U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28580398

Date: DEC. 07, 2023

Appeal of Texas Service Center Decision

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

The Petitioner 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, 8 U.S.C. § 1153(b)(2)(B)(i). 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 the Petitioner qualifies for the underlying EB-2 immigrant classification as an individual of exceptional ability. 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. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three

of which must be satisfied, for an individual to establish exceptional ability:

> (A) An 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;
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> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the [noncitizen] has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
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> (D) Evidence that the [noncitizen] has commanded a salary, or other renumeration for services, which demonstrates exceptional ability;
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> (E) Evidence of membership in professional associations; or
>
> (F) 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).[1]

The regulation at 8 C.F.R. § 204.5(k)(3)(iii) provides, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] We then consider the totality of the material provided in a final merits determination and assess whether the record shows that the petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the field.[3] 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). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of

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[1] In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

[2] See generally 6 USCIS Policy Manual F.5(B)(2), https: //www.uscis.gov/policy-manual.

[3] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of individuals of exceptional ability. See generally 6 USCIS Policy Manual, supra, at F.5(B)(2).

the totality of the evidence, to determine whether the fact to be proven is probably true." Matter of Chawathe, 25 I&N Dec. at 376.

Once a petitioner demonstrates eligibility as either a member of the professions holding an advanced degree or an individual of exceptional ability, they must then establish eligibility for 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[4], 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. ANALYSIS

The Petitioner indicates he intends to work as a commercial airline pilot and a flight instructor. For the underlying EB-2 classification, the Petitioner submitted evidence to meet five of the six exceptional ability criteria, specifically 8 C.F.R. § 204.5(k)(3)(ii)(A)-(C), (E), and (F). The Director found that although the Petitioner satisfied three criteria, official academic record, ten years of full-time experience in the occupation, and license in his occupation, the record did not establish that he possessed a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.[5] Upon de novo review, we find the record does not support the conclusions that the Petitioner meets the criteria for academic record and for experience in the occupation, and otherwise does not meet three of the six criteria under 8 C.F.R. § 204.5(k)(3)(ii).[6]

For the license criterion, the record reflects the Petitioner submitted his license issued by the ministry of transportation and communications, directorate of civil aeronautics in Peru indicating he received a license as an airline transport pilot on October 6, 2011. Accordingly, we agree with the Director that the Petitioner met this criterion.

> An 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 relies on various certificates and course completion documents to meet this criterion, namely:

- A certificate from [redacted] in Florida states that he "completed the Airline Transport Pilot Certification Training Program as required by 14 CFR § 61.156, and

[4] 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).

[5] In denying the petition, the Director did not address whether a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

[6] While we do not discuss each piece of evidence in the record individually, we have reviewed and considered each one.

therefore, has met the prerequisite required by 14 CFR § 61.35(A)(2) for the Airline Transport Pilot Airplane Knowledge Test" on December 6, 2021.

- A certificate from [redacted] states that he completed the flight instructor instrument certification course on June 26, 2004.
- Certificates from [redacted] in [redacted], Florida which state that he "qualified to exercise the privileges of a certificated flight instructor" as of October 27, 2001, and that he completed and graduated from the multi-engine rating – airplane course on April 20, 2001; the commercial pilot certification course on February 18, 2001; and the instrument rating – airplane course on July 3, 2000.
- Documents indicating the Petitioner completed courses for practical emergencies and ditching practices.

However, it is not readily apparent that these certificates meet the plain language of the regulation. The record does not include evidence relating to the parties issuing these certificates. The Petitioner has not sufficiently established that any of the certificates were issued from a "college, university, school, or other institution of learning" or that the certificates are "an official academic record." Therefore, we withdraw the Director's finding regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(A).

> Evidence in the form of letter(s) from current or former employer(s) showing that the individual 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).

The record contains a work certificate and social benefit document issued by [redacted] en liquidacion certifying that the Petitioner worked for the company from June 1, 2005, to May 25, 2020, as a "Captain II A320". However, the documents do not indicate whether the Petitioner worked in a full-time capacity, and they do not describe the Petitioner's job duties. Since the evidence provided does not demonstrate that he has at least ten years of full-time experience in his occupation as a commercial airline pilot and flight instructor, the Petitioner has not established that he meets the plain language of the criterion. Therefore, we withdraw the Director's finding regarding the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B).

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

This criterion requires evidence of membership in a professional association. The regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as any occupation having a minimum requirement of a U.S. bachelor's degree or foreign equivalent for entry into the occupation.

To meet this criterion, the Petitioner submitted his membership card for Aircraft Owners and Pilots Association (AOPA) with a two paragraph print out from AOPA's website indicating its members comprise pilots and individuals aspiring to learn to fly or who have an enthusiasm for aviation. The evidence submitted does not demonstrate that AOPA has a membership body comprised of individuals who have earned a U.S. baccalaureate degree or its foreign equivalent, or that the organization otherwise constitutes a professional association.

