



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

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

In Re: 25672675

Date: APR. 13, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a musician, seeks employment-based second preference (EB-2) immigrant classification as a member of the professions holding an advanced degree 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 the record did not establish that the Petitioner was a member of the professions holding an advanced degree. Further, the Director determined that the Petitioner did not demonstrate that his proposed endeavor was of national importance, he was well positioned to advance his endeavor, or that it would be beneficial for the United States to waive the requirements of a job offer and a labor certification. 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

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. 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. 8 C.F.R. § 204.5(k)(2).

Profession is defined as of the occupations listed in section 101(a)(32) of the Act, 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.<sup>1</sup> 8 C.F.R. § 204.5(k)(3).

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).<sup>2</sup> Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.<sup>3</sup> 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 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 discretion<sup>4</sup>, 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. ADVANCED DEGREE AND EXCEPTIONAL ABILITY

In support of the petition, the Petitioner stated that he was eligible for EB-2 classification as a “member of the professions holding an advanced degree” and that he was a “professional Musician registered in the Order of Musicians in Brazil.” The Petitioner further indicated that he was trained and licensed as an aircraft pilot and submitted documentation reflecting that he had been trained at an aviation school in Brazil, while also noting that he was “now an inventor and entrepreneur.” As a result, in the request for evidence (RFE), the Director stated the Petitioner did not provide sufficient evidence to establish that he was member of the professions holding an advanced degree. The Director requested that the Petitioner provide degrees or transcripts to demonstrate his education and, if he was relying on a bachelor’s degree or foreign equivalent degree, additional evidence to establish that he had five years of post-baccalaureate experience in his specialty.

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 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>.

<sup>4</sup> 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).

In response, the Petitioner again stated that he qualified as a member of the professions holding an advanced degree, explaining that he “is a very experienced Musician, in addition to a former aircraft pilot, an inventor, and an entrepreneur.” The Petitioner did not submit any evidence reflecting that he had earned a bachelor’s, or other, degree. The Petitioner also stated that he was an entrepreneur and the chief executive officer of [redacted] responsible for his development project called [redacted]. The Petitioner asserted that [redacted] was a project to develop “tools of music theory study,” or more specifically a tool combining elements of music with aviation calculation tools to assist musical student learning.

The Director denied the petition stating that the Petitioner was ineligible as he did not demonstrate that he was a member of the professions holding an advanced degree. On appeal, the Petitioner asserts that in the RFE the Director did not address whether the Petitioner satisfied at least three of the six regulatory criteria to establish him as an individual with exceptional ability and did not offer him the opportunity to submit documentation to demonstrate this eligibility. However, the Petitioner’s contention on appeal ignores its previous assertions related to his eligibility. For instance, as discussed, the Petitioner asserted in support of the petition that he was a member of the professions holding an advanced degree, and therefore, the Director requested in the RFE that he support this assertion with evidence. In response, the Petitioner again stated that he qualified as a member of the professions with an advanced degree. As such, we disagree with the Petitioner that the Director erred in not requesting evidence related to whether he qualified as an individual with exceptional ability. Regardless, we will now only analyze whether the Petitioner qualifies as an individual with exceptional ability, as he has now abandoned his claim that he qualified as a member of a professional with an advanced degree. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *see also, Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff’s claims to be abandoned as he failed to raise them on appeal to the AAO).

We reviewed the entirety of the record and have considered the Petitioner’s eligibility as an individual of exceptional ability. On appeal, the Petitioner only asserts that he has met the three criteria addressed below. We conclude that the Petitioner has not satisfied at least three of the six criteria, and therefore, we need not reach a final merits determination and reserve it.<sup>5</sup> Accordingly, the Petitioner does not qualify as an individual of exceptional ability. While we may not discuss each piece of evidence individually, we have reviewed and considered each one.

*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 provided evidence that he is a member of the Brazilian Musicians Association as of March 2019. This membership document further indicated that the Petitioner specialized in the bassoon and the saxophone. The Petitioner also indicated that the Brazilian Musicians Association is “responsible for supervising professional activities in the Music sector to ensure the quality of the service and standards are met,” that the association “attests that the Musician is qualified to carry out their duties with quality,” and that this identity card “allows for more efficient inspection” and defends against “illegal services.”

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<sup>5</sup> *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).

However, this evidence is insufficient to establish that the Petitioner's membership in the Brazilian Musicians Association is a license to practice his profession or certification for a particular profession or occupation. First, the document itself is identified as an "identity card," and there is little indication on its face that it could be deemed a license or certification in a profession, beyond noting that the Petitioner specializes in the bassoon, saxophone, and "popular" music. The Petitioner asserts that this identity card indicates that the Brazilian Musicians Association attests that he is qualified to carry out his work as a bassoonist and saxophonist, but there is no discussion of such an attestation or certification, nor an explanation as to how he received his membership card. The Petitioner has provided insufficient evidence to establish that his membership in the Brazilian Musicians Association represents a license or certification to practice a particular profession or occupation, for instance, by demonstrating the requirements of said licensure or certification, if any.

