



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

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

In Re: 22587070

Date: OCT. 18, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a pilot, seeks second preference immigrant classification as either an advanced degree professional or an individual of exceptional ability in the sciences, arts or business. He also seeks a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) 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. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Acting Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established eligibility for the underlying EB-2 immigrant visa classification as a member of the professions holding an advanced degree or an individual with exceptional ability. She also concluded that the Petitioner did not establish that a waiver of the classification's job offer requirement would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See 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.

Section 203(b) of the Act sets out this sequential framework:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act, 8 USC § 1101(a)(32), provides that “[t]he term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.”

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means 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.

To determine 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 at 8 C.F.R. § 204.5(k)(3)(ii) 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 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;
- (B) 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;
- (C) A license to practice the profession or certification for a particular profession or occupation;
- (D) Evidence that the alien has commanded a salary, or other remuneration [*sic*] for services, which demonstrates exceptional ability;
- (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.

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. Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows the petitioner possesses exceptional ability. *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 Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). 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 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.

Furthermore, while neither the statute nor the pertinent regulations define the term “national interest,” we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998). *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may grant a national interest waiver as matter of discretion. *See also Poursina v. USCIS*, 936 F.3d 868, 2019 WL 4051593 (9th Cir. 2019) (finding USCIS’ decision to grant or deny a national interest waiver to be discretionary in nature).

As a matter of discretion, the national interest waiver may be granted if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) 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. *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

II. ANALYSIS

The Petitioner states that he is pilot intending to "continue using [his] expertise and knowledge in the field of aviation by working as a Pilot for airlines in the U.S." Specifically, in his proposed endeavor he intends to "fill a position as a pilot that is vacant due to the shortage of airline pilots; serve as a flight instructor at flight schools; train newer generations of pilots; monitor engines, fuel consumption, and other aircraft systems to improve flight efficiency; and, generate tax revenue."

The Acting Director concluded that the Petitioner did not establish that he qualified for the requested EB-2 classification, or that a waiver of the classification's job offer requirement would be in the national interest. She determined that the proposed endeavor had substantial merit, but that the Petitioner did not demonstrate its national importance, that he was well-positioned to advance the proposed endeavor, or that a waiver of the job offer and thus a labor certification was in the national interest.

A. Eligibility as a Member of the Professions Holding an Advanced Degree

As noted above, a petition for an advanced degree professional must include evidence that a petitioner possesses a "United States academic or professional degree or a foreign equivalent degree above that of baccalaureate [or] A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2). With the initial filing and in response to a notice of intent to deny (NOID) the petition, the Petitioner asserted that he qualifies for advanced degree professional classification by virtue of a foreign education equivalent to a U.S. baccalaureate degree and more than five years of post-baccalaureate experience in the specialty, in accordance with 8 C.F.R. § 204.5(k)(3)(i)(B). However, the Acting Director noted in her decision that the record did not include the Petitioner's official academic record, including his bachelor's degree or academic transcripts.

As noted by the Acting Director, the record includes the following evidence of the Petitioner's education:

- A diploma and academic transcripts issued to the Petitioner by the [redacted] [redacted] Brazil, upon completion of the Aviators Officer Training Course in December 1985).
- A diploma issued to the Petitioner by the [redacted] Brazil, upon completion of the Course of Formation of Airline Officials in February 2019. No academic transcripts are provided.

- A certificate of specialization in transportation and academic transcript, issued to the Petitioner by the University of [redacted] in May 2003.¹
- An academic evaluation stating that the Petitioner completed academic coursework and examinations at the [redacted] to earn a bachelor's degree in aviation in 2019. The evaluation states that the Petitioner "satisfied requirements substantially similar to those required toward the completion of a Bachelor's Degree in Aviation from an accredited institution of higher education in the United States [and] ... completed a Postgraduate Program in Transportation ... in 2003."

