U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 31124983

Date: MAY 30, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, a commercial pilot, seeks classification under the employment-based, second-preference (EB-2) immigrant visa category and a waiver of the category's job-offer requirement. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) has discretion to excuse job offers in this category – and thus related requirements for certifications from the U.S. Department of Labor (DOL) – if petitioners demonstrate that waivers of these U.S.-worker protections would be "in the national interest." *Id.*; *see also Brasil v. Sec'y of Dep't of Homeland Sec.*, 28 F.4th 1189, 1193 (11th Cir. 2022) (holding that decisions on national interest waiver requests are discretionary).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate eligibility for the requested EB-2 immigrant visa category. On appeal, the Petitioner contends that the Director erred in finding insufficient evidence of his qualifications as a noncitizen of "exceptional ability." *See* section 203(b)(2)(A) of the Act.

The Petitioner bears the burden of demonstrating eligibility for the benefit request by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we affirm the Director's decision that the Petitioner did not meet the initial evidentiary criteria for EB-2 eligibility as a noncitizen of exceptional ability. We will therefore dismiss the appeal.

I. LAW

To establish eligibility for national interest waivers, petitioners must first demonstrate their qualifications for the EB-2 category, either as members of the professions holding "advanced degrees" or noncitizens of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(A) of the Act. To protect the jobs of U.S. workers, this immigrant visa category usually requires prospective employers to offer noncitizens jobs and to obtain DOL certifications to permanently employ them in the country. *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D). Petitioners may avoid the job offer/labor certification requirements by demonstrating that waivers of the U.S.-worker protections would be in the national interest. Section 203(b)(2)(B)(i) of the Act.

Neither the Act nor regulations define the term "national interest." So, to adjudicate these waiver requests, we have established a framework. If otherwise qualified as advanced degree professionals or noncitizens of exceptional ability, petitioners may warrant waivers of the job-offer/labor certification requirements by demonstrating that:

- Their proposed U.S. work has "substantial merit" and "national importance;"
- They are "well positioned" to advance their intended endeavors; and
- On balance, waivers of the job-offer/labor certification requirements would benefit the United States.

Matter of Dhanasar, 26 I&N Dec. 884, 889-91 (AAO 2016).

II. ANALYSIS

A. The Proposed Endeavor

The record shows that, before filing this petition, the Petitioner, a Venezuelan native and citizen, worked in various locations around the world for about eight years as an airplane captain and pilot. He has accumulated more than 3,000 flight hours, traveling to destinations across the globe, including in South and Central America, Europe, Asia, and the United States.

The Petitioner stated that, in the United States:

> I intend to continue my expertise and knowledge working in the aviation field . . ., where I can help fill the many and alarming number of Pilot positions in the U.S., as well as train others in the field, whether experienced pilots, or new professionals entering the field.

B. Exceptional Ability

The Petitioner asserts EB-2 eligibility as a noncitizen of exceptional ability.[1] To demonstrate his claimed qualifications, he must meet at least three of six initial evidentiary requirements. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A-F).[2] If he meets at least three criteria, USCIS must then make a final merits determination as to whether the evidence as a whole demonstrates his possession of "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." *See* 8 C.F.R. § 204.5(k)(2) (defining the term "exceptional ability in the sciences, arts, or business"); *see generally* 6 *USCIS Policy Manual* F.(5)(B), www.uscis.gov/policy-manual.

On appeal, the Petitioner concedes that he lacks evidence of at least 10 years of full-time experience as a commercial pilot before the petition's filing. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B); *see also* 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to establish eligibility "at the time of filing the benefit request").

[1] The Petitioner does not claim EB-2 eligibility as an advanced degree professional. *See* section 203(b)(2)(A) of the Act. Thus, we deem that claim to be "waived." *See United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020) (stating that, generally, "we rely on the parties to frame the issues").

[2] If the listed requirements "do not readily apply" to the Petitioner's occupation, he may submit "comparable evidence" to establish eligibility. *See* 8 C.F.R. § 204.5(k)(3)(iii).

We will therefore review whether he satisfied at least three of the five remaining evidentiary requirements at 8 C.F.R. § 204.5(k)(3)(ii). A petitioner must objectively demonstrate by a preponderance of the evidence that they meet evidentiary criteria. *See generally* 6 *USCIS Policy Manual* F.(5)(B)(2).

