



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

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

In Re: 23042194

Date: MAR. 15, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a commercial pilot, seeks classification as an individual of exceptional ability in the sciences, arts or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner qualifies for the classification sought or for a national interest waiver. 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.

To qualify for a national interest waiver, a petitioner must first show eligibility 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. Section 203(b)(2)(B)(i) 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). Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification. 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.

Once a petitioner demonstrates EB-2 eligibility, 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 USCIS may, as matter of discretion,¹ 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.

To establish eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). If an individual meets at least three of the regulatory criteria, we then consider the totality of the material provided in a final merits determination and assess whether the record shows a degree of expertise significantly above that ordinarily encountered in the individual's field. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination). *See also, generally*, 6 *USCIS Policy Manual* F.5 (B)(2), <https://www.uscis.gov/policy-manual>.

The Petitioner has worked as a pilot since 1998, for employers including commercial airlines and exporters, mostly in Brazil. He also worked as an instructor and demonstration pilot for an aircraft construction company. He entered the United States in September 2018 as the F-2 derivative spouse of an F-1 nonimmigrant student, and filed the immigrant petition in January 2019. After he filed the petition, the Petitioner has continued to work as a pilot, first for a charter company and then for an investment holding company, and he has started his own company offering “pilot services” and “aeronautical consult[ing] for new pilots.”

The Director determined that the Petitioner had met the requirements of three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), pertaining, respectively, to (1) a degree or certificate from an institution of learning; (2) experience in the occupation; and (3) licensure or certification. In the final merits determination, the Director concluded that the Petitioner's evidence, considered as a whole, does not establish a degree of expertise significantly above that ordinarily encountered in the Petitioner's field. We agree with the Director's conclusion.

Two of the criteria that the Director granted relate to the Petitioner's completion of flight school and possession of a pilot's license. The Petitioner did not establish that these achievements represent a level of expertise consistent with exceptional ability. Rather, they appear to be basic credentials, necessary for employment in the field. The Petitioner did not provide any evidence that one could become a commercial pilot without training and licensure, in Brazil or any other jurisdiction.

The Director stated that the remaining granted criterion, length of experience, does not inherently establish exceptional ability. The Petitioner does not address this conclusion on appeal.

¹ *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).

Other evidence that the Petitioner had submitted in support of his claim of exceptional ability included letters from employers, which the Petitioner characterized as recognition for achievements and significant contributions to the field. The letters included anecdotes about the Petitioner's job performance, indicating that he had helped his employers in ways such as persuading customers to purchase airplanes and flying a head of state across international boundaries under volatile political circumstances. We agree with the Director that, while these events were beneficial to the Petitioner's employers and customers, the Petitioner did not establish their significance to the field of commercial aviation.

The Petitioner provided Brazilian income tax returns, and statistics about Brazilian pilots' salaries. This information is incomplete. The statistics do not establish whether the salaries are weekly, monthly, or relate to some other interval, and the annual figures on the tax returns do not show whether the Petitioner's rate of pay was based on ability, seniority, or some other factor. The same employer paid the Beneficiary about 20% less in 2016 than in 2015. Evidence about the Petitioner's salary in the United States originated after the petition's filing date, and therefore cannot help to establish eligibility at the time of filing as required by 8 C.F.R. § 103.2(b)(1).

The Petitioner also submitted copies of flight logs and reports from Brazil, without explaining how they establish exceptional ability.

On appeal, the Petitioner states that he is one of "a few top Airline Pilots" who are licensed "to operate different types of airplanes." The Petitioner cites no statistics or other evidence to demonstrate that he holds a wider range of licenses than what is ordinarily encountered in his field.

The Petitioner has established that he is a qualified and experienced pilot, but he has not submitted enough evidence to demonstrate exceptional ability as the regulations define that term. The Petitioner's evidence does not provide a sufficient basis for comparison to demonstrate that he possesses a degree of expertise significantly above that ordinarily encountered in his field.

The Petitioner has not demonstrated eligibility for classification as an individual of exceptional ability. Because this issue determines the outcome of the Petitioner's appeal, we will dismiss the appeal and reserve the appellate arguments regarding the national interest waiver. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (holding that "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.