



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

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

In Re: 28880306

Date: NOV. 20, 2023

Appeal of Nebraska Service Center Decision

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

The Petitioner is commercial pilot who 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 EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualified for EB-2 classification as an individual of exceptional ability, but that the record did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. 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 conclude that the Director did not offer a complete and accurate analysis of the submitted evidence. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the analysis below.

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. If 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 discretion,¹ grant a national interest waiver if the petitioner demonstrates that:

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).

- 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

As previously indicated, the Director's decision did not offer a complete analysis or adequately explain the deficiencies in the evidence. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal).

Despite concluding that the Petitioner did not establish eligibility for a national interest waiver, the Director determined that: 1) the Petitioner qualifies as an individual of exceptional ability, and 2) that the Petitioner's endeavor has substantial merit and national importance under the first prong of the *Dhanasar* framework. For the reasons discussed below, we find that the record lacks sufficient evidence to support these conclusions, and we will remand this matter to allow the Petitioner an opportunity to address these issues.

A. Individual of Exceptional Ability

First, we will address the Director's conclusion that the Petitioner qualifies as an individual of exceptional ability.²

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).³

- (A) An official academic record showing the noncitizen's possession of 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) Letters from current or former employers showing that the noncitizen has at least 10 years of full-time experience in the proposed occupation;
- (C) A license to practice the profession or certification for the profession or occupation;
- (D) Evidence of the noncitizen's receipt of a salary or other remuneration demonstrating exceptional ability;
- (E) Proof 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.

² The Petitioner did not claim that he qualifies as a member of the professions holding an advanced degree.

³ 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).

Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.⁴ If a petitioner does so, a final merits determination is conducted 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.

In the matter at hand, the Director determined that the Petitioner meets the criteria listed at 8 C.F.R. § 204.5(k)(3)(ii)(A)-(C) and (E), thereby meeting four of the six criteria listed above. Despite acknowledging that meeting this threshold requirement is not sufficient to establish eligibility for the EB-2 classification, the Director did not conduct a final merits determination to explain the basis for concluding that the Petitioner is an individual of exceptional ability.

Although the record shows that the Petitioner met basic academic and licensing requirements for his profession and is a qualified pilot with over two decades of experience in his field, it does not appear that the Petitioner has a degree of expertise significantly above that ordinarily encountered in his field thus qualifying him as an individual of exceptional ability. As such, the Director's favorable conclusion must be withdrawn. On remand, the Director may ask for additional evidence and then consider all pertinent facts in a final merits determination where the Director shall explain the basis for his conclusion on the issue of exceptional ability.

B. National Interest Waiver

Next, we will address the Director's determination that the Petitioner's endeavor satisfies the substantial merit and national importance elements of the first prong under *Dhanasar*.

The Director did not explain the basis for concluding that the Petitioner's endeavor has substantial merit and national importance. However, the Director specified that the favorable determination was made with respect to the Petitioner's endeavor to own and operate a flight academy – [REDACTED] – which will offer pilot training courses. We note that at the time of filing the Petitioner did not indicate an intent to own and operate his own business. Rather, the Petitioner discussed his 25-year career as a pilot and stated that his endeavor is “to pursue positions within U.S. companies and other organizations that today face a very high demand for pilots.” It was not until the Petitioner responded to a request for evidence (RFE) that he first mentioned his intent to own and operate a business. The RFE response also includes a business plan, which further describes the altered endeavor whose primary purpose is to “offer flight training courses” for new and experienced pilots working in commercial and private aviation. The Petitioner stated that he plans to employ experienced pilots as his flight instructors who will provide services at one of six international locations “spanning throughout the United States, Mexico, and Colombia.” Although the “Operative Plan” section in the business plan makes references to a general manager and “main partners,” the Petitioner did not provide a staffing plan or hiring timeline, nor did he offer information about his own position, such as the role he would assume or the duties he would perform within the context of this altered entrepreneurial venture.

We further note that the work experience listed in the Petitioner's résumé indicates that none of his previously held positions involved owning a business, but rather showed a lengthy history of working

⁴ 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>.

as a pilot, which is consistent with the original endeavor to be a pilot, the endeavor the Petitioner listed when this petition was filed. The Petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The purpose of an RFE is to elicit information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), 103.2(b)(8), 103.2(b)(12). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Accordingly, the materially changed proposed endeavor should not have formed the basis of the Director's analysis of the Petitioner's eligibility for a national interest waiver. Because the Director's reliance on the altered endeavor impacted the analysis of the Petitioner's eligibility for a national interest waiver, including whether the endeavor has substantial merit or national importance, we will withdraw the Director's decision.

Notwithstanding the deficiencies in the Director's decision and our withdrawal thereof, the evidence of record does not appear to demonstrate that the Petitioner met the requirements of the analytical framework set forth in *Dhanasar*, which requires the Petitioner to demonstrate that: (1) his endeavor has substantial merit and national importance, (2) he is well-positioned to advance the endeavor, and (3) on balance, waiving the job offer requirement would benefit the United States. However, because the Director's decision does not properly apply the *Dhanasar* framework to the facts in the record, we will remand the matter for entry of a new decision, and further consideration of whether the Petitioner can establish that he satisfies the criteria for an advanced degree professional.

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