U.S. Citizenship and Immigration Services

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

In Re: 2764053

Date: JUN. 22, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an airline pilot, seeks classification as an individual of exceptional ability in the sciences, arts, or business. 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).

The Director of the Texas Service Center denied the petition. The Director concluded the Petitioner did not qualify for the EB-2 immigrant classification as an individual of exceptional ability and the record did not demonstrate his eligibility for the requested 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.

## 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. Section 203(b)(2)(B)(i) of the Act. Next, a petitioner must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion,[1] grant a national interest waiver if the petitioner shows:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance the proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

[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).

## II. ISSUES

As a preliminary matter, the Petitioner asserts on appeal through counsel that in denying the petition, the Director "imposed novel substantive and evidentiary requirements beyond those set forth in the regulations." However, counsel does not point to specific examples of this within the Director's request for evidence (RFE) and denial. Counsel also does not offer a detailed analysis explaining the particular ways in which the Director "imposed novel substantive and evidentiary requirements" in denying the petition, supported by pertinent law or regulation.

The Petitioner also alleges through counsel on appeal that the Director "did not apply the proper standard of proof in this case, instead imposing a stricter standard, to [his] detriment." Except where a different standard is specified by law, the "preponderance of the evidence" is the standard of proof governing immigration benefit requests. *See Matter of Chawathe, 25 I&N Dec. at 375; see also Matter of Martinez, 21 I&N Dec. 1035, 1036 (BIA 1997); Matter of Soo Hoo, 11 I&N Dec. 151, 152 (BIA 1965).* Accordingly, the "preponderance of the evidence" is the standard of proof governing national interest waiver petitions. *See 1 USCIS Policy Manual*, E.4(B), https://www.uscis.gov/policy-manual. While counsel contends on appeal that the Petitioner has provided evidence sufficient to demonstrate his eligibility for the EB-2 classification and a national interest waiver, counsel does not further explain or identify any specific instance in which the Director applied a standard of proof other than the preponderance of evidence in denying the petition.

Assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. The Petitioner has not done so here. While we acknowledge counsel's arguments on appeal asserting the Director erred by imposing novel, substantive evidentiary requirements in this case, and that he applied an improper stand of proof in analyzing the Petitioner's eligibility, without more, we will not further consider the Petitioner's arguments in this regard.

Additionally, the Petitioner's counsel offers other arguments on appeal which raise questions regarding whether portions of the brief submitted in support of this appeal relate to the matter at hand – whether the instant Petitioner qualifies as an EB-2 individual of exceptional ability who merits a national interest waiver. For instance, on appeal the Petitioner through counsel maintains:

> [B]y issuing a denial without warranting [him] an opportunity to present additional evidence and cure any questions raised by [the Director], the Appellant was deprived of Due Process rights and fair treatment. The Appellant is respectfully requesting the AAO to warrant him a chance for further review because the Service erroneously denied further analysis of NIW prongs. For doing so, the Service deprived the Appellant's fair chance to obtain his immigration benefit. It is amount to the violation of Due Process and fair treatment under USCIS policy, the United States Constitution, and international treaties.

Notably, the regulation at 8 C.F.R. § 103.2(b)(8) permits a director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director in the denial. Therefore, we disagree with counsel's assertions that it is

contrary to USCIS policy and an impermissible violation of a petitioner's due process rights under the United States Constitution when a director elects to deny a petition without first requesting evidence. However, in this case the Director *did* issue an RFE on 04/08/2022 identifying deficiencies in the record and asking the Petitioner to address them through the submission of evidence, to which the Petitioner responded on 09/22/2022. Counsel acknowledges as much later on in the appeal brief, when she discusses evidence that the Petitioner provided in the RFE response.

The Petitioner's counsel also references previously submitted letters on appeal, indicating that this material "attest[s] to [the Petitioner's] *extraordinary ability*." (Emphasis added). Determinations regarding whether someone qualifies as an individual of *extraordinary ability* are made in petitions seeking the EB-1 immigrant classification that differs from the EB-2 (national interest waiver) classification sought in this petition. Individuals of extraordinary ability must meet at least three of ten criteria set forth in 8 C.F.R. § 204.5(h), as opposed to three of six criteria for an individual of exceptional ability under 8 C.F.R. § 204.5(k).

