

# Application of *Dhanasar* Standard in NIW Cases

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In late 2016, the AAO issued the precedent case *Matter of Dhanasar*, which brought about important changes to adjudication of National Interest Waivers (NIWs). Now two years after new standard was adopted, we reviewed more recent non-precedent AAO cases and offer some observations on adjudication trends under the *Dhanasar* framework. This practice pointer builds on previous reviews of AAO cases.<sup>1</sup>

There was general enthusiasm for *Dhanasar*, since it allowed cases with mainly local benefit, and cases based more on potential than past accomplishment. USCIS stopped processing NIWs for several months to re-train in early 2017, and processing times grew to almost a year. Those processing times have not gone down, meaning that we are just starting to have enough adjudications and appeals to see post-*Dhanasar* trends.

Positive changes suggested by *Dhanasar* include:

- *Dhanasar* moved away from the geographic importance of “national in scope”
- The case recognized that evidence of the potential to create significant economic effect is not always required and the endeavor’s merit may be established without immediate quantifiable economic impact

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<sup>1</sup> <https://cbkimmigration.com/wp-content/uploads/2017/07/NIWcases.pdf>, and D. Berger *et al.*, “The New NIW Standard Established by *Matter of Dhanasar*” (AILA Teleconference, Sept. 7, 2017).

- The case specifically noted that “endeavor that has significant potential to employ U.S. workers of has other substantial positive economic effects, particularly in the economically depressed area” can satisfy national importance prong.
- *Dhanasar* admitted, “past achievements are not necessarily the best or only predictor of future success.” It proposed a broader list of factors relevant to determine whether a foreign national is well positioned to advance proposed endeavor.
- The case underlined that the balancing prong should not require a showing of harm to the national interest or a comparison against U.S. workers in the petitioner’s field.

Overall, some changes brought by the *Dhanasar* framework successfully implemented. However, USCIS is still focusing mainly on past accomplishments of the applicant and at times using pre-*Dhanasar* RFE-templates. *Dhanasar* offers room for creativity, but the practitioner may need to clearly cite *Dhanasar* to try to educate and persuade the adjudicator. And litigation may be needed in federal court to clarify the *Dhanasar* guidelines if USCIS and AAO trends persists.

Federal litigation would be a topic for a separate practice advisory, but we understand that some NIW appeals to federal court have been unsuccessful for subject matter jurisdiction because NIWs are a discretionary remedy.<sup>2</sup> *Dhanasar* intended NIWs to be a “broad” remedy, and continued litigation maybe needed to achieve that goal.<sup>3</sup>

## THE DHANASAR CRITERIA

*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 (emphasis added):

1. 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 wide range of fields including business, entrepreneurialism, science, technology, culture, health, and education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.
2. 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 will consider factors including, but not limited to: individual’s education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress toward achieving the endeavor; and the interest of potential customers, users, investors or other relevant entities or individuals.
3. The third prong requires the petitioner to demonstrate that, on balance, it would be **beneficial to the U.S. to waive the job offer and labor certification requirements** of the EB-2 category. To meet this requirement, USCIS may

<sup>2</sup> 8 USC §1252 (a)(2)(B)(ii). Also see *Jiin Pharmacy v. Chertoff*, 447 F.3d 196 (3rd Cir. 2006).

<sup>3</sup> *Dhanasar* refers to the NIW as a “broad discretionary waiver provision to benefit the United States.” at 889, available at [www.justice.gov/eoir/page/file/920996/download](http://www.justice.gov/eoir/page/file/920996/download).

evaluate factors such as: whether in light of the nature of foreign national's qualifications or the proposed endeavor, it would be impractical to secure a job offer or obtain labor certification; the U.S. would still benefit from the foreign national's contributions even if qualified U.S. workers are otherwise available; and whether the national interest of the foreign national's contributions is sufficiently urgent to warrant foregoing the labor certification process.

Looking more carefully at each prong of *Dhanasar*:

### ***Substantial Merit and National Importance***

- None of the AAO cases showed that the endeavor failed to meet the *substantial merit* requirement. It is very broadly interpreted. There was only one exception where not enough details were provided. ( In Matter of M-S- applicant claimed she will carry out research in the field of petroleum engineering, but does not sufficiently explain what kind of research or support her claim by evidence). Practitioners report also RFEs where the officer has not understood the proposed endeavor and then issued a boilerplate request for evidence.
- To evaluate *national importance*, the Service looks at the potential impact of the specific endeavor. It is clear to see two different patterns - research almost always satisfies the national importance test, while other endeavors receive more scrutiny.

For research-based cases:

- USCIS is willing to look forward. Letters of support describing potential valuable impact/uses are usually enough. USCIS also considers the importance of the problem that the endeavor aims to solve. (Ex. Need for alternative cancer treatment described in media articles Matter C-A-H-; see also Matter T-H-C-)
- As a positive factor, USCIS also notes any evidence that the research results are disseminated to others in the field through conferences and publications.
- “Research” is specifically mentioned in *Dhanasar* as an example of where merit may be established without immediate quantifiable economic impact. Thus, USCIS indeed does not require evidence of the potential to create significant economic effect for research and is readily willing to look forward at research’s potential and indirect benefits.

