

PRESENTED AT

46th ANNUAL CONFERENCE ON IMMIGRATION & NATIONALITY LAW

September 29-30, 2022

Austin, TX

**Matter of Dhanasar and the Entrepreneur, Investor
and Innovator, A Practical Guide to Obtaining
National Interest Waives for These Applications**

Ramon E. Curiel

Author Contact Information:

Ramon E. Curiel

Oliva, Saks, Garcia, Curiel, LLP

San Antonio, TX

ramon@osgclaw.com

210-308-6600

**MATTER OF DHANASAR AND THE ENTREPRENEUR, INVESTOR AND
INNOVATOR, A PRACTICAL GUIDE TO OBTAINING NATIONAL INTEREST
WAIVERS FOR THESE APPLICANTS**

BY

RAMON E. CURIEL

On December 27, 2016 (one month before the beginning of the Trump Administration), the Administrative Appeals Office (AAO) decided to vacate the longstanding precedent established by *NYSDOT* 21 I&N Dec. 215 (Acting AC 1998) and modify the evidentiary standards for applicants and employers applying for a National Interest Waiver (NIW) under the Employment-Bases 2nd (EB2) preference by issuing its decision in *Matter of Dhanasar* 26 I&N Dec. 884 (AAO 2016). Admittedly, the AAO modified the evidentiary criteria because it found the category to be “ill-suited” for self-employed individuals, such as entrepreneurs, to prove their cases before USCIS under the NYSDOT standards. Accordingly, entrepreneurs, investors and self-employed innovators should capitalize on this broader evidentiary standard and pursue National Interest Waivers when the applicant and their attorney can establish the required qualifications. This writing is a practical guide based on positive and negative experiences of this writer in navigating the relatively new standards in *Dhanasar*.

Is my client a Professional with Advanced Degree or someone with Exceptional Ability

It is important to remember that the NIW is only available to the EB2 category. Accordingly, the applicant must meet the definition of an Advanced Professional under 8 CFR § 204.5(k)(2) or someone with Exceptional Ability under 8 CFR § 204.5(k)(3)(ii). In short, an advanced degree means either (1) **any** United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. See 8 CFR § 204.5(k)(2) (emphasis added). It is important to note that the regulation uses the word “any” because some professionals obtain master’s degrees that are not certified or recognized by the foreign ministry of education. These degrees nevertheless should qualify as an advanced degree since unlike other regulations, such as in the H-1B nonimmigrant category, that require certain degrees to be from an accredited college or university. See 8 CFR § 214.2(h)(4)(iii)(C)(2), the regulations for the EB-2 category only require that the degree be “any degree” above that of baccalaureate. This writer was able to get an applicant recognized as an advanced degree professional despite the master’s degree not being accredited by the Ministry of Education of Spain by pointing to USCIS such regulatory language. Also, an advanced degree means: (2) a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty. See 8 CFR § 204.5(k)(2). It is important to note that the five years of progressive experience must follow the bachelor’s degree. This may present an issue for certain professionals in countries such as Mexico, where the professional does not obtain the formal degree until years later after graduation due to fulfilling of some requirements from the Education Secretariat. In these cases, the practitioner should be aware of the issue and clarify that all academic requirements have been fulfilled timely for the

professional to quantify the post-education progressive work experience. Because simply put, there can be no bachelor's plus five, without a bachelor's degree.

Exceptional Ability is defined as a degree of expertise significantly above that ordinarily encountered. May require more than former H-1 "distinguished merit and ability." *See Matter of Kim*, 12 I&N Dec. 758 (AC 1968). To prove exceptional ability, the applicant can provide 3 of the following:

- Degree relating to area of exceptional ability.
- Letter from current or former employer showing at least 10 years of experience.
- License to practice profession.
- Person has commanded a salary or remuneration demonstrating exceptional ability.
- Membership in a professional association.
- Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. *See* 8 CFR §204.5(k)(3)(ii).

The applicant can also submit comparable evidence if the above categories are inapplicable. *See* 8 CFR §204.5(k)(3)(iii). Similar to cases requiring "extraordinary ability," USCIS applies the 2-step approach to the evaluation of evidence regarding exceptional ability by first determining whether objectively the person met the three threshold requirements and then whether the evidence submitted is sufficient to demonstrate that the beneficiary meets the required high level of expertise. *See* USCIS Policy Memo, PM-602-0005.1, Evaluation of Evidence Submitted with Certain Form I-140 Petitions, (Dec. 22, 2010) at 4, AILA Doc. No. 11020231. Accordingly, a practitioner should be inclined to submit as much evidence and expert opinion as possible to meet this requirement.

Matter of Dhanasar Standards

Once an applicant meets the threshold of either meeting the definition of an advanced degree professional or person with exceptional ability, the applicant must meet the following requirements:

- (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.
- (3) that, on balance, it would be beneficial to the U.S. to waive the job offer and LC requirements. *Dhanasar at 884.*

Since the first requirement has two distinct definitions to meet, it is in practice that the applicant must meet four requirements: (a) the endeavor must have substantial merit; (b) the endeavor must be of national importance; (c) the applicant must be well positioned to advance the proposed endeavor; and (d) on balance it would be beneficial to the U.S. to waive the job offer and LC requirements. It is important to note that the waiver is discretionary, and the applicant must

Also available as part of the eCourse

[2022 eConference on Immigration and Nationality Law](#)

First appeared as part of the conference materials for the
46th Annual Conference on Immigration and Nationality Law session
"New Focus on to NIWs"