



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

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

In Re: 26351700

Date: MAY 10, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a commercial 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 petition, concluding that the record did not establish that the Petitioner is eligible for, and merits as a matter of discretion, 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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). To establish eligibility as an individual of exceptional ability, a petitioner must first 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 a degree of expertise significantly above that ordinarily encountered in the field.

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>.

Where 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. EXCEPTIONAL ABILITY

The Petitioner noted in his request for evidence (RFE) that the Petitioner met five of the criteria under 8 C.F.R. § 204.5(k)(3)(ii), but he did not address these criteria in his decision or conduct a final merits analysis. We agree that the Petitioner meets at least three of the criteria, specifically those pertaining to his certificates from two flight schools, the evidence of his ten years of full-time experience as a commercial pilot, and his licenses as an air transport pilot. Because he therefore meets the initial evidence requirements for this classification, we need not discuss his qualification under the remaining criteria. On remand, the Director should consider the totality of the evidence in the record in determining whether it establishes that the Petitioner possesses a degree of expertise significantly above that ordinarily encountered in his field, and thus qualifies as an individual of exceptional ability.

III. NATIONAL INTEREST WAIVER

The Petitioner’s proposed endeavor is to continue working as a commercial pilot. The record shows that at the time of filing he was employed as a pilot for a major airline, held an air transport pilot license in the United States, and had more than 13 years of experience as an airline pilot.

A. Substantial Merit and National Importance

The first prong, substantial merit and national importance, focuses on the specific endeavor that the individual proposes to undertake. The endeavor’s merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact. *Dhanasar*, 26 I&N Dec. at 889.

We initially note that the Director’s decision did not include a determination as to the substantial merit of the Petitioner’s proposed endeavor. In *Dhanasar*, we stated that while evidence of the potential for a significant economic impact is favorable when making this determination, endeavors having no likelihood of economic benefits may qualify, such as those related to research, pure science, and the furtherance of human knowledge. *Id.* In that precedent decision we concluded that evidence

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).

pertaining to the petitioner's specific research was of substantial merit due to its advancement of scientific knowledge and furtherance of national security issues. On remand, the Director should review the supporting evidence and determine whether the Petitioner's proposed endeavor as a commercial pilot is of substantial merit.

Turning to the second part of the first prong, the Director concluded that the Petitioner's proposed endeavor is not of national importance. However, other than a sentence indicating the *Dhanasar* framework's focus on the specific endeavor as opposed to an entire field or industry, the Director's decision does not include an analysis of the evidence submitted and an explanation of its deficiency in this regard. While it does include a list of some of the evidence submitted by the Petitioner in response to the RFE, this is followed by the conclusory statement that this evidence does not support the potential prospective impact of the proposed endeavor. USCIS regulations require that a denial decision explain specific reasons for denial and notify the affected party of its appeal rights. 8 C.F.R. § 103.3(a)(1)(i),(iii); cf. *Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that the reasons for denying a motion must be clear to allow the affected party a meaningful opportunity to challenge the determination on appeal). On remand, the Director should consider the evidence provided in support of the proposed endeavor's national importance and provide an analysis of that evidence to support his conclusion.

B. Well Positioned to Advance the Proposed Endeavor

The second prong shifts the focus from the proposed endeavor to the individual. To determine whether they are well positioned to advance the proposed endeavor, we consider factors including, but not limited to: their education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals. *Id.* at 890.

In concluding that the Petitioner is not well positioned to advance his proposed endeavor, the Director provided some brief analysis of the submitted evidence. However, we note that in several instances, the analysis references facts that do not appear in the record or pertain to the Petitioner's proposed endeavor. For example, the Director acknowledges letters of support "from scholars in the Aviation field" which were included in the initial filing, but those letters were from the Petitioner's fellow commercial pilots. Later, the Director mentions the lack of evidence to support the claims made in these letters and the Petitioner's "research plan," despite the Petitioner's endeavor not involving research.

In another example, the Director refers to the lack of evidence of funding to support the Petitioner's endeavor, including grants and "correspondence from potential investors." But the Petitioner does not indicate that his endeavor requires funding of this type, as he intends to continue to be employed as a commercial airline pilot. On remand, the Director should apply the relevant second prong factors as stated in *Dhanasar* to the facts contained in the record to determine whether the Petitioner is well positioned to advance his proposed endeavor.

C. Whether on Balance a Waiver is Beneficial

The third prong requires a petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, we may evaluate factors such as: whether, in light of the nature of the individual's qualifications or the proposed endeavor, it would be impractical either for them to secure a job offer or to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from their contributions; and whether the national interest in their contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, establish that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Id.* at 890-91.

The Director concluded that any benefit to the United States offered by the Petitioner's skills and abilities as a commercial pilot were not sufficient to outweigh the national interest in the protection of the domestic labor force inherent in the labor certification process.⁴ However, he did not address the Petitioner's arguments relating to the urgency created by a shortage of qualified pilots in the United States. In addition, he based his decision in part on a finding of "inconsistencies in the Petitioner's purported proposed endeavor," but did not identify these inconsistencies.⁵ On remand, the Director should fully re-evaluate the Petitioner's claims under the third prong of the *Dhanasar* framework in light of his revised analysis of the first two prongs per the discussion above. Further, he should clearly identify any inconsistencies in the record and explain their impact on the Petitioner's eligibility for a national interest waiver.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

⁴ The decision also incorrectly indicates that there is no appeal from the Director's decision.

⁵ Our review of the record did not uncover any material inconsistencies in the evidence submitted.