For other endeavors, not connected with research (entrepreneurs, professional work):

- *Dhanasar* indeed moved away from the geographic importance of endeavor. The endeavor must impact the field or industry more broadly and go beyond creating value to one’s clients, customers, institution. (Ex. No national importance found for work of Special Education Teacher, Financial Engineer, Legal Analyst, Travel Consultant, Metallurgical Engineer, Geophysicist, Human Resource Manager)
- USCIS takes into consideration the importance of the specific undertaking as the analytical focus is shifted from the field to the applicant’s endeavor. (Ex. Matter of K-O-A-A- No national importance where entrepreneur intended to design and produce special bags, which, among other things, will help poor and refugees; Matter F-O-O- No national

importance in work of medical technologist for highly contagious diseases (Ebola) in one of the leading national facilities)

- For entrepreneurs, establishing/expanding business USCIS requires specific evidence of substantial economic benefit achieved due to the proposed endeavor. Unlike in case of research endeavors, USCIS will not look at potential or indirect effect of the endeavor. (Matter of A-R-A- Where detailed business plan for a growing personal electronic distribution company suggested positive economic metrics, benefit to national producers as well as to logistics partners throughout U.S., USCIS referenced absence of “specific” evidence of “substantial economic benefit” and found no national importance present. *Matter of K-O-A-A-* AAO reversed finding of national importance questioning specifics of business plan where petitioner proposed to employ homeless people in her endeavor and citing no evidence of specific location of the company, or specific number of homeless she intends to hire.)
- Job creation must be direct and substantial, in order to satisfy national importance criteria. (Eg., *Matter of D-F-D-M-* Financial engineer argued that he will work on specific large consulting projects which will create jobs in U.S. USCIS did not find national importance because “no sufficient evidence regarding any projected U.S. job creation attributable to his financial engineering work”; *Matter of A-R-A-* Direct creation of 17 jobs, according to business plan – not enough.)

### ***Well Positioned to Advance the Proposed Endeavor***

The second prong can be the most challenging prong to meet. A bit of a shift from pre-*Dhanasar* cases where the third prong was the hardest. Pre-*Dhanasar* framework analyzed applicants qualifications and did balancing within 3d criteria. Where *Dhanasar* made the second prong to focus on the applicant and then do the balancing in the 3d prong. Thus, the most challenging part still connected to applicant’s qualification.

Out of all the examples of evidence that can suggest that the petitioner is “well positioned to advance its endeavor,” USCIS focuses on the “record of success in related or similar effort,” “the interest of potential customers, users, investors or other relevant entities or individuals,” and to some extent on “progress toward achieving the endeavor.”

- *Record of success* is interpreted as something more than successful prior research and publication in the field. USCIS looks for evidence that prior research is frequently cited by others in the field or otherwise serve “as impetus for the progress in the field, that it has affected the [sic] industry, or that it has generated substantial positive discourse in the broader academic community.” (Matter of U-A-K-U-; Matter of S-A-K-; Matter of S-C-P-; Matter of M-K- and many others). Note that these phrases are common in RFEs and AAO decisions, but do not appear in *Dhanasar*. There may be room to push back or litigate.
- USCIS tends to look at the number of citations and require “comparative statistics” for other researchers in the same field. (Matter of S-C-P-; Matter of M-K-; Matter of D-I-R- found not record of success, where no comparative statistics for citations provided. Matter of U-H- Concluded that frequently cited word provides an example of the petitioner’s track record of successful research, Matter of Q-K-, Matter of S-M-M-S- petitioner’s work “has been cited at a rate which is high relative to others in his field”)

- “The interest of potential customers, users, investors or other relevant entities or individuals” is sufficient where there is a showing of funding, large number of customers using the product, specific description of how results of the research are implemented in the field by others. (Matter of E-J-C-D-H- , found substantial interest where letters from experts in the field offer specific examples of the widespread utilization of the Petitioner’s crop biostimulant products and letters where corroborated by purchase orders, invoices and sales data.) Again, this appears to go beyond Dhanasar by focusing too much on the past, rather than potential for the future.
- USCIS requires specific examples on how research has generated positive interest among relevant parties (Matter of S-A-K- Reference letter saying that petitioner’s “original research has produced new and important findings that are continuously having positive global implications throughout the field” is not enough without specific examples of such implications, Matter of S-B- )
- *Implementation of petitioner’s work is strong evidence of record of success and “substantial interest.”* However, USCIS is looking for widespread implementation. Only plans to implement, not enough. Implementation within one institution is not enough. (USCIS found sufficient interest by relevant parties in Matter of P-Y-G where applicant’s research results has been implemented commercially by a pharmaceutical company. Matter of N-P- USCIS found no substantial level of interest noting that “while letter writers compliment the Petitioner’s work and state that these improvements could be applied to other PIVU departments, none of them states that they are aware of their implementation at hospitals other than those that employed him.” Matter of D-I-R- no evidence that implementation go beyond 1 institution)
- Reference letters are helpful. Need not only praise and applaud to petitioner’s work, but explain how, specifically petitioner influenced the field including the author’s own work. Comparison to others in the field seems to work the best. (Matter of Q-K- letters of support called Petitioner’s research “pioneering” and discussed in details direct impact of the research on author’s work and of work of others in the field. Matter of S-M-M-S- reference letters called Petitioner “a leading researcher in the field” and references specific examples how his research directly impacted the practices of clinical doctors and other researchers. But no record of success found in Matter of S-A-K- where reference letters say that “original research has produced new and important findings that are continuously having positive global implications throughout the field” but does not offer specific examples of such implications)
- **Progress toward achieving the endeavor** is found where grant funding for the proposed research has been secured or job offer to continue the research extended. USCIS focuses less on this factor and only relied on it in combination with “substantial interest” and “record of success” factors.
- **A business plan** is helpful, but not without some documented past success or interest from customers and investors. This is true even for a professionally prepared business plan with financial projections and market analysis. If a business plan references funding, USCIS requires evidence of where funding will come from. (Matter of I-N-, USCIS did not find petitioner well positioned to create a drug discovery company based on a platform develop by him where he presented business plan, patent registration and letter from a prospective customer, but not evidence that company attracted investment. Matter of S-K- , Matter of I-N, Matter of G-P-C-F-K-)