1. Academic Record

To meet this criterion, a petitioner must submit "[a]n official academic record showing that the [noncitizen] has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability." 8 C.F.R. § 204.5(k)(3)(ii)(A). The Petitioner's filings include copies of certificates and other documentary evidence that he completed several training programs at flight academies.

The Director's request for additional evidence (RFE) states that the Petitioner met the criterion. But the final decision finds his evidence insufficient. The decision states:

> [T]he petitioner has not demonstrated that he is above others in the field; qualification possessed by most members of a given field cannot demonstrate a degree of expertise significantly above the ordinarily encountered. The mere possession of a degree, diploma, certificate or similar award from a college, university school, or other institution of learning is not by itself considered sufficient evidence of exceptional ability. [Section 203(b)(2)(C) of the Act].

The Director erred in adjudicating this criterion. When determining whether materials meet an initial evidentiary requirement, USCIS considers whether the evidence satisfies the regulation's plain language. Until a petitioner satisfies at least three evidentiary criteria and the Agency conducts a final merits determination, USCIS generally does not consider whether evidence demonstrates exceptional ability.[3] "While officers should consider the quality and caliber of the evidence to determine whether a particular regulatory criterion has been met, officers should not yet make a determination regarding whether or not the [petitioner] qualifies for exceptional ability in this first step." 6 *USCIS Policy Manual* F.(5)(B)(2).

Here, rather than considering whether the Petitioner's flight academy records met the plain language of 8 C.F.R. § 204.5(k)(3)(ii)(A), the Director determined that they did not demonstrate exceptional ability. The Director's exceptional ability finding at this stage of the proceedings contradicts USCIS policy. We will therefore withdraw the finding.

Under de novo review, we find that the Petitioner has met this criterion. Consistent with 8 C.F.R. § 204.5(k)(3)(ii)(A)'s plain language, he has submitted copies of flight academy certificates in his area of claimed exceptional ability. The regulation indicates that any "school, or other institution of learning" may issue qualifying certificates. We therefore find that, under the regulation, flight academies qualify as schools or other institutions of learning in the aviation field. Thus, contrary to the Director's decision, the Petitioner has met this evidentiary criterion.

[3] The evidentiary requirement at 8 C.F.R. § 204.5(k)(3)(ii)(D) is an exception. That regulation expressly states that evidence of salary or other remuneration for services must "demonstrate[] exceptional ability."

2. License

This criterion requires submission of "[a] license to practice the profession or certification for a particular profession or occupation." 8 C.F.R. § 204.5(k)(3)(ii)(C). The record supports the Director's finding that the Petitioner met this requirement. He submitted a copy of his U.S. airline transport pilot's license from the Federal Aviation Administration (FAA).

3. Salary or Remuneration

To meet this requirement, a petitioner must submit evidence that they have "commanded a salary, or other remuneration for services, which demonstrates exceptional ability." 8 C.F.R. § 204.5(k)(3)(D). The Petitioner submitted copies of invoices he purportedly sent to an aviation company that had contracted his services in 2022. The invoices reflect billed wages of $9,000 in January 2022 and February 2022, and $10,000 in April 2022. In response to the Director's RFE, the Petitioner also submitted pages from DOL's *Occupational Outlook Handbook*, stating that the median annual wage for U.S. commercial pilots in 2021 was $99,640. The Petitioner also provided copies of some of his bank accountant statements in 2022. The bank statements show that the aviation company paid him $14,500 in January 2022, $16,000 in March 2022, and $17,071 in June 2022.

The differing salary and payment amounts reflected on the invoices and in the Petitioner's bank statements indicate that he did not receive uniform monthly wages. The evidence does not specify how many hours he worked during the relevant periods or the basis for the differing payment amounts. A letter indicates the aviation company's location outside the United States. Thus, the record also does not indicate whether the payments reflect gross wages or net wages after the deduction of local taxes.

