their prospective employees (beneficiaries), and also individuals who have filed petitions on their own behalf (i.e. self-petitions). When self-petitioning, the foreign national, including but not limited to an entrepreneur with an ownership stake in his or her employer, may file an I-140 and fill the role of both petitioner and beneficiary without a specific job offer. Hereinafter, any reference to "petitioner" includes cases involving either the individual or an employer as the petitioner.

Authorities

- Section 103(a) of the INA, Title 8 United States Code 1103(a).
- Section 203(b)(2) of the INA, Title 8 United States Code 1153(b)(2).
- Title 8 Code of Federal Regulations (CFR), section 204.5(k)(1)-(4).
- *Matter of Dhanasar,* 26 I&N Dec. 884 (AAO 2016).

Policy

I. Introduction

Section 203(b)(2) of the INA governs the second preference employment-based immigrant visa classification (EB-2), making visas available to those individuals who qualify by virtue of either being "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." Under 203(b)(2)(A), immigrant visas are available to such individuals only if their "services in the sciences, arts, professions, or business are sought by an employer in the United States." This statutory provision requires the individual to have a job offer from a U.S. employer who obtains an approved labor certification from the U.S. Department of Labor (DOL) on his or her behalf as required by section 212(a)(5)(A)(i) of the INA. *See* 8 CFR 204.5(k)(4)(i).

Under section 203(b)(2)(B) of the INA, however, the Secretary of Homeland Security[2] has the discretion to waive the job offer requirement (i.e., that the foreign national's services are sought by a U.S. employer), and thus the labor certification requirement, when the Secretary "deems it to be in the national interest." 8 CFR § 204.5(k)(4)(ii). To establish eligibility for an NIW, the petitioner must demonstrate that:

(i) the beneficiary qualifies as either a member of the professions holding an advanced degree or as an individual of exceptional ability;[3] and

(ii) the waiver of the job offer requirement is in the "national interest."

Neither the statute nor regulations define "national interest." The former Immigration and Naturalization Service (now USCIS) issued a precedent decision with respect to NIW petitions,

[2] The Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 et seq., transferred this function from the Attorney General to the Secretary of Homeland Security. The adjudication of the Form I-140 petition falls under the purview of USCIS.

[3] *See* 8 CFR 204.5(k)(1)-(3) (providing definitions and considerations for making advanced degree professional and alien of exceptional ability determinations). As explained in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), by statute, individuals of exceptional ability are generally subject to the labor certification requirement; they are not exempt because of their exceptional ability. In 8 CFR § 204.5(k)(2), "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, demonstrating a degree of expertise significantly above that ordinarily encountered in the field alone does not automatically qualify the beneficiary for a waiver of the job offer requirement.

see *Matter of New York State Dep't of Trans.*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998) (*NYSDOT*). This precedent decision introduced an adjudicative framework for evaluating requests for NIWs under section 203(b)(2)(B) of the INA.[4]

On December 27, 2016, the AAO issued the precedent decision, *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) (*Dhanasar*), vacating *NYSDOT* and establishing a revised analytical framework for determining whether a petitioner is eligible for the discretionary NIW. The AAO held that USCIS may grant a discretionary NIW if it determines that (1) the foreign national's proposed endeavor has both substantial merit and national importance; (2) he or she 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.[5]

Dhanasar explains that the new framework "will provide greater clarity, apply more flexibly to circumstances of both petitioning employers and self-petitioning individuals, and better advance the purpose of the broad discretionary waiver provision to benefit the United States."[6] *Id.* at 888.

II. Scope of this Memorandum and Revision to the Adjudicator's Field Manual (AFM)

USCIS is updating chapter 22.2(j)(4) of the AFM and upon publication of this memo, the previous version of AFM chapter 22.2(j)(4) will no longer be applicable to the NIW adjudicative process.

III. "Preponderance of the Evidence" Standard

A petitioner seeking an NIW must establish eligibility by a preponderance of the evidence, which means that a petitioner must establish that he or she more likely than not satisfies the qualifying requirements.[7] This is a lower standard of proof than that of "clear and convincing evidence" or the "beyond a reasonable doubt" standard. A petitioner does not need to remove all doubt from the adjudication. Even if an officer has some doubt about a claim, a petitioner will have satisfied the standard of proof if the record of proceeding contains relevant, probative, and credible evidence, considered "individually and within the context of the totality of the

[4] The *NYSDOT* framework first requires the petitioner to demonstrate that the area of employment is of "substantial intrinsic merit." Next, a petitioner must establish that any proposed benefit from the individual's endeavors will be "national in scope." Finally, the petitioner must demonstrate that the national interest would be adversely affected if a labor certification were required for the foreign national.

[5] In *Dhanasar*, a researcher and educator in the field of aerospace engineering filed an immigrant visa petition seeking classification under section 203(b)(2) of the INA as a member of the professions holding an advanced degree. In addition, the self-petitioner requested a waiver of the job offer requirement under section 203(b)(2)(B) of the INA. The evidence of record indicated that the petitioner qualified for the classification of a member of the professions holding an advanced degree, and the remaining issue in the case was whether the petitioner had demonstrated, by a preponderance of the evidence, eligibility for an NIW. Under the new framework, the AAO determined that the petitioner was eligible for an NIW.

[6] This new standard only applies to I-140 petitions seeking an NIW pursuant to INA 203(b)(2)(B)(i).

[7] *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

evidence," that leads an officer to conclude that the claim is "more likely than not" or "probably true."[8]

IV. Implementation

A. Members of the Professions holding an Advanced Degree or Aliens of Exceptional Ability in the Sciences, Arts, or Business.

The first issue to be adjudicated is whether the individual, including a self-petitioner, qualifies for EB-2 classification. This is a threshold requirement under the INA and remains unchanged under the new framework. Specifically, the individual must qualify as either a member of the professions holding a U.S. advanced degree or its foreign equivalent (or a U.S. baccalaureate degree, or its foreign equivalent, plus five years of progressive experience under the pertinent regulation) or as a person of exceptional ability in the sciences, arts, or business. 8 C.F.R. 204.5(k)(2).

Not every petitioner in the EB-2 classification will qualify for an NIW. Regardless of whether the petitioner is an advanced degree professional or an individual of exceptional ability, the petitioner seeking to waive the requirement of a job offer, and therefore the labor certification requirement, must show that the waiver itself is in the national interest.

