

# ***Matter of Dhanasar* Ushers in a New Era for National Interest Waivers**

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On December 27, 2016, the U.S. Citizenship and Immigration Services (CIS) Administrative Appeals Office (AAO) decided *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016), by vacating its 1998 decision in *New York State Department of Transportation*, 22 I&N Dec. 215 (Acting Assoc. Comm'r 1998), well known by immigration lawyers as *NYSDOT*, and articulating a new framework for analyzing and adjudicating national interest waiver petitions. *Dhanasar* is no less significant in the world of national interest waivers today than was *NYSDOT* in 1998; however, instead of putting the brakes on national interest waiver cases, *Dhanasar*'s "more flexible test, which can be met in a range of ways . . . is meant to apply to a greater variety of individuals." *Dhanasar* at 891. The new framework is a welcome development that, without question, provides an ameliorated path for obtaining national interest waiver approvals under appropriate circumstances - especially for researchers, scientists, entrepreneurs, and the self-employed. It should not, however, be viewed as having drastically changed the types of cases that are ultimately likely to be approved or the proof that is needed to support them.

## **Out with the Old - The *NYSDOT* Framework**

In *NYSDOT*, the AAO set forth a three-prong test for determining eligibility for a national interest waiver of the labor certification requirement. First, the proposed work must be in "an area of substantial intrinsic merit." Second, the benefit resulting from the individual's work must be "national in scope." And third, the individual must show that he or she "will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications." In the almost 20 years since *NYSDOT* was decided, this third prong has proved the most problematic. Among its many issues, it effectively cut out anyone who was self-employed or starting their own business from qualifying. Even in its original description in *NYSDOT*, the AAO took several tries to articulate the concept, leaving subsequent CIS adjudicators an almost-unlimited supply of phrases to cite in denial decisions.

## **In with the New - The *Dhanasar* Framework**

In *Dhanasar*, the AAO acknowledged how problematic and limiting the *NYSDOT* standard has been over the years and established a new, three-prong test for evaluating national interest waiver petitions. The first prong in *Dhanasar* focuses on the proposed endeavor - the foreign national's proposed endeavor must have "both substantial merit and national importance." The second prong focuses on the foreign national beneficiary/petitioner - the foreign national must be "well positioned to advance the proposed endeavor." Finally, the third prong seems to take the place of *NYSDOT*'s comparison with a hypothetical minimally qualified worker, requiring instead that, "on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements."

The chart below offers a comparison of the *NYSDOT* and *Dhanasar* analytical frameworks which should be useful in evaluating what has changed and in developing the structure for future national interest waiver filings under the new *Dhanasar* framework.

<i><b>NYSDOT</b></i>	<i><b>Dhanasar</b></i>	<b>Remarks</b>
1. The alien seeks employment in an area of substantial intrinsic merit.	1. <b>The foreign national’s proposed endeavor has both substantial merit . . .</b>	The first prong of <i>Dhanasar</i> corresponds to the first and second prong of <i>NYSDOT</i> .  Difference: <i>Dhanasar</i> drops the word “intrinsic.”
2. The proposed benefit of the alien’s work must be national in scope.	<p><b>and national importance.</b></p> <p>A Focuses on the specific endeavor.</p> <ul style="list-style-type: none"> <li>• An endeavor’s merit may be demonstrated in a range of areas, <i>such as</i>: business, entrepreneurialism, science, technology, culture, health, or education.</li> </ul> <p>B Evidence that the endeavor has the potential to create a significant economic impact may be favorable, but is not required.</p> <ul style="list-style-type: none"> <li>• Endeavors related to research, pure science, and furtherance of human knowledge may qualify, even without translating into economic benefits for the U.S.</li> </ul> <p>C Whether the endeavor has national importance is determined by its potential prospective impact.</p> <ul style="list-style-type: none"> <li>• An endeavor with national or global implications for a particular field, may have national importance.</li> </ul>	Difference: <i>Dhanasar</i> allows for endeavor to be of national importance instead of requiring benefit to be national in scope.

NYS DOT	Dhanasar	Remarks
	<p>D Evaluation of prospective impact is not done solely in geographic terms.</p> <ul style="list-style-type: none"> <li>An endeavor with significant potential to employ U.S. workers or with potential for other substantial positive economic effects, such as in an economically depressed area, may have national importance.</li> </ul>	
	<p>2. <b>The foreign national is well positioned to advance the proposed endeavor</b></p> <p>A Factors considered in determining include:</p> <ul style="list-style-type: none"> <li>the individual's education, skills, knowledge and record of success in related or similar efforts;</li> <li>a model or plan for future activities;</li> <li>progress towards achieving the proposed endeavor; and</li> <li>the interest of potential customers, users, investors, or other relevant entities or individuals.</li> </ul> <p>B Petitioners are not required to demonstrate that their endeavors are more likely than not to ultimately succeed.</p>	<p>Difference: Focus shifts from the proposed endeavor to foreign national.</p>
<p>3. The national interest would be adversely affected if a labor certification were required for the alien</p>	<p>3. <b>On balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.</b></p>	<p>Difference:</p> <ul style="list-style-type: none"> <li>Dhanasar changes to an affirmative statement and allows waiver when</li> </ul>

