Finding the Right Fit for Superlative Individuals

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This practice pointer addresses how practitioners assess and weigh the procedural and substantive factors that push a case toward one or more of the employment-based immigrant visa categories that bypass alien labor certification, based on the foreign national's qualifications and the employer's needs. These categories include EB-1(1) Alien of Extraordinary Ability, EB-1(2) Outstanding Researcher, EB-2(1) National Interest Waiver (NIW), and, far less often, Schedule A, Group II, which is not tied to a single preference category. We do not attempt to chart all possible courses for narrowing the choices among these high-preference immigrant petition types, only to point out significant channel markers and some prominent hazards to navigation.

PROCEDURAL OPTIONS

A few procedural options may be clear from the outset. Extraordinary Ability and NIW are the only immigrant visa classifications that allow self-sponsorship, so those are the only choices where the employer is unable or unwilling to sponsor the foreign worker, whether due to institutional policy, an end to grant funding, or unfavorable circumstances regarding ability to pay. Extraordinary ability and NIW both require a minimum of three types of evidence of individual renown, though the types of permissible documentation differ. If swift approval is an urgent concern, then the NIW will not help, as it is ineligible for premium processing, and adjudications can take anywhere from four months to eleven months.

While Outstanding Researcher and Schedule A, Group II both require a job offer and a minimum of two types of evidence about the individual's renown, Outstanding Researchers must also have the normal terminal degree in their field, at least three years of full-time professional experience

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in the field, and a renewable contract for ongoing work on a tenure track or comparable level. Furthermore, if the sponsoring employer is not a university or research institution, then it must have a full-time research staff of three or more, and documented research accomplishments (*i.e.*, institutional renown), in order to sponsor an Outstanding Researcher. Schedule A, Group II requires only that the foreign worker have one year of full-time experience, a terminal degree is not required, and the employer need not have any specific staff size nor distinction for its own research, but must file a prevailing wage request, post a notice of job availability, and wait out a 30-day "quiet period" after the internal job posting before the immigrant petition can be filed.

Keep in mind that "Alien of Exceptional Ability" is a term of art with a forked tongue. It refers to two distinct regulatory standards tied to two separate processes: the definition of Alien of Exceptional Ability at 8 CFR §204.5(k)(3) can only be used as a threshold test for National Interest Waivers, and only some of them; while the more exacting definition of Exceptional Ability at 20 CFR §656.15(d) applies only to petitions under Schedule A, Group II.

There are a few noteworthy differences among substantive evidentiary criteria which sound similar, but have crucial distinctions.

- Contributions to the field of endeavor by a person with Extraordinary Ability must be both original and of major significance *in* the field. The contributions of an Outstanding Researcher must be merely original. Those seeking Exceptional Ability for NIW must have evidence of significant contributions *to* the field, while Exceptional Ability for Schedule A requires original and major contributions to the field.

- Memberships in professional associations only count toward Extraordinary Ability, Exceptional Ability for Schedule A, or Outstanding Researcher if the organizations require outstanding achievement of their members, typically where admission involves a nomination and peer voting process. Furthermore, memberships only count toward Outstanding Researcher and Exceptional Ability for Schedule A if the organization has international membership. Luckily, memberships in national pay-to-join professional societies meet the criterion toward Exceptional Ability for an NIW.

- Professional prizes and awards only count toward Outstanding Researcher and Exceptional Ability for Schedule A if the awards are internationally recognized, while lesser national prizes and awards count toward Extraordinary Ability, and even less-than-national awards may count toward Exceptional Ability for NIW.

The potency of *Kazarian*[1] as a precedent has not dimmed at all. Adjudicators are forbidden from making up new substantive or evidentiary standards[2], yet they do so constantly, despite frequent reminders. Per the Service policy memorandum implementing *Kazarian*,[3] this precedent case

[1] *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir.2010).
[2] *Id.* at 1121.
[3] USCIS Memorandum, "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" (Dec. 22, 2010), AILA Doc. No. 11020231.

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applies to Extraordinary Ability, Outstanding Researcher, and Exceptional Ability petitions.

WINNER TAKES ALL

While fairly generous about prizes and awards in the context of O-1 adjudications, in the immigrant visa context, USCIS often will not even consider group or team awards, awards to the employer, or nominations for internationally-prominent awards (even Emmy or Grammy nominations). Awards must be actually won by and awarded to the named individual to count at all. This all-or-nothing approach is unrealistic and violates the piecemeal, cumulative spirit of the regulations, but this bit of fallout from *Kazarian* has been incorporated into in the *Adjudicator's Field Manual* (AFM) and is the prevalent attitude among adjudicators.