Further, the Petitioner stated his intent to act as an entrepreneur launching a new product meant to assist students in learning music. For instance, as noted, the Petitioner stated in response to the RFE that he was an entrepreneur and the chief executive officer of [redacted] responsible for his development project called [redacted] or more specifically a tool combining elements of music with aviation calculation tools to assist musical student learning. The Petitioner has not provided evidence demonstrating that a license or certification is required to create a new music educational tool and introduce it into the marketplace. The Petitioner appears to have performed this endeavor without licensure or certification as a musician. It is not apparent whether a professional license or certificate to practice as a musician would be sufficiently related to the claimed area of exceptional ability. Therefore, we cannot conclude that the Petitioner has a license to practice the profession or certification for a particular profession. In fact, it is not sufficiently clear within what profession the Petitioner's proposed endeavor would fall. Accordingly, the record is insufficient to establish the Petitioner's eligibility under this criterion.

*Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E)

For this criterion, the Petitioner points to his membership in the Brazilian Musicians Association. However, the Petitioner did not indicate how the Brazilian Musicians Association is a "professional association." For instance, a 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 United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation." 8 C.F.R. § 204.5(k)(2). The Petitioner does not describe how the Brazilian Musicians Association qualifies under this criteria by sufficiently describing how it qualifies as a professional association. Accordingly, the record is insufficient to establish eligibility under this criterion.

*Evidence 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 record includes letters of recommendation from the Petitioner's colleagues, his membership certificate in the Brazilian Musicians Association, a pilot's license in Brazil, and evidence of his completion of pilot training in Brazil. As previously stated, while we may not discuss each piece of evidence individually, we have reviewed and considered each one.

On appeal, the Petitioner points to letters of recommendation from his colleagues indicating that he is “an inventor that has revolutionized the field.” He further emphasizes his participation in several workshops and lectures as a speaker throughout 2017 and 2018. The Petitioner asserts the evidence reflects that “he has a record of notable success” based on his “leading role in defining projects, especially those related to “music and invention.” Although the letters of support indicate that the Petitioner’s professional acquaintances hold him in high regard personally and professionally and that they believe in the potential for success of his proposed music education tool, this evidence does not reflect that he has received recognition for achievements and significant contributions to his industry or field. To illustrate, in one support letter [redacted] a professor and orchestra musician from Brazil, expressed support for the value of the Petitioner’s proposed music education tool, noting that it could help students develop a greater interest in music. However, the letter does not indicate that the Petitioner’s music education tool has been used in the marketplace by students and that it had an actual impact on the field of music education. Likewise, another similar letter from [redacted] also a professor of music in Brazil, discusses the potential of the Petitioner’s proposed music education tool. However, again, the letter does not indicate that the Petitioner’s proposed music education tool could be categorized as an achievement or significant contribution to music education. Therefore, the provided recommendation letters do not demonstrate that the Petitioner has received recognition for achievements and/or that he has made significant contributions to his field.

The Petitioner also submitted an expert opinion letter from [redacted] a stated “music educator and multi-instrumentalist,” who states that she works as a music teacher in Massachusetts. [redacted] also attested to the fact that the Petitioner’s proposed music tool could produce “greater understanding of [music] content,” yet there is little evidence from this letter that his tool has been used by students and had an actual impact on the field of music education. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* We are ultimately responsible for making the final determination regarding an individual’s eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.* Here, the letter from [redacted] does not sufficiently address the Petitioner’s eligibility for this criterion, namely, the recognition he has received for his achievements and/or the significant contributions he has made to his field. Therefore, it has little probative value under this criterion.

Further, the Petitioner points to his participation in lectures and workshops related to music education. However, the Petitioner’s participation in these lectures and workshops reflect his promotion of his proposed music education tool, and do not reflect any achievements or recognition in his field. Otherwise, the Petitioner provides insufficient evidence on appeal to explain how his participation in lectures and workshops demonstrate his recognition for achievements and significant contributions to the field.

Based on the evidence provided, we conclude that the Petitioner has not established how his accomplishments extend beyond him performing as a musician in Brazil and him developing a proposed music education tool. While the Petitioner’s idea for a new music education tool may have potential, his performance does not represent achievements and significant contributions to his field. Accordingly, the evidence does not establish that the Petitioner satisfied this criterion.

### *Summary*

The record does not support a finding that the Petitioner meets at least three of the six regulatory criteria for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner therefore has not established his eligibility as an individual of exceptional ability under section 203(b)(2)(A) of the Act. As previously outlined, the Petitioner must show that he either is an advanced degree professional or that he possesses exceptional ability before we reach the question of the national interest waiver. We conclude that the evidence does not establish that the Petitioner meets the regulatory criteria for classification as an individual of exceptional ability or that he is a member of the professions holding an advanced degree. It is the Petitioner's burden to establish eligibility for the immigration benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 375-76. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot. The waiver is available only to foreign workers who otherwise qualify for classification under section 203(b)(2)(A) of the Act.

### III. CONCLUSION

The Petitioner has not established that he is eligible for the underlying classification as an advanced degree professional or as an individual of exceptional ability. Therefore, further analysis of his eligibility under the framework outlined in *Dhanasar* would serve no meaningful purpose.

Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's remaining arguments concerning his eligibility under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. at 25; *see also Matter of L-A-C-*, 26 I&N Dec. at 526 n.7.

The appeal will be dismissed for the above stated reasons.

**ORDER:** The appeal is dismissed.