NYS DOT		Dhanasar		Remarks
A	It would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien.	A	<p>Factors to be evaluated include:</p> <ul style="list-style-type: none"> <li>• 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, e.g.: <ul style="list-style-type: none"> <li>○ The labor certification process might prevent a petitioning employer from hiring a foreign national with unique knowledge or skills that are not easily articulated in a labor cert.;</li> <li>○ It might be impractical for an entrepreneur of self-employed inventor, when advancing an endeavor on his/her own, to secure a job offer from a U.S. employer;</li> </ul> </li> <li>• Whether, even assuming that other qualified US workers are available, the U.S. would still benefit from the foreign national's contributions; and</li> <li>• Whether the national interest in the foreign national's contributions is sufficiently urgent to warrant foregoing the labor certification process</li> </ul>	<p>allows waiver when "beneficial to the United States."</p> <ul style="list-style-type: none"> <li>• No showing of harm to the national interest.</li> <li>• No comparison against US. workers</li> </ul> <p>Significant quotes from <i>Dhanasar</i>:  "This more flexible test, which can be met in a range of ways...is meant to apply to a greater variety of individuals."    "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."    "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."</p>
B	An alien seeking waiver must present a benefit so great that it outweighs the national interest in the labor certification process			

<i>NYS DOT</i>		<i>Dhanasar</i>			Remarks
C	The alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.				
D	The alien's past record must justify projections of future benefit to the national interest - requiring the alien to show a past history of demonstrable achievement with some degree of influence on the field as a whole.				

The principal differences between the *NYS DOT* and the *Dhanasar* analyses are the lack of reference to any geographic scope and the apparent lack of comparison of the foreign national with a hypothetical, minimally qualified U.S. worker. The new framework also omits the word “intrinsic,” opting for the simpler “substantial merit.”

### Saying Goodbye to “Geographic in Scope”

Omitting any reference to the geographic scope of benefit should open the door for filings on behalf of individuals who may have an impact in their geographic area, but not nationwide. Teachers immediately come to mind. Although the *Dhanasar* case involved a researcher and educator in aerospace engineering at the post-secondary level, the analysis in *Dhanasar* could also apply to primary and secondary school teachers who are able to demonstrate that they are well-positioned to advance the proposed endeavor. For instance, under the right set of facts, an innovator and consultant in curriculum development for early childhood education might hold promise as a self-petitioner under the *Dhanasar* standard, even if his or her impact might be primarily local or regional. Under *Dhanasar*, whether an endeavor has national importance is determined by its potential prospective impact. Previous results and geographic reach are still factors which may be considered in determining the extent of that potential impact, but they are not the *only* factors.

### The Hypothetical, Minimally Qualified U.S. Worker

The third prong of the *NYS DOT* test required that the petitioner “persuasively demonstrate that the national interest would be adversely affected if a labor certification were required for the alien.” Stated another way, the petitioner “must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making available to U.S. workers the position sought by the alien.” In

*NYS DOT*, the AAO indicated that the foreign national “must present a national interest so great as to outweigh the national interest inherent in the labor certification process.” Finally, the petitioner 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.”

While recognizing the national interest in requiring job offers and labor certifications to protect the domestic labor supply, under the *Dhanasar* framework, the AAO no longer requires a comparison of the foreign national to a hypothetical, minimally qualified U.S. worker. Further, the AAO seems to move away from requiring any reference to an adverse impact on the employer if required to go through the labor certification process or of a comparison between the national interest in the labor certification process and the national interest in the foreign national’s request for a waiver.

### **What Does It Mean to Be Well Positioned to Advance the Endeavor?**

While the *Dhanasar* analysis does not require a comparison with the hypothetical, minimally qualified U.S. worker, the AAO does introduce the concept that the foreign national must be well positioned to advance the endeavor. The AAO considered such factors as:

- The individual’s education, skills, knowledge, and record of success in related or similar efforts
- A model or plan for future activities
- Progress towards achieving the proposed endeavor
- The interest of potential customers, users, investors, or other relevant entities or individuals

In cases decided immediately following *Dhanasar*, examples of circumstances that the AAO considered (some of which might be looked at as additional factors) include:

- project funding
- the individual’s leadership of a team working on a specific project
- reception of a project in the scientific community
- use of the individual’s research or achievement by other researchers in their own work
- the individual’s knowledge of and connectedness with public/private foundations and military/veterans affairs
- critical role in ongoing project
- peer and government praise for the individual’s work

As future cases unfold, additional factors will undoubtedly emerge. Some individuals may have a unique combination of skills or a multi-disciplinary academic background that uniquely prepare them for the proposed endeavor, an argument that was routinely dismissed under the

*NYSDOT* analysis as being a matter best addressed via the labor certification process. Other candidates may hold patents necessary for bringing products to production. The arguments and types of evidence presented under this prong of *Dhanasar* will largely be driven by case facts and creativity.