PLURAL-ISM

With respect to prizes, awards, and membership in professional associations, USCIS has a deep formalistic obsession with plurals. Service guidance and Administrative Appeals Office (AAO) decisions go in both directions at once, so tread with caution. AFM chapter 22.2(i)(1)(C) says, "although some items in the regulatory lists occasionally use plurals, it is entirely possible that the presentation of a single piece of evidence in that category *may* be sufficient…" The EB-1(1) RFE template no longer indicates that a plural in the regulatory criterion requires the petitioner to submit more than one piece of that type of evidence, and in liaison meetings U.S. Citizenship and Immigration Services (USCIS) has said instances of such RFE language should be reported to SCOPSRFE@dhs.gov, but a couple of AAO decisions from January 2014, and some that follow, take the opposite tack. All of the relevant cases are called, unhelpfully, "*Matter of Name Not Provided.*" Then again, sometimes the AAO contradicts itself and says that a single piece of evidence under the lesser awards or membership criteria may suffice.[4]

THE NEW NIW LANDSCAPE: *MATTER OF DHANASAR*

We now face a new analytical framework for NIWs, set forth in the December 27, 2016, precedent case *Matter of Dhanasar*,[5] which vacated the prior longstanding precedent *Matter of NYSDOT*,[6] replacing it with another three-pronged test.

The old three-pronged test under *NYSDOT* required a NIW petition to show, after meeting either regulatory threshold: 1) that the area of employment had substantial intrinsic merit; 2) that the benefit of the foreign national's proposed services was national in scope; and 3) that the national interests of the United States would be adversely affected by requiring labor certification.

New Three-Pronged Test Set Forth

Under the new test set forth in *Dhanasar*, once either the Advanced Degree Professional or Exceptional Ability threshold has been met, an NIW petition must show 1) that the proposed

[4] See "USCIS Answers Questions About Practicing Before the AAO" (Sept. 11, 2015), AILA Doc. No. 16020932.
[5] *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).
[6] *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Acting Assoc. Comm'r, Programs, 1998)

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endeavor has substantial merit and national importance; 2) that the foreign national is well-positioned to advance that endeavor; and 3) that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.

AAO Reasoning for New Test

The reasoning behind the AAO's reshaping of the three-pronged test was their apparent frustration with the troubling nature of *NYSDOT*, particularly its unworkable third prong. The *Dhanasar* decision correctly identified the infamous Footnote 6 in *NYSDOT,* with its "impact on the field as a whole" requirement, as the source of problematic overreach in adjudications, including the invented requirement of "unusual significance" that was applied to Dr. Dhanasar himself, running afoul of the *Kazarian* prohibition on making up new and restrictive rules.

The Three-Pronged Test

In *Dhanasar*, the AAO broke down the prongs of *NYSDOT,* picking apart how they had been applied by the Service. In Prong 1, "substantial intrinsic merit," they found that "intrinsic" really had not added anything to the adjudicative framework, but they retained the idea that a petitioner must show some potential lasting good which would inure to the country as the fruit of their work, shifting away from inherent worthiness of the field and increasing focus on the value of the individual's efforts in that field. Prong 2 of NYSDOT, often interpreted in a literal-minded, geographic fashion, especially outside the realm of heavily-cited peer-reviewed research, meant an NIW petition had to show how the potential benefit would be distributed around the United States. One great result of *Dhanasar,* aside from collapsing the "national" aspect into the first prong, is its rephrasing of "national in scope" to "national importance," accompanied by a blunt rejection of measuring geographic reach in favor of a broader, more conceptual inquiry. The new "national importance" test moves away from the map altogether, and much more clearly asks us to examine whether the petitioner's work establishes new methods, benchmarks, best practices, tools, technologies or other markers of influence on the field. Other long-overdue indicators of a return to sanity include *Dhanasar*'s confirmation that endeavors which yield benefits in terms of greater cultural, scholarly or scientific understanding, but do not "translate into economic benefit for the United States,"[7] can be deemed to meet the new test under prong 1, as can discoveries which are too new to have led to commercial applications or broad changes in scientific practice, reaffirming the value of potential impact yet to be realized.

