U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32460311

Date: AUG. 26, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a pilot, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish eligibility for the requested EB-2 immigrant classification as an individual of exceptional ability. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To qualify for the underlying EB-2 visa classification, a petitioner must establish they are an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business.[1] Section 203(b)(2)(A) of the Act.

Exceptional ability means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). A petitioner must initially submit documentation that satisfies at least three of six categories of evidence. 8 C.F.R. § 204.5(k)(3)(ii)(A)-(F).[2] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[3] If a petitioner does so, we will then conduct a final merits determination to decide whether the evidence in its totality shows that they are recognized as having the requisite degree of expertise and will

[1] As the Petitioner does not claim he is an advanced degree professional, we will not address this issue further.

[2] If these types of evidence do not readily apply to the individual's occupation, a petitioner may submit comparable evidence to establish their eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

If a petitioner establishes eligibility for the underlying EB-2 classification, they must then demonstrate that they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. While neither the statute nor the pertinent regulations define the term "national interest," *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016), provides the framework for adjudicating national interest waiver petitions. *Dhanasar* states that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[4] grant a national interest waiver if the petitioner demonstrates that:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

Id.

II. ANALYSIS

A. Exceptional Ability

The Director determined the Petitioner met three of the six claimed categories of evidence at 8 C.F.R. § 204.5(k)(3)(ii), including: official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A), ten years of full-time experience at 8 C.F.R. § 204.5(k)(3)(ii)(B), and a license to practice the profession at 8 C.F.R. § 204.5(k)(3)(ii)(C). Additionally, although the Director did not address the remaining three evidentiary criteria at 8 C.F.R. § 204.5(k)(3)(ii) in their decision, they previously determined in the request for evidence (RFE) that the Petitioner met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) relating to membership in professional associations. After evaluating the totality of the evidence in the context of the final merits determination, the Director then concluded that the Petitioner did not establish that he had a degree of expertise significantly above that ordinarily encountered in his field and therefore was not an individual of exceptional ability.

On appeal, the Petitioner asserts that the decision runs counter to the evidence in the record and generally claims the Director erred in their consideration of the evidence. As an example of this, he points to the Director's determination that, because he met the first three of the six evidentiary criteria, an analysis as to whether he satisfied the remaining criteria would serve no meaningful purpose. This, according to the Petitioner, shows the Director ignored the evidence submitted under the three remaining evidentiary categories. We disagree. While conducting their analysis of the totality of the evidence in the final merits determination, the Director did acknowledge the evidence submitted for the remaining criteria, including the expert opinion letters and letters of recommendation, and determined that this evidence did not establish the Petitioner possessed a degree of expertise

[4] *See Flores v. Garland*, 72 F.4th 85, 88 (5th Cir. 2023) (joining the Ninth, Eleventh, and D.C. Circuit Courts (and Third in an unpublished decision) in concluding that USCIS' decision to grant or deny a national interest waiver is discretionary in nature).

significantly above that ordinarily encountered in the field. As such, we are not persuaded by the Petitioner's assertion that the Director failed to properly consider the evidence.

As a preliminary matter, although we agree with the Director's ultimate conclusion that the record does not establish the Petitioner is an individual of exceptional ability, upon de novo review, we withdraw the Director's determination that the Petitioner met the criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(C) and (E), relating to a license to practice the profession and membership in professional associations.

Profession is defined as one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.[5] 8 C.F.R. § 204.5(k)(2).

The Director determined the Petitioner satisfied the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C) based on his Colombian pilot license. The plain language of the regulation requires the Petitioner to provide "a *license to practice the profession* or a certification for a particular profession or occupation." 8 C.F.R. § 204.5(k)(3)(ii)(C) [emphasis added]. While we acknowledge that the Petitioner also provided his Colombian airline transport pilot and instructor in aeronautical specialties licenses, he has not shown that any of these are licenses to practice a "profession" as defined by the regulatory definition at 8 C.F.R. § 204.5(k)(2). Without more, we cannot conclude that the record establishes he satisfies the plain language of this criterion and withdraw the Director's determination to the contrary.

Similarly, we also disagree with the Director's determination that the Petitioner met the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E)[6] based on his memberships in the National Association of Flight Instructors, the Aircraft Owners and Pilot Association, and the Latino Pilots Association. Without additional evidence, such as their membership requirements, the Petitioner has not established that any of these qualify as "professional associations" as required by the plain language of this criterion and consistent with the regulatory definition at 8 C.F.R. § 204.5(k)(2). As such, we do not agree with the Director that the Petitioner has established his membership in "professional associations," and we withdraw the Director's determination to the contrary.

Even though the Petitioner has not satisfied three of the six regulatory criteria, we nonetheless will evaluate the totality of the evidence in the context of the final merits determination. The record contains copies of the Petitioner's commercial pilot title diploma issued from the [redacted] in 2001, along with the academic record associated with this diploma, and a copy of his outstanding student certificate. Additionally, the Petititioner provided his aeronautical specialties instructor course certificate and diploma earned in 2002 also from the [redacted] And the Petitioner submitted evidence of multiple training certificates he obtained throughout his career, including evidence of his completion of the Airbus A320 Family Aircraft Technical Flight Familiarisation course in 2019.

