U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26582011

Date: SEP. 12, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, an aircraft maintenance technician, seeks employment-based second preference (EB-2) immigrant classification as an individual of exceptional ability. *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 that the Petitioner qualifies for the underlying EB-2 qualification or for 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 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.

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).[1] Meeting at least three criteria, however, does not, in and of itself, establish eligibility for this classification.[2] If

[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 individuals of exceptional ability. 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

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.

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 USCIS may, as matter of discretion[3], 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.[4]

II. ANALYSIS

A. Exceptional Ability Criteria

The Director determined that the Petitioner met the following three of the six categories of evidence required to demonstrate exceptional ability:

- An official academic record showing that the individual 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);
- A license to practice the profession or certification for a particular profession or occupation. 8 C.F.R. § 204.5(k)(3)(ii)(C); and
- Evidence of membership in professional associations. 8 C.F.R. § 204.5(k)(3)(ii)(E).

The Director concluded, however, that the Petitioner had not demonstrated that he has a degree of expertise significantly above that ordinarily encountered in the field; the Petitioner had not established that he is an individual of exceptional ability and, as such, does not qualify for the EB-2 classification.

On appeal, the Petitioner submits a brief and supporting documentation. The Petitioner states that the Director's decision "contains numerous erroneous conclusions of both law and fact," asserting that the Petitioner qualifies under the remaining three evidentiary categories of evidence to establish exceptional ability and should receive a final merits determination based on his qualifications under all six categories.

[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).
[4] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

B. Final Merits Determination

To determine whether the Petitioner established that he has a degree of expertise significantly above that ordinarily encountered in the field of aviation, the Director assessed the entirety of the record. The Director determined that the Petitioner did not establish that he holds such a degree of expertise. In explaining his decision, the Director restated his conclusions concerning the evidentiary criteria that the Petitioner did not meet. Regarding the evidentiary criteria that the Petitioner did establish—evidence of his Aircraft Line Technician certification, his licenses from the Federal Aviation Administration (FAA) and the special Administrative Unit of Civil Aeronautics, and his membership in the Professional Aviation Maintenance Association (PAMA)—the Director determined that his qualifications were typical for the average maintenance technician in the aviation industry and, therefore, that the Petitioner had not demonstrated that his skill level qualified him as an individual of exceptional ability.

On appeal, the Petitioner lists "numerous certifications in various fields of aircraft maintenance," stating that they demonstrate that his qualifications are not typical for an average professional working in the aviation industry. We note that several of the certificates listed post-date the filing date of the petition and therefore cannot be reviewed as evidence. *See* 8 C.F.R. § 103.2(b)(1), (12). The other certifications relate to internal training provided to the Petitioner by his employers. This routine, on-the-job training does not demonstrate that the Petitioner has expertise beyond that normally possessed by others in his field.

In his brief, the Petitioner cites job offers that were submitted in response a request for evidence (RFE), which include basic qualification requirements. The Petitioner asserts the following (quoted as written):

> This is the way of every aircraft mechanic job opening in the market because it is rare to find a professional with such comprehensive and exceptional qualifications as the appellant. The abundant job openings in the aviation maintenance field demonstrate what the typical qualifications of the average professional in the aircraft maintenance field are. by contrast, it also reflects the exceptionality of [redacted] capabilities and ability.

These job offers require a high school diploma and certain licenses, certificates, and between two and five years of various types of maintenance experience. While the record demonstrates that the Petitioner has more than five years of experience, the evidence of record does not establish that he has an ability significantly beyond what would ordinarily be expected of a seasoned aircraft maintenance technician.

To demonstrate recognition for achievements and significant contributions to the industry or field,[5] the Petitioner initially submitted letters from his peers that commend elements of his work, including his leadership, professionalism, organizational skills, and technical knowledge; one letter states that the Petitioner "always handles all his projects exceptionally well." While the Director acknowledged the content of these letters, he determined that "they do not mention recognition of achievements and

[5] *See* 8 C.F.R. § 204.5(k)(3)(ii)(F).