B. National Interest Waiver Framework

Under the new framework set forth by *Dhanasar*, USCIS may determine that it is in the national interest to waive the job offer requirement, and therefore the labor certification, if the petitioner demonstrates by a preponderance of the evidence that:

(1) the foreign national's proposed endeavor has both substantial merit and national importance;
(2) the foreign national is well positioned to advance the proposed endeavor; and
(3) on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the NIW as a matter of discretion.[9]

1. The First Prong: The Proposed Endeavor has both Substantial Merit and National Importance

The first prong of the *Dhanasar* test focuses on whether the foreign national's proposed endeavor has both substantial merit and national importance.

[8] USCIS will consider not only the quantity, but also the quality of the evidence. *Id.* at 376.
[9] USCIS notes that only language in the decision, not the headnote, should be relied upon for citation.

a. Evaluating Substantial Merit

As stated in *Dhanasar*, an endeavor's merit may be demonstrated in areas such as business, entrepreneurialism, science, technology, culture, health, or education. Additional endeavors with substantial merit may also include endeavors in the arts or social sciences. To establish that an endeavor has substantial merit, the petitioner should provide a detailed description of the endeavor and why it is meritorious. Documentary evidence that supports the petitioner's statements and establishes the endeavor's merit should also be provided. Additionally, evidence of the endeavor's potential significant economic impact may be considered by officers, but "merit may be established without immediate or quantifiable economic impact" and "endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States."[10] *Id.* at 889.

b. Evaluating National Importance

Officers will also examine the national importance of an endeavor by considering its potential prospective impact. Officers should focus on the nature of the proposed endeavor, rather than only the geographic breadth of the endeavor. As the AAO stated in *Dhanasar*, "[c]ertain locally- or regionally- focused endeavors, however, may be of national importance despite being difficult to quantify with respect to geographic scope." *Id.* at 887. The decision also noted that an endeavor "may have national importance because it has national or even global implications within a particular field, such as certain improved manufacturing processes or medical advances" or that it "has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area…" *Id.* at 889-890. Therefore, officers should look for broader implications of the proposed endeavor.

In *Dhanasar*, the petitioner proposed to support teaching activities in Science, Technology, Engineering, and Math (STEM) disciplines as a supplementary component of the primary work in research and development related to air and space propulsion systems. The AAO acknowledged the substantial merit of STEM teaching to U.S. educational interests, but held that the petitioner's proposed teaching activities would not meet the national importance requirement, as the record did not indicate he would be engaged in activities that would influence the field of STEM education more broadly. In contrast, activities such as developing partnerships among school districts and universities, science agencies, businesses, and other community partners to improve the reach and accessibility of STEM learning; and/or developing or implementing a STEM strategic plan for a state school system, may qualify as broadly influencing STEM education.

[10] In *Dhanasar*, the AAO found the petitioner's endeavor to "advance scientific knowledge and further national security interests and U.S. competitiveness in the civil space sector" as having substantial merit. *Id.* at 892.

Other occupations with impact that is similarly limited to a particular pool of customers or clients, without broader implications for a field, may not generally rise to the level of having national importance for the purpose of establishing eligibility for an NIW. For example, the impact of a physician engaged in clinical practice or an accountant who prepares financial statements for clients may not typically rise to the level of having national importance for meeting the first prong of the NIW analysis. In the same way, the work of a high school foreign language teacher in a classroom setting, in and of itself, would not meet the national importance element of prong one because the prospective impact of that endeavor would not influence the field of foreign language education more broadly.

However, if the evidence of record demonstrates that the individual's proposed endeavor will broadly enhance societal welfare or cultural or artistic enrichment, it may rise to the level of national importance. Evidence that an endeavor impacts a matter that a government entity has described as having national importance or is the subject of national initiatives may be probative evidence for establishing the first prong. For example in *Dhanasar*, the petitioner's proposed endeavor of research in hypersonic propulsion was found to have national importance based on the importance of U.S. strategic interest in developing the technology for national security and civilian purposes.

2. The Second Prong: The Individual is Well Positioned to Advance the Proposed Endeavor

While the first prong focuses on the proposed endeavor, the second prong centers on the foreign national. Specifically, the petitioner must demonstrate that the individual is well positioned to advance the proposed endeavor.

Consistent with *Dhanasar*, in order to determine that the individual is well positioned to advance the endeavor, USCIS may 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.

Below is a non-exhaustive list of the types of evidence that may be used to establish that the individual is well positioned to advance a proposed endeavor. This list is not meant to be a checklist or to indicate that any one type of enumerated evidence is either required or sufficient to establish eligibility; rather, the adjudicator will consider the totality of the evidence provided.

To show the *individual's education, skills, knowledge, and record of success in related or similar efforts,* a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Degrees, certificates, or licenses in the field.
- Patents, trademarks, or copyrights owned by the individual.
- Letters from experts in the foreign national's field, describing the individual's past achievements and providing specific examples of how the individual is well positioned to advance his or her endeavor.[11]
- Published articles and/or media reports about the individual's achievements or current work.
- Documentation demonstrating a strong citation history.
- Evidence that the individual's work has influenced his or her field of endeavor.
- Evidence demonstrating the individual has a leading, critical or indispensable role in the endeavor or similar endeavors.
- Evidence showing that the individual's past inventions or innovations have been used or licensed by others in the field.

To show *a model or plan for future activities*, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- A plan describing how the foreign national intends to continue his or her work in the United States.
- A detailed business model, when appropriate.
- Correspondence from prospective/potential employers, clients or customers.
- Documentation reflecting feasible plans for financial support (see Section V for a more detailed discussion of evidence related to financing for entrepreneurs).

To show *progress towards achieving the proposed endeavor*, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Evidence of grants the individual has received listing the amount and terms of the grants, as well as the grantees.
- Copies of contracts, agreements, or licenses resulting from the proposed endeavor or otherwise demonstrating the individual is well positioned to advance the proposed endeavor.
- Evidence of achievements that the individual intends to build upon or further develop (including the types of documentation listed under "individual's education, skills, knowledge, and record of success in related or similar efforts").
- Evidence demonstrating the individual has a leading, critical or indispensable role in the endeavor.

[11] Testimonial letters should include information about the expert's own credentials, such as a curriculum vitae.

