U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34832406

Date: NOV. 01, 2024

Appeal of Texas Service Center Decision

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

The Petitioner, an airline 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 Petitioner's Form I-140, Immigrant Petition for Alien Workers, concluding that the Petitioner did not establish his underlying eligibility for EB-2 classification as an individual of exceptional ability, and furthermore that he did not establish he merited a national interest waiver. 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.

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. 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).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] 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 substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2)(A) of the Act.

[1] 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).

[2] 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.

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. *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,[3] 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.

The Director found that the Petitioner met four of the six categories of initial evidence for establishing exceptional ability.[4] Specifically, the Director indicated the Petitioner satisfied the following criteria: official academic record at 8 C.F.R. § 204.5(k)(3)(ii)(A); ten years of experience at 8 C.F.R. § 204.5(k)(3)(ii)(B); membership in professional associations at 8 C.F.R. § 204.5(k)(3)(ii)(E); and recognition for achievements and significant contributions to the industry at 8 C.F.R. § 204.5(k)(3)(ii)(F). Because the Petitioner fulfilled at least three criteria as required, the Director conducted a final merits determination, ultimately concluding the Petitioner did not possess a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business to establish that he is an individual of exceptional ability.

On appeal, the Petitioner claims he also meets the criteria for salary at 8 C.F.R. § 204.5(k)(3)(ii)(D) and, with regard to the final merits determination, that the evidence in its totality shows he is an individual of exceptional ability. Because the Director concluded the Petitioner met at least three criteria, we need not make a determination on the Petitioner's other claimed criteria. However, we will evaluate the totality of the evidence in the context of the final merits determination.

The Petitioner provided evidence showing he graduated first among 19 students in his pilot training class in 1993. Since that time, the Petitioner has been an airline pilot and has recorded over 22,000 hours of flight time. The record also reflects that he has been certified to operate six different types of aircraft.[5] He provided a letter of recommendation wherein the author asserted that the Petitioner has been a member of the Ethiopian Airline Pilot Association (ALP-ETH) since 1993 and has served in that organization in varying capacities, including as a leader of two departments for a total of 10

[3] *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).

[4] The Petitioner did not claim, and the Director did not address, whether the Petitioner established eligibility for the underlying EB-2 classification as an advanced degree professional. The Petitioner does not raise this issue on appeal.

[5] The Petitioner claimed in his brief submitted in support of his Form I-140 that he was certified to operate the DHC-6, Fokker 5, and Boeing 707, 737, 757/767, 777, and 787 aircraft. The record of his accumulated flight time shows he is certified to operate the DHC-6, F-50, and Boeing 707, 737, 757, 767, and 769 aircraft. Finally, his airline transport pilot license issued in 2003 reflects his is certified to operate the DHC-6, F-50, and B707, 737, 757/767, and 777/787 aircraft. We are relying on the Petitioner's airline transport pilot license to recognize that he is certified to operate six different aircraft. We recognize there may be some discrepancy in the labeling of the different aircraft and thus whether they are all distinct from each other. The different distinctions, however, do not affect our overall decision.

years, as president for approximately 16 months, and as a special advisor to the president since 2022. He also provided a commendation letter that attests generally to the Petitioner's experience as an airline pilot, and a paystub from September 2023. The Petitioner does not sufficiently explain or provide other probative evidence, however, to establish how the duration of his experience and hours of flight time logged, or his certification to operate certain aircraft, yields a level of expertise *significantly* above other pilots.[6]

Additionally, while the author of the letter of recommendation generally claims that the Petitioner was involved in the ALP-ETH, the record does not contain documentation to corroborate the information in the letter. Furthermore, the record does not include evidence detailing the nature, responsibilities, or requirements of his membership in ALP-ETH, or for the respective leadership positions he purportedly held, to establish he possesses a degree of expertise significantly above that ordinarily encountered.

Finally, while the Petitioner claims that he has commanded a salary demonstrating exceptional ability, the single paystub for September 2023 he provided is insufficient to extrapolate to an annual income.[7] Additionally, even if we were to accept the Petitioner's claimed annual income based on this paystub, which we do not, the Petitioner does not explain or provide other sufficient evidence showing how earning more than another average airline pilot by itself, or in conjunction with the other evidence in the record, establishes that he possesses the requisite expertise to establish he is an individual of exceptional ability.

The record as a whole, including the evidence discussed above, does not establish the Petitioner's eligibility for the underlying EB-2 visa classification as an individual of exceptional ability. As noted above, the Director also concluded that the Petitioner did not establish that he merited a national interest waiver. While the Petitioner also contests this conclusion on appeal, since our determination that the Petitioner did not establish eligibility for the underlying EB-2 visa classification is dispositive of his appeal, we decline to reach and hereby reserve the appellate arguments on this issue. *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 L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

ORDER: The appeal is dismissed.

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[6] For instance, the Petitioner asserted through counsel in his brief accompanying his Form I-140 that being selected to operate larger and more advanced aircraft is a criterion that can be used to determine expertise relative to one's peers, and thus his qualifications to fly large and technologically advanced aircraft like the Boeing 777 and 787 set him apart. However, the Petitioner provided no evidence to support the assertion and counsel's unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight").

[7] We note that the paystub includes a significant amount of overtime pay and therefore may not be consistent with the remainder of his paychecks for that or other years.