



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 26407717

Date: APR. 04, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a pilot, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree and/or 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 record did not establish that the Petitioner qualified for the EB-2 immigrant classification. In addition, the Director concluded that the Petitioner was not eligible for, and did not merit, a national interest waiver of the job offer requirement. The matter is now before us on appeal. 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

An advanced degree is any United States academic or professional degree or a foreign equivalent degree above that of a bachelor's degree. A United States bachelor's degree or foreign equivalent degree followed by five years of progressive experience in the specialty is the equivalent of a master's degree. If a doctoral degree is customarily required for the specialty, the non-citizen must a United States doctorate or a foreign equivalent degree. 8 C.F.R. § 204.5(k)(2).

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

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 aliens of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5>.

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 a degree of expertise significantly above that ordinarily encountered in the field.

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then establish 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 discretion³, 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.

II. EB-2 CLASSIFICATION

The Petitioner submitted evidence of his career as a commercial pilot, and indicated on Form I-140, Immigrant Petition for Alien Workers, that the job title of his proposed endeavor was “commercial and private pilot.” He did not offer a more detailed description of this endeavor in the record, stating only that it was his intention “to work as an outstanding experienced Airline Transport Pilot.”

A. Member of the Professions Holding an Advanced Degree

Because the Petitioner did not indicate in his initial submission or in response to the Director’s request for evidence (RFE) whether he intended to qualify as a member of the professions holding an advanced degree or as an individual of exceptional ability, we will consider both. Regarding the former, the Petitioner did not claim or submit evidence that he holds a United States bachelor’s degree or a foreign equivalent, which is the minimum level of education needed to qualify. Rather, on ETA Form 9089, Application for Permanent Employment Certification, he indicated that the highest level of education he achieved was an associate’s degree. Although he listed a Bachelor of Science degree in a brief summary of his career accomplishments, there is no evidence of this degree or others that might be equivalent to the stated associates degree.

The Petitioner also checked the box for “other” in Part J of the form, but this appears to refer to the numerous training courses he completed over the course of his career, as evidenced by several certificates and other evidence. As there is no evidence that any of these certificates are the equivalent of a United States bachelor’s degree, the record does not establish that the Petitioner is eligible as a member of the professions holding an advanced degree.

³ See also *Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

B. Individual of Exceptional Ability

Turning to the Petitioner's eligibility as an individual of exceptional ability, the Director looked to the ETA Form 9089 and determined that "the minimum requirements for the position do not demonstrate it requires an alien of exceptional ability." However, in reaching this conclusion, the Director relied upon caselaw relating to the labor certification process. Because an individual requesting a national interest waiver seeks to avoid the EB-2 classification's job offer requirement, and thus the labor certification process, this caselaw is not applicable to such a petition. Further, there is no requirement in the statute or pertinent regulations that petitioners seeking a national interest waiver must show that their endeavor requires an individual of exceptional ability. We therefore withdraw that portion of the Director's decision.

As the Petitioner did not specify whether he intended to qualify as an advanced degree professional or an individual of exceptional ability, he also did not specify for which of the evidentiary criteria under 8 C.F.R. § 204.5(k)(3)(ii) he intended to qualify, and does not do so on appeal. Nevertheless, we will briefly address each of the criteria for which applicable evidence was submitted.⁴ However, we will not consider the additional evidence he submitted on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The Director's RFE notified the Petitioner of the deficiencies in the evidence under the evidentiary criteria, providing him with sufficient notice and opportunity to respond.

An official academic record showing that the alien 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)

As noted above, the record includes several certificates earned by the Petitioner over the course of his career as a pilot, with most having to do with his certification to fly different models and types of aircraft. However, all but one of these are not accompanied by official academic records naming the courses completed, any marks received, and the number of credits or hours. The certificate issued by the Center for Aeronautical Training and Evaluation of the [redacted] indicates that the Petitioner completed the airline transport pilot course, and lists the courses taken and hours devoted to each course. However, the record is insufficient to establish that the issuer qualifies as an institution of learning in the field of commercial aviation.

The record also includes the Petitioner's transcripts for courses taken at the University Institute of [redacted]. However, the English translation accompanying this document is not properly certified per 8 C.F.R. § 103.2(b)(3), and thus cannot be considered. In addition, even if the translation was certified as complete and accurate by the translator, it does not appear that this course of study related to the Petitioner's claimed area of exceptional ability as a pilot, as the bulk of the courses relate to economics or marketing.

⁴ The record does not include evidence submitted initially or in response to the Director's RFE which pertains to the criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(D), (E) and (F).

For the reasons given above, the evidence is insufficient to establish that the Petitioner meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought; 8 C.F.R. § 204.5(k)(3)(ii)(B)

This criterion requires evidence in the form of letters from current or former employers. While the Petitioner submitted letters from friends and colleagues attesting to his 45 years of experience in the airline industry and more than 13,000 hours of flight time, these are not sufficient to meet this criterion.

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 Petitioner submitted documentation which shows that he held commercial and airline transport pilot licenses in Venezuela and the United States. But this evidence shows that all of these licenses expired well before the filing date of this petition. As the regulation is phrased in the present tense, this evidence is insufficient to establish that as of the date the petition was filed, the Petitioner held licenses which would meet this criterion.⁵

C. Final Merits Determination

Per the discussion above, the Petitioner has not submitted evidence which meets the requirements of any of the evidentiary criteria. As such, he has not met the initial evidence requirement for classification as an individual of exceptional ability, and we need not conduct a final merits determination. Nonetheless, we have reviewed the totality of the record and determined that it does not establish that the Petitioner has been recognized as having a degree of expertise significantly above that ordinarily encountered in the field. Specifically, although he appears to have years of experience as a commercial airline pilot and maintained his proficiency through training, the evidence does not demonstrate that he stood amongst his peers or was recognized as having the high degree of expertise required for this classification.

III. NATIONAL INTEREST WAIVER

Because the Petitioner has not established his eligibility for the underlying EB-2 immigrant classification, he is not eligible for a national interest waiver. Further, the Petitioner does not specifically challenge any of the Director's conclusions regarding his national interest waiver claim on appeal, and we therefore deem that claim to be waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

⁵ The Director indicated in his RFE that this criterion had been met, but did not address this or any other evidentiary criteria in his final decision.

III. CONCLUSION

The Petitioner has not established his eligibility for the underlying EB-2 immigrant classification as either a member of the professions holding an advanced degree or an individual of exceptional ability. In addition, he does not specifically challenge the Director's conclusions regarding his request for a national interest waiver, and has not otherwise shown that he is eligible for and otherwise merits the waiver. The petition will remain denied.

ORDER: The appeal is dismissed.