We agree with the Director that the Petitioner has not established that his wages demonstrate exceptional ability. He has not demonstrated that he sent the invoices to the aviation company or that the company paid them. The invoices alone therefore do not establish his wages. Examining only the payment amounts received in January 2022, March 2022, and June 2022, the evidence shows the Petitioner's receipt of average monthly wages of $15,857 ($47,571/3), or $190,284 a year, significantly above the median annual wage of $99,640. But the Petitioner omitted his bank statements for the consecutive months from January 2022 to June 2022. Thus, the record does not indicate whether he received wages or worked for the aviation company in the other three months during that period: February 2022; April 2022; and May 2022. If the Petitioner did not receive any payments for work in the other months, then his average monthly salary would be only $7,928.50 a month ($47,571/6), or $95,142 a year, less than the median annual wage. Also, on the Form I-140, Immigrant Petition for Alien Workers, the Petitioner stated his annual wage as the exact median amount of $99,640. Further, the record does not indicate whether the payments to the Petitioner reflect wages only. His invoices purportedly billed the company for wages and per diem food expenses. Thus, the payments may include non-wage expense reimbursements.

The Petitioner has not provided enough information for us to determine whether, from January 2022 through June 2022, he received more or less than the median annual wage for his occupation. Also, because the record indicates his employer's location outside the United States, the Petitioner has not established U.S. wage information as the most appropriate to which to compare his foreign wages.

Thus, contrary to 8 C.F.R. § 204.5(k)(3)(D), he has not established that his salary or other remuneration demonstrates exceptional ability.

4. Membership in Professional Associations

This criterion requires "[e]vidence of membership in professional associations." 8 C.F.R. § 204.5(k)(3)(ii)(E). The Director found that proof of the Petitioner's membership in the Aircraft Owners and Pilots Association (AOPA) met the requirement.

For 8 C.F.R. § 204.5(k), however, the term "profession" means "one of the occupations listed in section 101(a)(32) of the Act[, 8 U.S.C. 1101(a)(32),] as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k)(2). Thus, the phrase "professional associations" in 8 C.F.R. § 204.5(k)(3)(ii)(E) refers to associations that require their members to have at least baccalaureate degrees.

The Petitioner did not submit evidence that the AOPA requires its members to have bachelor's degrees or that he has a baccalaureate. Thus, contrary to the Director's finding, the Petitioner has not submitted evidence of his membership in a professional association.

5. Achievements and Significant Contributions

To meet this requirement, a petitioner must submit "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." 8 C.F.R. § 204.5(k)(3)(ii)(F). The Petitioner submitted a printout listing him on an "Achievements Roster" for an FAA pilot proficiency program. He also provided recommendation letters from other pilots and an aviation executive.

The FAA "Achievements Roster" printout shows that a governmental entity recognized the Petitioner for achievements in the pilot proficiency program, which obviously relates to the aviation field. But this regulatory criterion specifically requires "evidence of recognition for achievements *and* significant contributions to the industry or field." 8 C.F.R. § 204.5(k)(3)(ii)(F) (emphasis added); *see also Matter of Echeverria*, 25 I&N Dec. 512, 518 (BIA 2011) (holding that use of the conjunction "and" in a series of regulatory requirements "constitutes a clear indication that" one "must satisfy each of the . . . discrete eligibility requirements") The Petitioner has not submitted sufficient evidence to show that his achievements in the FAA program constitute "significant contributions" to the field or that he otherwise received recognition for significant contributions to the field. Many of the recommendation letters praise the Petitioner as an "excellent professional." But none recognize him or state his recognition for significant contributions to the aviation field. One letter states that he has a "track record of distinguished achievements." But the letter does not detail them or explain their significance to the field.

The Petitioner met less than three of the six initial evidentiary requirements. Thus, he cannot demonstrate EB-2 eligibility as a noncitizen of exception ability. *See* 8 C.F.R. § 204.5(k)(3)(ii). We will therefore affirm the petition's denial.

C. The Remaining Issues

Our conclusion that the Petitioner has not met the initial evidentiary requirements for EB-2 eligibility as a noncitizen of exceptional ability resolves this appeal. Thus, we decline to reach and hereby reserve his appellate arguments regarding a final merits determination on his claimed eligibility as a noncitizen of exceptional ability and the merits of his national interest waiver request. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies need not make "purely advisory findings" on issues unnecessary to their ultimate decisions); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternate issues on appeal where an applicant did not otherwise qualify for relief).

III. CONCLUSION

The Petitioner has not met the initial evidentiary criteria for EB-2 classification as a noncitizen of exceptional ability. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.