The academic evaluation does not explain why the Petitioner was issued two separate diplomas from the [redacted] the first in 1985 and the second in 2019, but they appear to represent two different programs or courses of study. The second diploma does not include academic transcripts indicating the type of coursework the Petitioner completed or the number of credits or hours earned, and no explanation is provided in the academic evaluation. Nor does the academic evaluation explain how the Petitioner's certificate of specialization earned in 2003 can be considered "postgraduate" study if it was completed 16 years before the Petitioner earned his undergraduate degree. The record does not include any explanation for these anomalies in the chronology of the Petitioner's education. A petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Even if we were to accept that the Petitioner has earned the equivalent of a U.S. bachelor's degree, the record reflects that this degree was earned in February 2019. To qualify as an advanced degree professional, the Petitioner must establish that he possesses five years of *post-baccalaureate* experience. In addition, a petitioner must meet all of the eligibility requirements of the petition at the time of filing. 8 C.F.R. § 103.2(b)(1), (12). The record does not establish that the Petitioner could have attained five years of *post-baccalaureate* experience at the time the petition was filed in September 2019.

On appeal, the Petitioner does not address this issue or submit additional evidence. Since the Petitioner does not challenge the Acting Director's determination that he does not qualify for the requested EB-2 classification as an advanced degree professional, we consider this issue waived on appeal. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012), (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived).

B. Eligibility as an Individual with Exceptional Ability

As noted above, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating 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). When a petitioner has satisfied at least three of the six criteria, a final merits determination concerning the petitioner's eligibility is still required per the two-part adjudication framework established in *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). We consider the totality of the record to determine if a petitioner has demonstrated, by a preponderance of the evidence, that it

¹ The Acting Director consulted the Electronic Database for Global Education created by the American Association of Collegiate Registrars and Admissions Officers and noted that the Petitioner's 2003 certificate of specialization is not equivalent to a U.S. advanced degree.

has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. In the final merits analysis, the quality of the evidence must be evaluated. *Matter of Chawathe*, 25 I&N Dec. at 376.

The Acting Director determined that the Petitioner did not qualify as an individual with exceptional ability because, although the evidence established that he satisfied at least three of the six criteria, the totality of the evidence did not establish that he has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Specifically, she concluded that the Petitioner met the criteria outlined in 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E), as an individual with a diploma issued by an institution of learning related to aviation, a pilot's license, and membership in professional associations. However, in her decision, the Acting Director fully analyzed the remaining criteria under 8 C.F.R. § 204.5(k)(3)(ii) and the evidence that the Petitioner submitted. She provided a detailed discussion of why the evidence did not establish that the Petitioner met each of these additional criteria, as well as why the Petitioner did not establish based on the totality of the record that he has a degree of expertise significantly above that ordinarily encountered in the field of aviation. In her decision, the Acting Director stated that, while she evaluated the evidence on an individual basis to determine that the Petitioner met at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), she further "examined the entire record and has determined that the Petitioner does not have a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business." We discuss each of the individual criteria further below, as well as the final merits evaluation based on the totality of the record.

As noted above, the Acting Director determined that the Petitioner met the criteria outlined in 8 C.F.R. § 204.5(k)(3)(ii)(A), (C), and (E), as follows:

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).

The Petitioner has submitted a copy of his diploma issued upon completion of the Aviators Officer Training Course, and his certificate of specialization in transportation. We agree with the Director's determination that the Petitioner met 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 Acting Director determined that the Petitioner met this criterion based on his pilot's license and we agree.

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

The Acting Director determined that the Petitioner met this criterion based on his membership in the Sindicato Nacional Dos Aeornautas (SNA), or National Aeronautics Union.²

The Petitioner also submitted evidence related to the following criteria, which the Acting Director did

² In response to the NOID, the Petitioner stated that he was "not submitting evidence to prove this criterion."

not find the Beneficiary met:

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 Acting Director considered the Petitioner's letters of experience from individuals attesting to the Petitioner's experience in the field of aviation.³ She specifically noted that the letter submitted with the initial petition did not detail the Petitioner's job duties or indicate whether the employment was full- or part-time. She further noted that the additional letters submitted in response to the NOID did not list the dates of the Petitioner's experience, did not detail his job duties, and did not state whether the employment was full- or part-time.

On appeal, the Petitioner does not submit new evidence documenting his experience. The regulation at 8 C.F.R. § 204.5(g)(1) states, "Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed . . . or of the training received." As the record does not include this regulatory prescribed evidence of the Petitioner's qualifying experience, we cannot determine that he has at least 10 years of full-time experience in the occupation. Therefore, this criterion has not been met.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D).

In response to the NOID, the Petitioner stated that he was "not submitting evidence to prove this criterion." No additional evidence or argument regarding this criterion is submitted on appeal.

