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MATTER OF DHANASAR: THE NEW NATIONAL INTEREST WAIVER STANDARD

Posted on January 10, 2017 by Cora-Ann Pestaina

Overturning nearly two decades of precedent on how an individual qualifies for the National Interest Waiver (NIW), the Administrative Appeals Office (AAO) of the U.S. Citizenship and Immigration Services (USCIS) recently issued a precedent decision, *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) which vacated *Matter of New York State Dep't of Transp.* , 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998) on which USCIS routinely relied when adjudicating NIW petitions.

As background, the NIW is an immigrant petition for lawful permanent residence under the employment-based second preference ("EB-2") category. In the ordinary course, a valid, permanent offer of employment in the U.S. and a labor certification application certified by the Department of Labor (DOL) are mandatory prerequisites to the filing of such an employment-based immigrant petition. However, the Immigration Act of 1990 (IMMACT90) provided that the labor certification requirement in the employment-based second category may be waived and foreign nationals may qualify for the NIW in the sciences, arts, professions or business if they are: (1) members of the professions holding advanced degrees; or (2) foreign nationals of "exceptional ability" who will "substantially benefit prospectively the national economy, cultural or educational interest, or welfare" of the United States, i.e. where the foreign national's employment is deemed to be in the "national interest." Yet, neither Congress nor USCIS have defined the "national interest." Rather, it has been left intentionally undefined in an effort to leave the application of this test as flexible as possible.

In 1998, the threshold qualifications for a NIW were articulated in NYSDOT. NYSDOT restricted the use of the NIW as a way to bypass the labor certification process for foreign nationals qualifying for placement in the EB-2 category. In

NYSDOT, the AAO defined a three-prong test as the legal standard for adjudicating NIW petitions. Under this test, the foreign national had to demonstrate that (1) the area in which the foreign national seeks employment is of substantial intrinsic merit; (2) the prospective benefit of the foreign national's services is national in scope; and (3) the national interest would be adversely affected if a labor certification were required. That is, the foreign national will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The NYSDOT standard resulted in inconsistent adjudications, confusion and general frustration. It was impossible to devise a sure fire plan of attack or to predict the success of a NIW petition. Even if a petitioner could meet the first two prongs of the NYSDOT test, the third prong proved the most difficult to establish and was the sole subject of many USCIS Requests for Evidence. Under this prong, although a NIW is granted based on prospective national benefit, the foreign national's past record had to justify projections of future benefit to the national interest. In other words, a NIW petitioner had to demonstrate that the prospective national interest was not entirely speculative, but based on demonstrable prior achievements. I previously blogged here providing a practical account of issues presented by the NYSDOT standard and how our firm was able to overcome that third prong and win a NIW petition for a marine biologist.

Acknowledging the existing confusion, in *Matter of Dhanasar*, the AAO stated that based on the agency's experience with NYSDOT "we believe it is now time for a reassessment." *Matter of Dhanasar* articulates a new NIW standard that the AAO believes provides greater clarity, applies more flexibly to circumstances of both petitioning employers and self-petitioning individuals and better advances the purpose of the broad discretionary waiver provision to benefit the United States.

Matter of Dhanasar provides that after eligibility for EB-2 classification has been established, USCIS may grant a NIW if the petitioner demonstrates, by a preponderance of the evidence, that:

- The foreign national's proposed endeavor has both substantial merit and national importance.
- The foreign national is well positioned to advance the proposed endeavor.
- 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 decision noted that *Dhanasar's* prong #1 – requiring substantial merit and national importance – focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's substantial merit may be demonstrated in a range of areas including business, entrepreneurialism, science, technology, culture, health, or education. It is possible to establish an endeavor's substantial merit without a demonstration of immediate or quantifiable economic impact, although such evidence would be favorable. The AAO provided the examples of endeavors related to research, pure science, and the furtherance of human knowledge which may qualify whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States.

To determine whether the proposed endeavor has national importance, the AAO stated that it considers its potential prospective impact. An endeavor 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," the AAO noted. "In modifying this prong to assess 'national 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."

Dhanasar's prong #2 - requiring that the foreign national demonstrate that he or she is well positioned to advance the proposed endeavor – shifts the focus away from the proposed endeavor and onto the foreign national. The AAO stated that it will consider factors including, but not limited to, the petitioner'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. In recognition of the challenges presented in attempting to forecast feasibility or future success, the AAO stated

that petitioners will not be required to demonstrate that their endeavors are more likely than not to ultimately succeed. Nevertheless, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.

Dhanasar's prong #3 requires a demonstration that, on balance, it would be beneficial to the US to waive the requirements of a job offer and thus of a labor certification. The AAO recognized the intent of Congress to further the national interest by requiring job offers and labor certifications to protect the domestic labor supply. But, on the other hand, Congress also created the NIW in recognition of the fact that in certain cases the benefits afforded by the labor certification process can be outweighed by other factors that are also in the national interest. These two interests need be balanced within the context of individual NIW adjudications.

The AAO stated that this analysis requires an evaluation of 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; whether, even assuming that other qualified U.S. workers are available, the U.S. 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. The AAO emphasized that, in each case, the factors considered "must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification." The AAO noted that this new prong in *Dhanasar*, unlike the third prong in NYSDOT, "does not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner's field." Under NYSDOT, the petitioner had to demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the foreign national by making the position sought by the foreign national available to U.S. workers. The petitioner, whether the U.S. employer or the foreign national, had to establish that the foreign national will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

Matter of Dhanasar indeed rovides much needed flexibility and a clearer understanding of the evidence required in order to qualify for a NIW. In particular, this decision more widely opens the door for entrepreneurs to

qualify for NIW. Under *Dhanasar's* prong #1, the entrepreneur will no longer have to provide evidence that the proposed benefit will be national in scope as it has always been difficult for an entrepreneur to show that localized employment through his or her enterprise would be national in scope. Instead, the entrepreneur could demonstrate that the proposed endeavor has significant potential to employ U.S. workers.

The AAO acknowledged that the third prong of NYSDOT was always especially problematic for entrepreneurs and other self-employed individuals. A self-employed consultant would never be able to sponsor oneself through a labor certification as there is no distinct employer. In fact, the DOL regulations prohibit one who is the owner of the corporation from filing a labor certification on his or her own behalf as this person might negatively influence the good faith effort to recruit US workers. Also, certain governmental agencies do not have a policy of filing labor certifications on behalf of foreign nationals even though they may be critically needed. Under the more flexible *Matter of Dhanasar* standard, getting rid of the comparison requirement and focusing on the foreign national's own background, the entrepreneur can demonstrate that even assuming that other qualified U.S. workers are available, the U.S. would still benefit from the foreign national's contributions.

Matter of Dhanasar still requires the subjective determinations of USCIS adjudicators and accordingly, great care still needs to go into assembling a NIW petition. But this precedent decision opens the door to lawful permanent residence for individuals involved in a wider range of endeavors who would have failed to qualify under the NYSDOT standard.