To show *interest of potential customers, investors, or other relevant individuals*, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Letters from a government entity demonstrating its interest in the proposed endeavor.[12]
- Evidence that the individual has received investment from U.S. investors, such as venture capital firms, angel investors, or start-up accelerators, in amounts that are appropriate to the relevant endeavor.
- Evidence that the individual has received awards, grants, or other indications of relevant non-monetary support (for e.g., using facilities free of charge, etc.) from Federal, State, or local government entities with authority over the field of endeavor.
- Evidence demonstrating how the individual's work is being used by others, such as:
    - Contracts with companies using products, projects, or services that the individual developed or assisted in developing.
    - Documents showing licensed technology or other procedural or technological advancements developed in whole or in part by the individual and relied upon by others.
    - Patents or licenses awarded to the individual with documentation showing why the particular patent or license is significant to the field.

The petitioner may submit evidence to document the foreign national's past achievements, if applicable, and evidence that supports projections of future work in the proposed endeavor such that it more likely than not shows that the individual is well positioned to advance his or her endeavor. In *Dhanasar*, the significance of the petitioner's past and current research in his field was supported by evidence of peer and government interest in his research, as well as by consistent federal funding of the petitioner's research projects.[13]

USCIS acknowledges that a foreign national may be well positioned to advance an endeavor even if the individual cannot be certain that the proposed endeavor will be a success. As explained in *Dhanasar*, "petitioners are not required to demonstrate that their endeavors are more likely than not to ultimately succeed." *Id.* at 890. However, unsubstantiated claims are insufficient and would not meet the petitioner's burden of proof. In each case, officers must consider the totality of circumstances to determine whether the preponderance of evidence establishes that the individual is well positioned to advance the proposed endeavor.

[12] A letter from an interested government entity describing how the foreign national could potentially contribute to a project or endeavor in an area of substantial merit and national importance may be considered favorable, provided that the record of proceeding contains probative evidence corroborating the statements made in such a letter.

[13] In *Dhanasar*, the AAO noted that the petitioner submitted detailed expert letters describing U.S. Government interest and investment in the petitioner's research, and the record included documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space Administration (NASA) and the Air Force Research Laboratories (AFRL) within the U.S. Department of Defense. The AAO concluded that the petitioner's education, experience and expertise in his field, the significance of his role in research projects, as well as the sustained interest of and funding from government entities such as NASA and AFRL, position him well to continue to advance his proposed endeavor of hypersonic technology research.

3. The Third Prong: 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 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. As explained in *Dhanasar*, with respect to NIW adjudications, Congress entrusted the Secretary to balance the protection of the domestic labor supply furthered by requiring job offers and labor certifications, with the fact that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also in the national interest. In performing this balancing analysis, *Dhanasar* indicates that officers should consider one or more of the following factors, among others:

- The impracticality of a labor certification application.
- The benefit to the United States from the prospective foreign national's contributions even if other U.S. workers were also available.[14]
- The national interest in the individual's contributions is sufficiently urgent.

Other factors for consideration might include:

- Whether the individual's endeavor may lead to potential creation of jobs.
- Whether the individual is self-employed in a manner that generally does not adversely affect U.S. workers.

The balancing of these interests can be evaluated in several ways. For example, the foreign national's endeavor and positioning may be assessed to determine whether they cumulatively provide benefits to the nation that would outweigh the benefits of protecting the wages and working conditions of U.S. workers through the labor certification requirement.[15] Another example may be one in which the labor certification process is likely to provide little benefit, such as where the petitioner is self-employed in a manner that generally does not adversely affect U.S. workers or where the petitioner establishes or owns a business that provides jobs for U.S. workers.

As stated in *Dhanasar*, officers may also consider the impracticality of the labor certification in individual cases. The labor certification process may be impractical for a petitioner hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor certification. In addition, entrepreneur or self-employed inventors who are seeking to pursue an

[14] In *Dhanasar*, the AAO noted that "[b]ecause of his record of successful research in an area that furthers U.S. interests, we find that this petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available." *Id.* at 893.
[15] *See* INA 212(a)(5).

individual endeavor may have a difficult time securing a job offer from a U.S. employer and therefore would not be able to obtain a labor certification.

In *Dhanasar*, the AAO noted that the petitioner held three graduate degrees in fields tied to the proposed endeavor, and possessed considerable experience and expertise in a highly specialized field that has significant implications for U.S. national security and competitiveness. It found that the petitioner's contributions in his field were of such value that they would benefit the United States even assuming that other qualified U.S. workers were available. Therefore, the AAO concluded 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.

V. Specific Evidentiary Considerations for Entrepreneurs[16]

To meet one or more of the three prongs, there may be a variety of distinct evidence submitted by an entrepreneurial petitioner undertaking a proposed endeavor either individually (as a sole proprietor) or through an entity based in the United States in which the petitioner typically possesses (or will possess) an ownership interest, and in which the petitioner maintains (or will maintain) an active and central role such that his or her knowledge, skills, or experience would significantly advance the proposed endeavor. USCIS officers may take into account the fact that many entrepreneurs do not follow the traditional career path followed by most workers and there is no single way in which an entrepreneurial start-up entity may be structured, and therefore officers may evaluate these submissions with that understanding in mind.

The following describes types of evidence, including levels of funding, a petitioner-entrepreneur may submit in support of a claim that he or she meets one or more of the three prongs:

- **Ownership and Role in the U.S.-Based Entity**: The petitioner may have an ownership interest in an entity based in the United States, of which the petitioner may also be the founder or co-founder. The petitioner may also play an active and central role in the operations of the entity as evidenced by the petitioner's appointment as an officer (or similar position of authority) of the entity or other key role within the entity.

- **Degrees, Certifications, Licenses, and Other Evidence of Experience**: This evidence may indicate that the petitioner has knowledge, skills, and/or experience that would significantly advance the proposed endeavor being undertaken by the entity. Education and employment history along with other factors related to the petitioner's background may increase credibility and make the petitioner's claims more convincing. Some

[16] USCIS adopts the common meaning of the term "entrepreneur," which embodies the concept of active, material participation by an individual in the operations and growth of a new business entity. *See Black's Law Dictionary* (9th ed. 2009) (defining "entrepreneur" as "[o]ne who initiates and assumes the financial risks of a new enterprise and who usually undertakes its management").

examples include: successfully leading prior start-up entities or having advanced degrees in the appropriate field.