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 Acting Director considered the letters of testimony from the Petitioner's colleagues submitted with the initial petition and in response to the NOID. She noted that the letters discuss and commend the Petitioner's work achievements and aviation expertise, as well as detail the Petitioner's participation in aviation-related meetings. This is also supported in the record with documentation of the Petitioner's conference and speaking engagements and his participation in various government commissions related to aviation. However, the Acting Director noted that the record did not contain independent testimony from experts in the field to corroborate the claims made in the testimonials from colleagues or to demonstrate that the Petitioner is recognized for his achievements in the industry outside his circle of colleagues.

³ In response to the NOID, the Petitioner in error stated that the Acting Director determined that this criterion had been met.

On appeal, the Petitioner reiterates his accomplishments and professional achievements but does not provide new evidence in support of this criterion. Nor does he explain how the Acting Director erred in her analysis of the evidence in the record.

Importantly, the Petitioner has not explained the nature of his specific contributions to the field of aviation, supported by documentary evidence. Rather, as the Acting Director notes, the record contains letters from colleagues who offer general praise about his abilities but do not support his assertions that he has advance[d] and develop[ed] the field of aviation.” Therefore, we agree with the Director the record does not demonstrate the Petitioner has received “recognition for achievements and significant contributions to the industry or field.” This criterion has not been met.

As noted above, on appeal, the Petitioner does not provide new evidence of his exceptional ability. He reiterates that he is an accomplished professional with more than 40 years of experience and references previously submitted evidence that demonstrates that he meets at least three of the six criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). However, the Petitioner does not address the final merits determination set forth under *Kazarian* or explain how the Acting Director erred in her analysis.

In discussing the final merits of the Petitioner’s claim of exceptional ability in the totality of the evidence, the Acting Director again provides a full discussion and analysis of the evidence in the record. She states that the Petitioner’s educational credentials, licenses, and professional association memberships 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.

She further discusses the Petitioner’s membership in the SNA, including a printout identifying the SNA as a professional association protecting the rights of airmen and improving labor relations between airmen and airlines and government entities. She notes that 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.

Upon review of the record, we agree with the Acting Director that the Petitioner has not established that he possesses a degree of expertise significantly above that ordinarily encountered in the field of aviation. While the record demonstrates that the Petitioner has extensive experience as a pilot, the Petitioner has not explained how his academic achievements and his license, both required for entry into the profession, demonstrate his exceptional ability. Nor does he provide additional details about his membership in professional associations, such as the membership requirements or the relevance and significance of his membership in these associations. Additionally, he does not provide new evidence to demonstrate that he meets any of the other criteria under 8 C.F.R. § 204.5(k)(3)(ii).

The Petitioner is a very highly qualified and well-trained pilot with many years of experience. However, this alone is insufficient to establish that the Petitioner qualifies as an individual of exceptional ability. The record does not demonstrate that the Petitioner possesses a degree of expertise as a pilot significantly above that ordinarily encountered in the sciences, arts, or business. The Petitioner has not shown that he is as an individual of exceptional ability, and he has not asserted that he is an advanced degree professional. Therefore, the documentation in the record does not establish eligibility for the underlying EB-2 classification.

As explained in the legal framework above, 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 the Petitioner has not established this threshold issue, the remainder of the Petitioner's arguments need not be addressed.⁴ It is unnecessary to analyze any remaining independent grounds when another is dispositive of the appeal. Therefore, we decline to reach whether he meets the remainder of the first prong on national importance, or the second and third prongs under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *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).

III. CONCLUSION

As the Petitioner has not established that he qualifies for the underlying EB-2 classification, he has not established that he is eligible for or otherwise merits a national interest waiver. The appeal will be dismissed for the above stated reasons.

ORDER: The appeal is dismissed.

⁴ Even if we had addressed the remaining issues and arguments, we still would have dismissed this appeal. As noted above, the Acting Director concluded that, although the proposed endeavor has substantial merit, the Petitioner did not establish its national importance, that he was well-positioned to advance the proposed endeavor, or 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. On appeal, the Petitioner references the same supporting evidence submitted with the original petition and NOID response and does not provide any new evidence. The Acting Director fully addressed the previously submitted evidence and explained how it was deficient in establishing that the Petitioner is eligible for a national interest waiver. The Petitioner's arguments on appeal do not establish that he meets all of the three *Dhanasar* prongs.