Prong 2

Prong 2 of *Dhanasar* shifts attention away from the field and prospective benefit of the endeavor to an assessment of how well the individual is positioned to advance the proposed endeavor, based on his or her education, skills, knowledge, past experience relevant to the proposed endeavor, business model or detailed plan for the proposed endeavor, and indicators of interest from prospective investors, users, or customers. Mercifully, the AAO noted, "We recognize that forecasting feasibility and 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

[7] *Dhanasar*, 26 I&N Dec. at 889.

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petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed."[8]

Dhanasar offers a welcome reiteration of the "preponderance of the evidence" standard of proof as applicable to NIW petitions, noting that the preponderance standard should be applied to both quantitative and qualitative factors including relevance, probative value, and credibility.[9]

AAO Describes Flawed Logic of *NYSDOT*

The real surprise in *Dhanasar* is the gusto with which the AAO identified, dissected and laid bare the flawed logic in four separate lines of inquiry in the third prong of *NYSDOT.* They noted that petitioners under *NYSDOT* had to show-1) that the national interest would be adversely affected if labor certification were required; 2) that the prospective benefit to the US from their services outweighed the inherent (and inherently unquantifiable) benefit of the labor certification process; 3) that they would serve the national interest to a substantially greater extent than a US worker having the same minimum qualifications; and 4) that the petitioner's past record of achievement justified a projection of future benefit to the national interest, and approval of this last balancing test was in turn contingent on satisfying the Footnote 6 additional test of proving "influence on the field as a whole."

Noting that this convoluted set of tests required the petitioner to prove a negative, to measure the immeasurable, to measure the very labor market the NIW purports to avoid, and to compare the prospective benefit of the foreign worker's endeavors to that of a fictional US worker holding the same minimum qualifications, the AAO also made the paradigm-shifting observation that "there are some talented individuals for whom past achievements are not necessarily the best or only predictor of future success."[10] This provides welcome clarification that an NIW petition may offer both backward-looking evidence of accomplishments to date and forward-looking evidence of impact of the proposed endeavor, but that those past accomplishments may not be indicative of the prospective benefit, particularly with respect to entrepreneurs implementing a novel business idea.

What Has Really Changed in Prong 3?

Before we break out the party hats, how much has really changed with respect to prong 3? We do not know, since there are as yet no NIW cases approved under the new framework. It is still hard to tell how much easier it will be to establish that it is "in the national interest" to waive labor certification, or whether practitioners are still going to need apples-to-oranges arguments showing that a labor certification requirement might actively hinder the worker's endeavors in which there is a demonstrable national interest. Under *NYSDOT,* this was the prevailing model. It was easiest to demonstrate with respect to individuals working in hybrid disciplines where labor certification might be denied due to combination of occupations or duties (e.g., artist/curator; coach/commentator), or where labor certification was impossible for structural reasons relating to the nature of the employment, such as work fundamentally involving inter-organizational collaborations; an evolving constellation of freelance, self-directed projects; serial

[8] Id. at 890.
[9] Id. at 890.
[10] Id at 887–88.

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short spates of full-time employment with a succession of unrelated entities (e.g., film directors, incubator-CEOs) . Structural incompatibility with the 40-hour work week, long-term single employer scenario was and probably still is quite helpful with 3rd-prong eligibility, but it should not be the dispositive factor. Does the 3rd prong of *Dhanasar* really get us out of this hole where foreign workers with linear full-time jobs in a well-recognized field will still inherently have a harder time qualifying for NIW? Time will tell.

As of this writing, we are stuck in the realm of unsupported conjecture as to how the *Dhanasar* analytical framework will be applied by USCIS. Since NIW petitions are ineligible for Premium processing, so even the luckiest and speediest are adjudicated in about four months, and for those that are denied, an appeal to the AAO takes another 11 to 24 months, there are as yet no published decisions to illustrate how USCIS may interpret and apply the three prongs of *Dhanasar*.

CONCLUSION

For all of these high-preference categories, a successful case depends heavily on a strong, cohesive narrative, framed in language suitable for a lay reader. This is the heart of the attorney's role: to understand the petitioner's story and tell it as briefly as possible in a compelling way that a non-expert can comprehend, in a way that addresses the applicable legal standard without merely parroting the standard. The narrative is not confined to the support letter or attorney cover letter; it is a unifying thread that runs throughout the presentation, including the forms, exhibit list, expert testimonial and reference letters, any publications, patents and other evidence.

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