Investments: An investment, binding commitment to invest or other evidence demonstrating a future intent to invest in the entity by an outside investor (consistent with industry standards) may provide independent validation and support for the substantial merit of the proposed endeavor or the petitioner being well placed to advance the proposed endeavor. This investment may come from wealthy individuals such as angel investors or established organizations such as venture capital firms. It may be in the form of equity, debt, or other investment securities (e.g., warrants). It may also come in various stages (e.g. seed, Series A, B, C, etc.) and in various amounts depending on the stage in which it is made (later stage investments are generally larger than earlier stage investments) and the amount of capital that would be appropriate to the endeavor (i.e., different endeavors have different capital needs).

- **Incubator and/or Growth Accelerator Participation**: Incubators are private or public entities that provide resources, support, and assistance to entrepreneurs in order to foster the growth and development of an idea or enterprise. Growth accelerators focus on helping entrepreneurs and their start-ups speed the launch, growth, and scale of their businesses. The entry of an entrepreneur into an incubator and/or growth accelerator is competitive and officers may consider this evidence as an endorsement of the petitioner's past track record in his or her industry as well as support for the petitioner's proposed endeavor.

- **Awards or Grants**: Funds in the form of grants or awards may come from Federal, State or local government entities with expertise in economic development, research and development, and/or job creation. In addition, awards or grants may be given by other entities such as research institutes and think tanks. Similar to investment from outside investors, this evidence may provide independent validation and support for the substantial merit and/or national importance of the proposed endeavor or the petitioner being well placed to advance the proposed endeavor.

- **Intellectual Property**: Critical patents and other intellectual property held by the petitioner or one of the petitioner's prior start-up entities, accompanied by documentation showing why the particular patent or other intellectual property is significant to the field, may serve as probative evidence of a prior record of success and potential progress toward achieving the endeavor. The submission should document how the petitioner contributed to the development of the intellectual property and how it may have been used internally or externally.

- **Published Materials about the Petitioner and/or the Petitioner's U.S.-Based Entity**: These materials may consist of printed or online newspaper or magazine articles or other

similar published materials evidencing that the petitioner or his or her entity has received significant attention or recognition by the media.

- **Revenue Generation, Growth in Revenue, and Job Creation**: This evidence may support that the proposed endeavor undertaken by the start-up entity has substantial merit or that the petitioner is well positioned to advance the proposed endeavor by showing that the entity has exhibited growth in terms of revenue generation and/or jobs that have already been created in the United States and, if applicable, the petitioner's contribution to such growth. This evidence may also support that the proposed endeavor undertaken by the start-up entity has national importance when coupled with other evidence, such as the location of the start-up entity in an economically depressed area that has benefited or will benefit from jobs created by the start-up entity.

- **Letters and Other Statements from Third Parties**: Letters may be from relevant government entities, outside investors, or established business associations with knowledge of the entity's research, products, or services and/or the petitioner's knowledge, skills or experience that would advance the proposed endeavor. While entrepreneurs typically do not undergo the same type of peer review common to academia, entrepreneurs may operate in a variety of high-tech or cutting-edge industries that have their own industry or technology experts that provide various forms of peer review. Additionally, the merits of a variety of aspects relating to the entrepreneur's business, business plan, product, or technology may undergo various forms of review by third parties, such as prospective investors, retailers, or other industry experts.

The evidence as a whole may provide support for both the petitioner's past entrepreneurial achievements as well as corroborate projections of the proposed endeavor being undertaken by the petitioner or his or her entity. Officers must consider the individual circumstances of each case, and evidence that may be sufficient for approval in one case may not be sufficient in another context.[17] As with all other types of NIW petitions, unsubstantiated claims are not sufficient to meet the petitioner's burden of proof. Officers must consider the totality of evidence in the record to determine whether each of the three prongs is established by a preponderance of the evidence.

As a matter of practice, many entrepreneurial endeavors are measured in terms of revenue generation, projected profitability, cash flow and valuation. Other metrics may be of equal importance in determining whether the petitioner has established each of the three prongs. As noted in *Dhanasar*, "many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution." *Id.* at 90. Accordingly,

[17] For example, one entrepreneur petitioner might submit evidence of certain amounts of revenue, investment and creation of jobs that are sufficient to meet one or more of the prongs. The same amounts, submitted by a different petitioner undertaking an endeavor in a different context, may or may not be sufficient to meet one or more prongs depending on the facts of the case.

petitioners are not required to establish that the proposed endeavor is more likely than not to ultimately succeed based solely on the typical metrics used to measure entrepreneurial endeavors, only that the proposed endeavor has both substantial merit and national importance, that the petitioner is well positioned to advance the proposed endeavor, and 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.

VII. Conclusion

Congress established under INA 203(b)(2)(B) that the Secretary of Homeland Security may waive the job offer requirement, and thus the labor certification requirement, when the Secretary "deems it to be in the national interest." To establish eligibility for the NIW, the petitioner has the burden of demonstrating that the beneficiary qualifies as either a member of the professions holding an advanced degree or as an individual of exceptional ability; and the waiver of the job offer requirement is in the "national interest." This policy memorandum provides guidance and clarification to USCIS employees and petitioners on implementation of the *Dhanasar* decision that vacated *NYSDOT* and establishes a revised, more flexible analytical framework for determining whether a petitioner is eligible for the discretionary NIW.

Implementation

Adjudicator's Field Manual Update

Chapter 22.2(j) of the AFM (AFM Update ADXX-XX) is revised with new content in (4).

☞ 1. Chapter 22.2(j)(4) of the AFM is revised to read as follows:

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(4) National Interest Waiver of Job Offer

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In 1998, the Administrative Appeals Office (AAO) issued a precedent decision, Matter of In Re: New York State Department of Transportation , 22 I&N Dec. 215 (Comm. 1998) ("NYSDOT"), which created a three-prong test for petitioners seeking a national interest waiver. On December 27, 2016, the AAO issued the precedent decision, Matter of Dhanasar, 26 I&N Dec. 884 (AAO 2016) (Dhanasar), vacating NYSDOT and establishing a revised analytical framework for determining whether a petitioner is eligible for the discretionary NIW. The AAO held that USCIS may grant a discretionary NIW if it determines that (1) the foreign national's proposed endeavor has both substantial merit and national importance; (2) he or she 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.