With a reply to a request for evidence, the Petitioner also submitted an email dated March 20, 2023, from the Royal Aeronautical Society (RAS) indicating the Petitioner's membership application "was

approved by the Membership Grading Committee on 8 March 2023." However, the Petitioner's membership to RAS was effective after the date of filing this petition on June 22, 2022. A petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). Therefore, evidence of the Petitioner's membership after the filing of the petition cannot be used to establish eligibility.

The Petitioner has not demonstrated his membership in a professional association under this criterion.

Because the record does not otherwise satisfy at least two of the criteria, we need not determine whether it satisfies the Petitioner's additional claimed criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F), in order to satisfy at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Therefore, we reserve our opinion regarding whether the record satisfies the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). 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).

The Petitioner contends on appeal that the Director "did not apply the proper standard of proof . . ., instead imposing a stricter standard, and erroneously applied the law . . . ." (emphasis omitted). The Petitioner further argues that the Director "did not give due regard" to the evidence submitted and that "[t]he evidence collectively . . .does indeed demonstrate that the [Petitioner's] exceptional ability significantly exceeds the standard level of expertise commonly encountered in the aviation industry." (emphasis omitted). The Petitioner argues a comprehensive review of his "extensive flight hours, depth of knowledge, adaptive command, influential participation, and industry recognition elevate them to a level of expertise that is significantly above the ordinary." (emphasis omitted). He specifically points out that his "10,531 flight hours, including over 6,210 hours as a Pilot in Command" show his experience "exceeds the average for commercial pilots" (emphasis omitted); his training and certifications show his proficiency extends "beyond common pilot duties to include navigating complex international routes and handling diverse flight conditions"; his royal aeronautical society membership shows his "active role in the ongoing evolution of aviation best practices"; and his work with "a prominent U.S. air carrier reflects industry recognition of their exceptional abilities." (emphasis omitted). He also points out that the letters of recommendation were not mentioned by the Director, arguing the letters "attest to his extensive knowledge and capacity giving specific details as to why the [Petitioner] is a pilot with a degree of expertise significantly above that ordinarily encountered in the same field."

Even if we did not withdraw the two criteria discussed above, we agree with the Director's conclusion and reasoning in the final merits determination. The standard of proof in this proceeding is a preponderance of the evidence, meaning that a petitioner must show that what is claimed is "more likely than not" or "probably" true. Matter of Chawathe, 25 I&N Dec. at 375-76. To determine whether a petitioner has met the burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. Id.; Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989). Here, the Director properly analyzed the Petitioner's documentation and weighed the evidence to evaluate the Petitioner's eligibility by a preponderance of the evidence.

The evidence in its totality does not show that the Petitioner is recognized as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). We have reviewed the record in the aggregate and conclude that it does not support a finding that the Petitioner has established the recognition required for classification as an individual of exceptional ability. As pointed out by the Director, the Petitioner has training, experience, and licensing as a pilot, however, they do not automatically render him an individual of exceptional ability because these types of qualifications are part of the normal course of employment and professional development in the field of aviation. With respect to the Petitioner's membership in AOPA, the record does not explain the minimum requirements for membership in this organization, or the relevance and significance of his membership, including how this demonstrates a level of expertise significantly above that ordinarily encountered of other pilots.

The Petitioner argues that the Director did not review the evidence in its totality and that the final merits determination did not specifically mention the submitted recommendation letters. The letters are from the Petitioner's colleagues who attest to the Petitioner having worked as a commercial pilot and who value his knowledge, skills, and professionalism as a pilot. The letters provide general statements praising the Petitioner's "outstanding professionalism" and "enthusiastic spirit"; however, the letters do not show a level of expertise significantly above other commercial pilots. For instance, one letter describes the Petitioner and a colleague being selected to deliver an Airbus 320, and that their selection was based on their "professionalism" and "because [they] both speak English very good."

The Petitioner argues that his total flight hours is significantly above others in his occupation and help show his exceptional ability as a pilot. However, he has not provided evidence to corroborate his total flight hours exceeds others in his field. The letters of recommendation and other evidence in the record do not mention the Petitioner's flight hours or that his hours exceed others in his occupation. The Petitioner's claims have not been corroborated with independent, probative evidence. The Petitioner must support his assertions with relevant, probative, and credible evidence. See Matter of Chawathe, 25 I&N Dec. at 376.

The Petitioner has not established his qualification for the EB-2 classification as an individual of exceptional ability in the sciences, arts, or business, and is therefore ineligible for a national interest waiver. While the Petitioner asserts on appeal that he meets all three of the prongs under the Dhanasar analytical framework, we reserve our opinion regarding these issues. See INS v. Bagamasbad, 429 U.S. at 25-26; see also Matter of L-A-C-, 26 I&N Dec. at 526 n.7.

III. CONCLUSION

The record does not establish that the Petitioner qualifies for second-preference classification as an

individual of exceptional ability. Therefore, we conclude that the Petitioner has not established eligibility for the immigration benefit sought. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.