### **The Balancing Test**

The third prong of *Dhanasar* is a welcome replacement for the third prong of *NYSDOT*. Under *Dhanasar*, the petitioner must demonstrate that “it would be beneficial to the United States to waive the job offer and labor certification requirements.” The AAO noted that Congress sought to further the national interest by protecting the U.S. labor force but also created a national interest waiver because at times the national interest in protecting the U.S. labor force can be outweighed by other factors that are also in the national interest. The AAO in *Dhanasar* found that Congress entrusted the CIS with balancing these relevant interests. This is some of the language which has apparently opened the door for entrepreneurs - by their very nature, they would be unable to obtain either a job offer or labor certification. *NYSDOT* effectively froze them out of the NIW. In *Dhanasar*, the AAO specifically addressed the issue, saying that - as opposed to *NYDOT*, in which the test, “has proven particularly ill-suited for USCIS to evaluate petitions from self-employed individuals, such as entrepreneurs,” the third *Dhanasar* prong is intended to embrace them. In *Dhanasar*, the AAO articulated the following factors which the CIS might consider:

- Whether it would be impractical to secure a job offer
- Whether it would be impractical for a petitioner to obtain labor certification
- Whether, even assuming other qualified U.S. workers are available, the United States would still benefit from the foreign national’s contributions
- Whether the national interest in the foreign national’s contributions is sufficiently urgent to warrant forgoing the labor certification process

Additional factors, which seemed to be relevant in *NYSDOT* cases and should still have merit under the *Dhanasar* analysis include:

- An individual’s running out of nonimmigrant eligibility with insufficient time to secure labor certification
- An individual’s inability to secure H-1B under multiple years of the H-1B annual quota coupled with insufficient time to secure labor certification

### **Strike While the Iron is Hot**

In these early cases under *Dhanasar*, the AAO has focused little on the counterweight of the national interest in the labor certification process. In the 6 (of 8) cases in which the appeals were sustained, the AAO did not even mention the counter-concern of protecting the domestic labor supply. Instead, the decisions essentially relied upon the conclusions reached in evaluating prongs one and two to determine that, on balance, it would be in the national interest to waive the job offer and labor certification requirement. Should the CIS adjudicators begin to address this element in future decisions denying national interest

waiver petitions, presumably future AAO decisions will address the countervailing national interest in the labor certification process. Such future cases may offer greater insight into how the *Dhanasar* balancing test will ultimately be applied, and whether the beneficial impact of *Dhanasar* will become more limited over time. Practitioners and clients are advised to pursue cases now, before any future curtailment of the new standard. Now is the opportunity to help refine the law rather than become more limited by it.

### **Types of Evidence to Submit**

A review of the early *Dhanasar* cases indicates that the AAO is favorably disposed to weigh petitioner's statements and supporting letters heavily, and to consider almost any form of evidence and any argument presented. Practitioners should talk through the types of documentation with their clients. Find out what makes the client different, and then walk the client through the process of thinking of all the different ways that might be documented. Now is the time to be creative and submit anything that is probative and might be persuasive, but don't forget about the types of evidence that have been successful in the past - after all, this is still a national interest waiver.

Below is a non-exhaustive list of documentation that might be useful:

#### ***Dhanasar* First Prong**

- Petitioner/Beneficiary statements
- Expert opinion letters
- Colleague and peer support letters
- Prospective customer/client letters
- Evidence of grant funding
- Evidence of start-up funding
- Congressional Research Service reports on the importance of a particular industry or endeavor
- News articles
- Research Reports
- Financial/economic documentation
- Business plan

#### ***Dhanasar* Second Prong**

- Evidence of the individual's academic credentials, licenses, certifications, and any uniquely qualifying credentials
- Evidence of patents, publications, and industry recognition



- Evidence of grant funding or start-up funding currently available
- Evidence of product beta-testing success
- Evidence of market research showing need for type of product under development
- Evidence that the individual serves in a leading role with an industry leader or in a key role on a project
- Evidence that the individual developed the particular technology in question, or directly improved it
- Evidence that the individual has served as a peer reviewer, presented at conferences, or has been cited by peers who use his or her work in advancing their own research or endeavors
- Evidence of the individual's past success/accomplishments
- Letters (expert, peer/colleague, prospective customer/clients)

#### ***Dhanasar* Third Prong**

- Evidence from prongs one and two
- Evidence of little time remaining in H-1B status
- Evidence of difficulty in securing labor certification for the particular position
- Evidence of the time sensitivity of ongoing projects
- Evidence that the project and future opportunities may be limited for those who do not have LPR status
- Evidence of child age-out (may not carry the day, but it can't hurt to raise the issue)

#### **A Word of Hope and Caution**

Because a national interest waiver is still a national interest waiver, practitioners should not let their guard down. *Dhanasar* could be further refined in future decisions. No one wants their case to be the case that provides the AAO an opportunity to clarify or restrict the original *Dhanasar* decision, especially if that opportunity might have been prevented by presenting just a few more arguments or evidence. When the evidence and arguments are there, putting forward *NYS DOT*-worthy evidence is still a worthwhile strategy. That being said, in some cases - particularly those for researchers, scientists, self-employed individuals, and entrepreneurs - *Dhanasar* opens what was formerly a closed door to the National Interest Waiver.