A. National Interest Waiver Framework

Under the new framework set forth by Dhanasar, USCIS may determine that it is in the national interest to waive the job offer requirement, and therefore the labor certification, if the petitioner demonstrates by a preponderance of the evidence that:

(1) the foreign national's proposed endeavor has both substantial merit and national importance;
(2) the foreign national is well positioned to advance the proposed endeavor; and
(3) on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the NIW as a matter of discretion.[18]

i. The First Prong: The Proposed Endeavor has both Substantial Merit and National Importance

The first prong of the Dhanasar test focuses on whether the foreign national's proposed endeavor has both substantial merit and national importance.

a. Evaluating Substantial Merit

As stated in Dhanasar, an endeavor's merit may be demonstrated in areas such as business, entrepreneurialism, science, technology, culture, health, or education. Additional endeavors with substantial merit may also include endeavors in the arts or social sciences. To establish that an endeavor has substantial merit, the petitioner should provide a detailed description of the endeavor and why it is meritorious. Documentary evidence that supports the petitioner's statements and establishes the endeavor's merit should also be provided. Additionally, evidence of the endeavor's potential significant economic impact may be considered by officers, but "merit may be established without immediate or quantifiable economic impact" and "endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States."[19] Id. at 889.

[18] USCIS notes that only language in the decision, not the headnote, should be relied upon for citation.
[19] In Dhanasar, the AAO found the petitioner's endeavor to "advance scientific knowledge and further national security interests and U.S. competitiveness in the civil space sector" as having substantial merit. Id. at 892.

b. Evaluating National Importance

Officers will also examine the national importance of an endeavor by considering its potential prospective impact. Officers should focus on the nature of the proposed endeavor, rather than only the geographic breadth of the endeavor. As the AAO stated in Dhanasar, "[c]ertain locally- or regionally- focused endeavors, however, may be of national importance despite being difficult to quantify with respect to geographic scope." Id. at 887. The decision also noted that an endeavor "may have national importance because it has national or even global implications within a particular field, such as certain improved manufacturing processes or medical advances" or that it "has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area…" Id. at 889-890. Therefore, officers should look for broader implications of the proposed endeavor.

In Dhanasar, the petitioner proposed to support teaching activities in Science, Technology, Engineering, and Math (STEM) disciplines as a supplementary component of the primary work in research and development related to air and space propulsion systems. The AAO acknowledged the substantial merit of STEM teaching to U.S. educational interests, but held that the petitioner's proposed teaching activities would not meet the national importance requirement, as the record did not indicate he would be engaged in activities that would influence the field of STEM education more broadly. In contrast, activities such as developing partnerships among school districts and universities, science agencies, businesses, and other community partners to improve the reach and accessibility of STEM learning; and/or developing or implementing a STEM strategic plan for a state school system, may qualify as broadly influencing STEM education.

Other occupations with impact that is similarly limited to a particular pool of customers or clients, without broader implications for a field, may not generally rise to the level of having national importance for the purpose of establishing eligibility for an NIW. For example, the impact of a physician engaged in clinical practice or an accountant who prepares financial statements for clients may not typically rise to the level of having national importance for meeting the first prong of the NIW analysis. In the same way, the work of a high school foreign language teacher in a classroom setting, in and of itself, would not meet the national importance element of prong one because the prospective impact of that endeavor would not influence the field of foreign language education more broadly.

However, if the evidence of record demonstrates that the individual's proposed endeavor will broadly enhance societal welfare or cultural or artistic enrichment, it may rise to the level of national importance. Evidence that an endeavor impacts a matter that a government entity has described as having national importance or is the subject of national initiatives may be probative evidence for establishing the first prong. For

example in Dhanasar, the petitioner's proposed endeavor of research in hypersonic propulsion was found to have national importance based on the importance of U.S. strategic interest in developing the technology for national security and civilian purposes.

ii. The Second Prong: The Individual is Well Positioned to Advance the Proposed Endeavor

While the first prong focuses on the proposed endeavor, the second prong centers on the foreign national. Specifically, the petitioner must demonstrate that the individual is well positioned to advance the proposed endeavor.

Consistent with Dhanasar, in order to determine that the individual is well positioned to advance the endeavor, USCIS may 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.

Below is a non-exhaustive list of the types of evidence that may be used to establish that the individual is well positioned to advance a proposed endeavor. This list is not meant to be a checklist or to indicate that any one type of enumerated evidence is either required or sufficient to establish eligibility; rather, the adjudicator will consider the totality of the evidence provided.

To show the individual's education, skills, knowledge, and record of success in related or similar efforts, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Degrees, certificates, or licenses in the field.
- Patents, trademarks, or copyrights owned by the individual.
- Letters from experts in the foreign national's field, describing the individual's past achievements and providing specific examples of how the individual is well positioned to advance his or her endeavor.[20]
- Published articles and/or media reports about the individual's achievements or current work.
- Documentation demonstrating a strong citation history.

[20] Testimonial letters should include information about the expert's own credentials, such as a curriculum vitae.

- Evidence that the individual's work has influenced his or her field of endeavor.
- Evidence demonstrating the individual has a leading, critical or indispensable role in the endeavor or similar endeavors.
- Evidence showing that the individual's past inventions or innovations have been used or licensed by others in the field.

To show *a* model or plan for future activities, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- A plan describing how the foreign national intends to continue his or her work in the United States.
- A detailed business model, when appropriate.
- Correspondence from prospective/potential employers, clients or customers.
- Documentation reflecting feasible plans for financial support (see Section V for a more detailed discussion of evidence related to financing for entrepreneurs).

To show *progress towards achieving the proposed endeavor*, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Evidence of grants the individual has received listing the amount and terms of the grants, as well as the grantees.
- Copies of contracts, agreements, or licenses resulting from the proposed endeavor or otherwise demonstrating the individual is well positioned to advance the proposed endeavor.
- Evidence of achievements that the individual intends to build upon or further develop (including the types of documentation listed under "individual's education, skills, knowledge, and record of success in related or similar efforts").
- Evidence demonstrating the individual has a leading, critical or indispensable role in the endeavor.

To show interest of potential customers, investors, or other relevant individuals, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Letters from a government entity demonstrating its interest in the proposed endeavor.[21]

[21] A letter from an interested government entity describing how the foreign national could potentially contribute to a project or endeavor in an area of substantial merit and national importance may be considered favorable, provided that the record of proceeding contains probative evidence corroborating the statements made in such a letter.