- For entrepreneurs – evidence of success of this current endeavor required. Starting similar business in the past was not enough. (Matter of S-K- Launch of a similar business in a home country, coupled with a business plan for U.S. company was not found sufficient to satisfy the second prong )
- For a scientific researcher, the authors have found that copies of grant materials funding the proposed research, the grant’s Principal Investigator’s letter on the importance of the proposed research and international researcher’s role in it, and the beneficiary’s own personal statement of the proposed research could satisfy this prong.

In its application of the second prong concerning being “well-positioned to advance the proposed endeavor,” USCIS continues to look at persons past achievements (and compare to peers in the field) as a primary measure of future success. Effectively NYSDOT standard of “past history of demonstrable achievement with some degree of influence on the field as a whole” is still applied. This approach, clearly contradicts *Dhanasar*, which seek to misplace this standard and criticized it as a “yardstick” coming from footnote 6 of *NYSDOT*. *Dhanasar* expressly stated in its own footnote 6, “past achievements are not necessarily the best or only predictor of future success.” Practitioners filing cases based on future potential will need to clearly cite *Dhanasar* in an attempt to educate the officer, and may need to be ready to appeal or litigate.

In particular the following misapplication to *Dhanasar* standard, led it to roll back to using “yardstick”:

- Adjudicators of NIW cases focus almost exclusively on past-looking 2 criteria: “record of success in related or similar effort,” “the interest of potential customers, users, investors or other relevant entities or individuals,” and do not take into account other more forward looking criteria like “individual’s education, skills, knowledge” and model and plan for future activities”.
- Within those two criteria adjudicators add new requirements, never mentioned by *Dhanasar*, raising the bar very high. For example, in order to demonstrate “record of success” one must demonstrate, USCIS say, that his prior work influenced the broader field, was frequently cited or otherwise provide an impetus to the field. However, plain language of *Dhanasar* and common meaning of “record of success” does not suggest that high standard, but rather some accomplishments that suggest ability to carry out future endeavor.
- USCIS also imposes high level of interest of potential customers, users, investors or other relevant entities or individuals, which was never mentioned in *Dhanasar*. For example, by requiring not just statement of interest and high evaluation by experts in the field, but implementation; not just implementation within 1 institution, but within many institutions. Adjudicators often cite to interest not being “sufficient” even though list of factors, does not have word “sufficient.”

Recently, the Texas Service Center has been issuing broad brush RFEs providing little to no analysis of the evidence submitted. For researchers, in particular, the TSC states that not every researcher who has performed original research will be found to be well positioned to advance his or her proposed research. Quoting from one such RFE, “The petitioner has not shown her articles have been widely cited by other independent researchers in the field or otherwise served as an

impetus for progress in the field. It would be helpful to include discussion of the variance of publication and citation cycles among fields – what might be a high citation count in one field, might be quite low in another field.” Practitioners should request a qualitative review of the citations and point to other evidence of impact.  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4770502/pdf/AJA-18-296.pdf>;  
<http://www.sciencemag.org/features/2017/02/new-tools-measuring-academic-performance>

### **ON BALANCE, IT IS BENEFICIAL TO THE U.S. TO WAIVE A JOB OFFER AND LABOR CERTIFICATION REQUIREMENT**

At AAO review level where, prong 1 and 2 were satisfied, the third prong was also found to be met. The adjudicators tend to restate the “well positioned analysis coupled with national importance analysis.” No AAO case was denied solely on failure to meet 3d prong.

This, most likely, happens because higher scrutiny applied in the second prong. As a result, for all the applicant who was able to demonstrate they are well positioned to advance an endeavor of national importance, it is also true to say that the U.S. would still benefit from the foreign national's contributions even if qualified U.S. workers are otherwise available.