[5] Profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries. Section 101(a)(32) of the Act.

[6] As noted, while the Director did not discuss this criterion in their decision, the Director previously indicated the Petitioner met this criterion in their RFE.

While the Petitioner claims the Director erred in considering his expertise in relation to other airline pilots, asserting instead that he is a "test/technical pilot and ground instructor," which is a "very important distinction," the Petitioner did not explain how the record establishes his expertise is significantly above that ordinarily encountered among test/technical pilot and ground instructors. Specifically, the Petitioner asserts that the Director erred in not considering the significance of his completion of the Airbus A320 Family Technical Flight Familiarisation course in 2019, but has not shown how completing this course establishes he has expertise significantly above that ordinarily encountered in his field. He did not, for example, compare the knowledge gained in this five-day course to the overall knowledge of other test/technical pilots in the field. Notably, the record contains articles discussing the specialized role of test/technical pilots, indicating that several test pilots in the United States graduate from U.S. military schools or other schools dedicated to test pilot training. Yet the Petitioner did not explain how his expertise is significantly above other test/technical pilots, especially given that he does not have the credentials that are discussed in the articles provided. The evidence in the record describing the course acknowledges that "[t]echnical flights require knowledge, skills [,] and attitudes which are different from that required for normal revenue flights," and that the course allows airlines to "fulfill [the] need for a specific technical flight training." The record also contains a summary of the contents of the training course indicating that the course covers the Airbus's A320 family, A330, A340 and A380, and includes 3 phases: ground school, full flight stimulator training, and actual aircraft flight training ultimately culminating in a four-hour flight test. But, while the knowledge gained from this course may be "different" from the expertise normally encountered among pilots, the evidence does not establish this knowledge is *significantly* above that ordinarily encountered in the field. And while the Petititioner repeatedly relies on completion of this course to establish his eligibility, we note that the possession of a degree, diploma or certificate alone is not sufficient to establish exceptional ability.[7]

The Petitioner also offered documentation of his nearly 20 years of employment history in such roles as a pilot in command, a pilot performing technical flight familiarization flights, a copilot, a ground and static simulator instructor, and an operations department assistant. But the Petitioner did not, for example, demonstrate how this experience related to other test/technical pilots.

The Petitioner also submitted evidence of his membership in the National Association of Flight Instructors, the Aircraft Owners and Pilot Association, and the Latino Pilots Association, but the record does not demonstrate that these associations have any membership requirements above those commonly found for associations for pilots working in the field.

Similarly, while the Petitioner submitted his Colombian pilot, airline transport pilot, and instructor in aeronautical specialties licenses, he did not establish how the possession of these licenses provide a degree of expertise significantly above that ordinarily encountered in his field. For example, the Petitioner did not explain or show how his licenses differentiate him from the average licensed pilot.

Finally, the Petitioner provided employment verification letters, letters of recommendation, and expert opinion letters attesting to his experience and background; however, these letters do not establish he has expertise significantly above that ordinarily encountered in the field. On appeal, the Petitioner asserts that the Director erred in their analysis of these letters by ignoring the authors' use of such

[7] *See* INA 203(b)(2)(c); *See also* 6 *USCIS Policy Manual*, *supra*, F.5(B)(2).

phrases as "expertise and skill," "exhaustive training," "specialized training," "exhaustive education" and "much more is demanded: scientific and engineering knowledge." But these assertions only establish that the letters discuss his expertise and background, they do not establish the Petitioner has expertise *significantly* above that ordinarily encountered.

Moreover, the letters primarily focus on the qualifications of test/technical pilots, rather than explaining how the Petitioner has developed expertise significantly above others in the field. For example, Mr. A-A-T-, Senior Flight Test Engineer and Former Head of Production Fight Test for [redacted] France discusses at length the requirements of a test/technical pilot, stating these pilots "must have more knowledge of the ever-evolving technology of the aircraft. . . a deep knowledge and understanding of the technicality of the constantly advance technology of the aircraft and its system," yet the letter does not discuss the Petitioner's specific knowledge, nor elaborate on how it is significantly above that ordinarily encountered in his field. Similarly, Capt. M- M-, Director of Production Flight Test at [redacted] states the Petitioner's "performance during this training met the high standard expected of experienced airline pilots chosen to perform these tyles of technical flights," yet this does not establish his expertise is significantly above those in the field. The lack of detailed information does not place the Petitioner at a level of expertise significantly above that ordinarily encountered in his field.

The totality of the evidence does not demonstrate that the Petitioner has obtained a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business, and therefore, he has not established he is an individual of exceptional ability as defined at 8 C.F.R. § 204.5(k)(2).[8]

B. National Interest Waiver

Because the Petitioner has not established that he is eligible for the EB-2 classification, and this issue is dispositive, we decline to reach and hereby reserve our determination as to whether he is eligible for a national interest waiver. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not demonstrated that he qualifies as an individual of exceptional ability under section 203(b)(2)(A) of the Act. Accordingly, the Petitioner has not established eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

[8] *See also* 6 *USCIS Policy Manual*, *supra*, F.5(B)(2).