- Evidence that the individual has received investment from U.S. investors, such as venture capital firms, angel investors, or start-up accelerators, in amounts that are appropriate to the relevant endeavor.
- Evidence that the individual has received awards, grants, or other indications of relevant non-monetary support (for e.g., using facilities free of charge, etc.) from Federal, State, or local government entities with authority over the field of endeavor.
- Evidence demonstrating how the individual's work is being used by others, such as:
    - Contracts with companies using products, projects, or services that the individual developed or assisted in developing.
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The petitioner may submit evidence to document the foreign national's past achievements, if applicable, and evidence that supports projections of future work in the proposed endeavor such that it more likely than not shows that the individual is well positioned to advance his or her endeavor. In Dhanasar, the significance of the petitioner's past and current research in his field was supported by evidence of peer and government interest in his research, as well as by consistent federal funding of the petitioner's research projects.[22]

USCIS acknowledges that a foreign national may be well positioned to advance an endeavor even if the individual cannot be certain that the proposed endeavor will be a success. As explained in Dhanasar, "petitioners are not required to demonstrate that their endeavors are more likely than not to ultimately succeed." Id. at 890. However, unsubstantiated claims are insufficient and would not meet the petitioner's burden of proof. In each case, officers must consider the totality of circumstances to determine whether the preponderance of evidence establishes that the individual is well positioned to advance the proposed endeavor.

[22] In Dhanasar, the AAO noted that the petitioner submitted detailed expert letters describing U.S. Government interest and investment in the petitioner's research, and the record included documentation that the petitioner played a significant role in projects funded by grants from the National Aeronautics and Space Administration (NASA) and the Air Force Research Laboratories (AFRL) within the U.S. Department of Defense. The AAO concluded that the petitioner's education, experience and expertise in his field, the significance of his role in research projects, as well as the sustained interest of and funding from government entities such as NASA and AFRL, position him well to continue to advance his proposed endeavor of hypersonic technology research.

iii. The Third Prong: 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 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. As explained in Dhanasar, with respect to NIW adjudications, Congress entrusted the Secretary to balance the protection of the domestic labor supply furthered by requiring job offers and labor certifications, with the fact that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also in the national interest. In performing this balancing analysis, Dhanasar indicates that officers should consider one or more of the following factors, among others:

- The impracticality of a labor certification application.
- The benefit to the United States from the prospective foreign national's contributions even if other U.S. workers were also available.[23]
- The national interest in the individual's contributions is sufficiently urgent.

Other factors for consideration might include:

- Whether the individual's endeavor may lead to potential creation of jobs.
- Whether the individual is self-employed in a manner that generally does not adversely affect U.S. workers.

The balancing of these interests can be evaluated in several ways. For example, the foreign national's endeavor and positioning may be assessed to determine whether they cumulatively provide benefits to the nation that would outweigh the benefits of protecting the wages and working conditions of U.S. workers through the labor certification requirement.[24] Another example may be one in which the labor certification process is likely to provide little benefit, such as where the petitioner is self-employed in a manner that generally does not adversely affect U.S. workers or where the petitioner establishes or owns a business that provides jobs for U.S. workers.

As stated in Dhanasar, officers may also consider the impracticality of the labor certification in individual cases. The labor certification process may be impractical for a petitioner hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor certification. In addition, entrepreneur or self-employed inventors who are seeking to pursue an individual endeavor may have a difficult time securing a

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job offer from a U.S. employer and therefore would not be able to obtain a labor certification.

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B. Specific Evidentiary Considerations for Entrepreneurs[25]

To meet one or more of the three prongs, there may be a variety of distinct evidence submitted by an entrepreneurial petitioner undertaking a proposed endeavor either individually (as a sole proprietor) or through an entity based in the United States in which the petitioner typically possesses (or will possess) an ownership interest, and in which the petitioner maintains (or will maintain) an active and central role such that his or her knowledge, skills, or experience would significantly advance the proposed endeavor. USCIS officers may take into account the fact that many entrepreneurs do not follow the traditional career path followed by most workers and there is no single way in which an entrepreneurial start-up entity may be structured, and therefore officers may evaluate these submissions with that understanding in mind.

The following describes types of evidence, including levels of funding, a petitioner-entrepreneur may submit in support of a claim that he or she meets one or more of the three prongs:

- **Ownership and Role in the U.S.-Based Entity**: The petitioner may have an ownership interest in an entity based in the United States, of which the petitioner may also be the founder or co-founder. The petitioner may also play an active and central role in the operations of the entity as evidenced by the petitioner's appointment as an officer (or similar position of authority) of the entity or other key role within the entity.

- **Degrees, Certifications, Licenses, and Other Evidence of Experience**: This evidence may indicate that the petitioner has knowledge, skills, and/or

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experience that would significantly advance the proposed endeavor being undertaken by the entity. Education and employment history along with other factors related to the petitioner's background may increase credibility and make the petitioner's claims more convincing. Some examples include: successfully leading prior start-up entities or having advanced degrees in the appropriate field.

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- **Published Materials about the Petitioner and/or the Petitioner's U.S.-Based Entity**: These materials may consist of printed or online newspaper or magazine articles or other similar published materials evidencing that the petitioner or his or her entity has received significant attention or recognition by the media.

- **Revenue Generation, Growth in Revenue, and Job Creation**: This evidence may support that the proposed endeavor undertaken by the start-up entity has substantial merit or that the petitioner is well positioned to advance the proposed endeavor by showing that the entity has exhibited growth in terms of revenue generation and/or jobs that have already been created in the United States and, if applicable, the petitioner's contribution to such growth. This evidence may also support that the proposed endeavor undertaken by the start-up entity has national importance when coupled with other evidence, such as the location of the start-up entity in an economically depressed area that has benefited or will benefit from jobs created by the start-up entity.

- **Letters and Other Statements from Third Parties**: Letters may be from relevant government entities, outside investors, or established business associations with knowledge of the entity's research, products, or services and/or the petitioner's knowledge, skills or experience that would advance the proposed endeavor. While entrepreneurs typically do not undergo the same type of peer review common to academia, entrepreneurs may operate in a variety of high-tech or cutting-edge industries that have their own industry or technology experts that provide various forms of peer review. Additionally, the merits of a variety of aspects relating to the entrepreneur's business, business plan, product, or technology may undergo various forms of review by third parties, such as prospective investors, retailers, or other industry experts.