The record lacks an explanation for these inconsistencies. Thus, we question the accuracy of the information provided in the brief submitted in support of the appeal and whether the information provided is correctly attributed to this particular petitioner. The "truth is to be determined not by the quantity of evidence alone but by its quality." USCIS examines "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.

## III. EB-2 CLASSIFICATION

The Petitioner plans to offer commercial airline pilot services to U.S. employers and has provided evidence, including his airline pilot training certificates, resume, and pilot licenses, as well as letters from colleagues and former employers to establish that he attended various airline pilot training programs offered at flight schools in order to work as a commercial airline pilot from 1991 through 2018, when he was admitted to the United States as an F-2 nonimmigrant as the spouse of an F-1 student.

The Petitioner consistently asserted that he is eligible for the EB-2 classification as an individual of exceptional ability and did not claim eligibility as a member of the professions holding an advanced degree. In denying the petition, the Director determined that the Petitioner fulfilled the academic record, experience, and licensure criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (C), but did not satisfy the other criteria enumerated at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner does not challenge the Director's determination that he does not meet the requirements under the criteria enumerated at 8 C.F.R. § 204.5(k)(3)(ii)(D), (E),and (F). Therefore, we consider these issues 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).

As the Petitioner has satisfied the initial regulatory requirements at 8 C.F.R. § 204.5(k)(3)(ii), we will consider the entire record to determine whether the individual has a degree of expertise significantly above that ordinarily encountered. *See 6 USCIS Policy Manual* F.2, https://www.uscis.gov/policy-

manual/volume-6-part-f-chapter-5. For the reasons provided below, we conclude that the Petitioner does not qualify as an individual of exceptional ability.[2]

In discussing the final merits of the Petitioner's claim of exceptional ability in the totality of the evidence, the Director provided a full discussion and analysis of the evidence in the record. He stated, among other things, that the Petitioner's training credentials, experience, and licensure as an airline pilot did 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.

Importantly, the Director requested documentary evidence to show the significance of the Petitioner's work in the occupation in his RFE, such as evidence that the Petitioner's contributions have provoked widespread commentary in the field; material from others in the industry to show that his aviation methodologies were being utilized by others employed therein; and evidence that his achievements and significant contributions have been recognized by peers, governmental entities, or professional or business operations. However, the Petitioner did not present evidence sufficient to address this aspect. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

For instance, in addressing the significance of the Petitioner's achievements in the field of endeavor, the Director acknowledged that the Petitioner initially submitted letters from colleagues and former employers who commended his expertise, training, leadership and management skills in the field of aviation. He noted that the Petitioner also provided additional letters in response to the RFE from signatories who discussed how the Petitioner has competently performed his job and attest to his skillsets. The signatories affirm that the Petitioner's work as a pilot has benefited the companies that he has worked for. The Director specifically noted in his denial that the letters were not accompanied by corroborative evidence showing the impact of the Petitioner's work, such as examples of implementation of his piloting or training strategies, methodologies or innovations, or how the Petitioner's work has otherwise been recognized outside of organizations where he has been employed. *Matter of Chaw*athe, 25 I&N Dec. at 376.

On appeal, the Petitioner generally references the letters previously submitted in support of the petition, and specifically points to a letter from B-, CEO of [redacted] who worked for the same company that employed the Petitioner in the 1990s, as evidence of the Petitioner's "*extraordinary ability.*"[3] B- notes therein that the Petitioner was promoted to airline captain in 1993 whilst B- was a training manager, and that later on the Petitioner was promoted first to a pilot instructor position, then to a "technical support pilot" [TSP] position. B- asserts that the TSP position was "rare," and "offered only to Captains who stood out from their peers." However, B- does not provide additional narrative to explain what the specific criteria was for the Petitioner's selection for the TSP job, or the nature of the job duties performed by Petitioner in the TSP role. He also does not discuss the significance of the impacts, if any, that the Petitioner's work as a TSP has had on the field of endeavor.

[2] While we may not discuss every document submitted, we have reviewed and considered each one.

[3] As previously discussed, an EB-1 individual of extraordinary ability is a different U.S. immigrant classification than the EB-2 (national interest waiver) classification sought in this petition.

Upon review of the record, we agree with the 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. The Petitioner is a 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.

## IV. NATIONAL INTEREST WAIVER

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. 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).

Even if we had addressed the remaining issues and arguments, we still would have dismissed this appeal. The 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 RFE response and does not provide any new evidence. The 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.

## 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.