The evidence as a whole may provide support for both the petitioner's past entrepreneurial achievements as well as corroborate projections of the proposed endeavor being undertaken by the petitioner or his or her entity. Officers must consider the individual circumstances of each case, and evidence that may be sufficient for approval in one case may not be sufficient in another context.[26] As with all other types of NIW petitions, unsubstantiated claims are not sufficient to meet the petitioner's burden of proof. Officers must consider the totality of evidence in the record to

[26] For example, one entrepreneur petitioner might submit evidence of certain amounts of revenue, investment and creation of jobs that are sufficient to meet one or more of the prongs. The same amounts, submitted by a different petitioner undertaking an endeavor in a different context, may or may not be sufficient to meet one or more prongs depending on the facts of the case.

determine whether each of the three prongs is established by a preponderance of the evidence.

As a matter of practice, many entrepreneurial endeavors are measured in terms of revenue generation, projected profitability, cash flow and valuation. Other metrics may be of equal importance in determining whether the petitioner has established each of the three prongs. As noted in Dhanasar, "many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution." Id. at 90. Accordingly, petitioners are not required to establish that the proposed endeavor is more likely than not to ultimately succeed based solely on the typical metrics used to measure entrepreneurial endeavors, only that the proposed endeavor has both substantial merit and national importance, that the petitioner is well positioned to advance the proposed endeavor, and 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 new analytical framework for adjudication of NIWs became effective on December 27, 2016, when the *Matter of Dhanasar*, 26 I&N Dec. 884 was published. Pending cases filed with USCIS prior to the date of publication may receive requests for evidence to enable officers to adjudicate the case under the new standard.

Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Please email all comments to ope.feedback@uscis.dhs.gov. Please include the following to make your comments clear:

- State the title of this memo in the subject line of your message;
- Refer to a specific portion of the memo;
- Explain the reason for any recommended change; and
- Include data, information, or authority that supports the recommendation.

You must submit your comments before the closing date noted in the red box at the top of the memo. USCIS may distribute any comments received (including any personal information and contact information) on its public website or to those who request copies. By providing

comments, you consent to their use and consideration by USCIS, and you acknowledge that your comments may become public.

NIW RFE ECHO Standards

NIW RFE Standard Paragraphs:

Introduction: NIW Self-Petitioner

Reference is made to this Form I-140, Immigrant Petition for Alien Worker, seeking XXXInsertClassificationSnippetXXX for [[[LETTER_PETITIONER_FIRM_NAME_TX]]] (petitioner and beneficiary), filed on his/her own behalf. The priority date for this petition is XXXDATEXXX.

The beneficiary intends to work as XXXa or anXXX XXXOCCUPATIONXXX in the field of XXXFIELDXXX.

In order to establish eligibility, the petitioner must establish that:

- The beneficiary qualifies for the requested classification; and
- An exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

USCIS has designated *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) ("Dhanasar") as a precedent decision. That decision rescinded the earlier precedent decision, *Matter of New York State Dep't of Transp.* ("NYSDOT"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), regarding national interest waivers under Section 203(b)(2)(B)(i) of the Immigration and Nationality Act, and introduced a new three-prong test for determining eligibility. Under *Dhanasar*, USCIS may grant a national interest waiver as a matter of discretion if the petitioner demonstrates by a preponderance of the evidence that:

- The beneficiary's proposed endeavor has both substantial merit and national importance;
- The beneficiary is well positioned to advance the proposed endeavor; and
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

The evidence does not establish that XXXStateWhichOfTheAboveIsNotEstablishedXXX. Therefore, USCIS requests additional evidence.

Introduction: NIW Other Petitioner

You, [[[LETTER_PETITIONER_FIRM_NAME_TX]]] (the petitioner), filed an Immigrant Petition for Alien Worker (Form I-140) on [[[LETTER_CASE_RECEIPT_DT]]]. On the Form I-140, you sought to classify [[[LETTER_BENEFICIARY_FIRST_NAME_TX]]] [[[LETTER_BENEFICIARY_LAST_NAME_TX]]] (the beneficiary) as XXXInsertClassificationSnippetXXX. The priority date for this petition is XXXDATEXXX.

The beneficiary intends to work as XXXa or anXXX XXXOCCUPATIONXXX in the field of XXXFIELDXXX.

In order to establish eligibility, you must establish that:

- The beneficiary qualifies for the requested classification; and
- An exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

USCIS has designated *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) ("Dhanasar") as a precedent decision. That decision rescinded the earlier precedent decision, *Matter of New York State Dep't of Transp*. ("NYSDOT"), 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), regarding national interest waivers under Section 203(b)(2)(B)(i) of the Immigration and Nationality Act, and introduced a new three-prong test for determining eligibility. Under *Dhanasar*, USCIS may grant a national interest waiver as a matter of discretion if the petitioner demonstrates by a preponderance of the evidence that:

- The beneficiary's proposed endeavor has both substantial merit and national importance;
- The beneficiary is well positioned to advance the proposed endeavor; and
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

If these three elements are satisfied, USCIS may approve the national interest waiver as a matter of discretion.

The evidence does not establish that XXXStateWhichOfTheAboveIsNotEstablishedXXX. Therefore, USCIS requests additional evidence.

NIW: Establishing the Proposed Endeavor's Substantial Merit

Please submit evidence to establish that the beneficiary's proposed endeavor has substantial merit. XXXInsertEvidenceSnippetXXX

Evidence to establish that the beneficiary's proposed endeavor has substantial merit consists of, but is not limited to, the following:

- A detailed description of the proposed endeavor and why it is of substantial merit; and
- Documentary evidence that supports the petitioner's statements and establishes the endeavor's merit.

NIW: Establishing the Proposed Endeavor's National Importance

Please submit evidence to establish that the beneficiary's proposed endeavor has national importance. This evidence must demonstrate the endeavor's potential prospective impact. XXXInsertEvidenceSnippetXXX

Evidence to establish that the beneficiary's proposed endeavor has national importance consists of, but is not limited to, the following:

- A detailed description of the proposed endeavor and why it is of national importance,
- Documentary evidence that supports the petitioner's statements and establishes the endeavor's national importance. Such evidence must demonstrate the endeavor's potential prospective impact, and may consist of, but is not limited to, evidence showing that the proposed endeavor:
  - Has national or even global implications within a particular field;
  - Has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area;
  - Will broadly enhance societal welfare or cultural or artistic enrichment; and
  - Impacts a matter that a government entity has described as having national importance or is the subject of national initiatives.

NIW: Establishing the Beneficiary is Well Positioned to Advance the Proposed Endeavor

Please submit evidence to establish that the beneficiary is well positioned to advance the proposed endeavor. XXXAcknowledgeIfTheProposedEndeavorHasBothSubstantialMeritAndNationalImportanceXXX

XXXInsertEvidenceSnippetXXX

Evidence which best establishes that the beneficiary is well positioned to advance the proposed endeavor will document the beneficiary's qualifications (skills, experience and track record), support (financial and otherwise) and commitment (plans and progress) to drive the endeavor forward, and will support projections of future work in the proposed endeavor. USCIS may consider factors including, but not limited to, the following: XXXDELETE A BULLET BELOW IF THE EVIDENCE LISTED ABOVE IN THE EVIDENCE SNIPPET ADDRESSES THE FACTOR, OR IF THE FACTOR IS NOT READILY APPLICABLE TO THE BENEFICIARY OR ENDEAVORXXX

- The beneficiary's education, skills, knowledge, and record of success in related or similar efforts:
  - XXXInsertEducationSkillsKnowledgeRecordOfSuccessSnippetXXX;
- A model or plan for future activities:
  - XXXInsertModelOrPlanForFutureActivitiesSnippetXXX;
- Any progress towards achieving the proposed endeavor:
  - XXXInsertProgressTowardsAchievingProposedEndeavorSnippetXXX;

- The interest of potential customers, users, investors, or other relevant entities or individuals:
  - XXXInsertInterestOfPotentialCustomersUsersInvestorsOthersSnippetXXX.
- Other evidence that the beneficiary is well-positioned to advance the endeavor.

Note: The beneficiary may be well positioned to advance the endeavor even if there is no certainty that the proposed endeavor will be a success. However, unsubstantiated claims are insufficient and would not meet the petitioner's burden of proof.

NIW: Establishing 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

Please submit evidence to establish 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. This balance was described in Dhanasar as on one hand protecting the domestic labor supply through the creation of the labor certification process, while on the other hand recognizing that in certain cases the benefits inherent in the labor certification process can be outweighed by other factors that are also deemed to be in the national interest. XXXACKNOWLEDGE IF THE PROPOSED ENDEAVOR HAS BOTH SUBSTANTIAL MERIT AND NATIONAL IMPORTANCE, AND THE BENEFICIARY IS WELL POSITIONED TO ADVANCE THE PROPOSED ENDEAVORXXX

XXXInsertEvidenceSnippetXXX

USCIS may evaluate factors including, but not limited to, the following:

- Whether, in light of the nature of the beneficiary's qualifications or proposed endeavor, it would be impractical either for the beneficiary 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 beneficiary's contributions;
- Whether the national interest in the beneficiary's contributions is sufficiently urgent to warrant forgoing the labor certification process;
- Whether the beneficiary's endeavor may lead to potential creation of jobs; and
- Whether the beneficiary is self-employed in a manner that generally does not adversely affect U.S. workers.

NIW-Related RFE/NOID Snippet Groups:

NIW (SCOPS)

EducationSkillsKnowledgeRecordof:

To show a beneficiary's education, skills, knowledge, and record of success in related or similar efforts, the petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Degrees, certificates, or licenses in the field;
- Patents, trademarks, or copyrights owned by the beneficiary;
- Letters from experts in the beneficiary's field, describing the beneficiary's past achievements and providing specific examples of how the beneficiary is well positioned to advance his or her endeavor;
- Published articles and/or media reports about the beneficiary's achievements or current work;
- Documentation demonstrating a strong citation history;
- Evidence that the beneficiary's work has influenced his or her field of endeavor;
- Evidence demonstrating the beneficiary has a leading, critical or indispensable role in the endeavor or similar endeavors; and
- Evidence showing that the beneficiary's past inventions or innovations have been used or licensed by others in the field.

ModelorPlanforFutureActivities:

To show a model or plan for future activities, the petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- A plan describing how the beneficiary intends to continue his or her work in the United States;
- A detailed business model, when appropriate;
- Correspondence from prospective/potential employers, clients or customers; and
- Documentation reflecting feasible plans for financial support.

ProgressTowardsAchievingProposed:

To show progress towards achieving the proposed endeavor, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Evidence of grants the beneficiary has received listing the amount and terms of the grants, as well as the grantees;

- Copies of contracts, agreements, or licenses resulting from the proposed endeavor or otherwise demonstrating the beneficiary is well positioned to advance the proposed endeavor;

- Evidence of achievements that the beneficiary intends to build upon or further develop (including the types of documentation listed under "beneficiary's education, skills, knowledge, and record of success in related or similar efforts"); and

- Evidence demonstrating the beneficiary has a leading, critical or indispensable role in the endeavor.

InterestofPotentialCustomers,Use:

To show interest of potential customers, investors, or other relevant beneficiaries, a petitioner may submit one or more pieces of evidence from the following non-exhaustive list:

- Letters from a government entity demonstrating its interest in the proposed endeavor;
- Evidence that the beneficiary has received investment from U.S. investors, such as venture capital firms, angel investors, or start-up accelerators, in amounts that are appropriate to the relevant endeavor;
- Evidence that the beneficiary has received awards, grants, or other indications of relevant non-monetary support (for e.g., using facilities free of charge, etc.) from Federal, State, or local government entities with authority over the field of endeavor;
- Evidence demonstrating how the beneficiary's work is being used by others, such as:
    - Contracts with companies using products, projects, or services that the beneficiary developed or assisted in developing;
    - Documents showing licensed technology or other procedural or technological advancements developed in whole or in part by the beneficiary and relied upon by others; and
    - Patents or licenses awarded to the beneficiary with documentation showing why the particular patent or license is significant to the field.

EVIDENCE:

- You did not submit any evidence to establish that the beneficiary meets this requirement.
- You did not submit any evidence to establish that the petitioner meets this requirement.
- You submitted XXXListEvidenceXXX to establish that the beneficiary meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.
- You submitted XXXListEvidenceXXX to establish that the petitioner meets this requirement. However, this is insufficient because XXXExplainDeficienciesXXX.