significant contributions to the industry." On appeal, the Petitioner reiterates that the content of these letters demonstrates the Petitioner's exceptional ability. Upon review, we agree with the Director's assessment; although the Petitioner may have performed his work exceptionally well in the opinion of his peers, that performance was limited to his work for a specific employer. The record does not include evidence of recognition of any achievements or contributions on a scale beyond that employer. The Petitioner has not established that he has received recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Concerning the Director's decision with regard to whether the Petitioner had established that he has at least ten years of full-time employment[6] in the occupation for which he is being sought,[7] the Petitioner cites two issues. Firstly, the Petitioner contends that full-time employment is defined as 35 working hours per week,[8] or seven hours per working day, stating, "the petitioner has worked all working days of the year." In calculating the Petitioner's employment experience, the Director determined that a period of employment from August 23, 2010, to August 26, 2011, did not qualify as full-time employment because the hours of employment cited in the letter from his employer did not add up to the 369 days claimed. However, the record shows that these hours refer not to his working hours, but to course hours completed for his technical degree program prior to his employment. Therefore, the hours are not includable in the calculation of employment regardless of full- or part-time status. Further, while the record shows that the employment periods referenced in the letters from the Petitioner's employers total more than ten years of work in the field of aircraft maintenance, they do not establish at least ten years of full-time employment in the occupation for which he is being sought. Only the letter referencing the period of employment from May 25, 2019, to January 8, 2021, attests that the Petitioner was employed full-time; the record does not include evidence showing that he worked full-time during any other claimed period of employment. The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. He has not done so here.

Secondly, the Director determined that evidence submitted showing the period of employment from May 25, 2019, to January 8, 2021, could not be accepted as "valid." The evidence was submitted in response to the RFE, and the Director reasoned that because that employment period was not referenced either in the original evidence of record or on the Department of Labor Form ETA 750, Application for Alien Employment Certification, doubt was cast on the credibility of the evidence.[9] The Director also cited precedent cases related to the introduction of new facts[10] and material change to the petition.[11] The exclusion of this employment period resulted in the Petitioner's employment

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[6] In the final merits section of the decision, the Director contradicts his earlier determination that the Petitioner did not establish that he had at least ten years of full-time employment; the Director states that the Petitioner established his "full-time experience in the industry since 2010." We will defer to the Director's analysis of the Petitioner's work history earlier in the decision and presume that the contradiction was in error.

[7] *See* 8 C.F.R. § 204.5(k)(3)(ii)(B).

[8] While the Petitioner incorrectly cited full-time employment as defined at 8 C.F.R. § 204.6(e), which applies to the EB-5 classification, he is correct in that the 35 hours per week is considered to be full-time employment for the EB-2 classification. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

[9] *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

[10] *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

[11] *See Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998).

experience totaling fewer than ten years. On appeal, the Petitioner asserts that the employment letter meets the requirement at 8 C.F.R. § 204.5.(k)(3)(ii)(B) and states, "If the evidence was submitted with the response, there are no inconstancies in the record." We disagree. The Director noted the inconsistencies between the initial filing and the response to the RFE. These inconsistencies have not been resolved with independent, objective evidence, such as payroll records, pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner has not established that he has at least ten years of full-time employment in the occupation for which he is being sought.

Concerning the Director's decision with regard to whether the Petitioner established that he has commanded a salary, or other renumeration for services, which demonstrates exceptional ability,[12] the Petitioner initially submitted an IRS Nonemployee Compensation Form 1099-NEC for his employment in 2020 showing that he earned $19,231.81 in U.S. dollars while working as an aircraft mechanic in Colombia. In response to the RFE, the Petitioner stated that, according to the Economic Research Institute (ERI), "the average annual salary for aircraft mechanics in Columbia [*sic*] is COP $41,129,180 (or approximately USD$ 8,933.16)." The response included a footnote to a link what appears to be a webpage on the ERI's website with information concerning aircraft mechanics in Colombia. The Director determined the following:

> The referenced web page link was not found in the evidence of record. Simply going on the record without supporting substantive evidence to support assertions is not sufficient in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (BIA 1972).

On appeal, the Petitioner submits the webpage referenced, which shows that an average salary for aircraft mechanics in Colombia is COP$41,615,756. We note that it does not appear that the webpage provides an average salary for the year 2020; the webpage shows that it was last updated in January 2023. Also notable is the fact that the record does not include a conversion rate to show how the Petitioner's earnings in 2020 would compare to the average salary of an aircraft mechanic in Colombia in 2020. The Petitioner has not established that he has commanded a salary demonstrating exceptional ability.

In his brief, the Petitioner references the USCIS Policy Manual,[13] stating,

> It is critical to understand that each criterion independently does not need to show that the Petitioner has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business, but rather "officers should evaluate the evidence *together* when considering the petition in its entirety for the final merits determination."

Considered in its entirety, for the reasons discussed above, the evidence of record does not establish that the Petitioner possesses a degree of expertise significantly above that ordinarily encountered in the field of aviation. The Petitioner has not established that he qualifies for the EB-2 classification as an individual of exceptional ability.

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[12] *See* 8 C.F.R. § 204.5(k)(3)(ii)(D).
[13] *See* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-5.

Because the identified reasons for dismissal are dispositive of the Petitioner's appeal, we decline to reach and hereby reserve remaining arguments concerning eligibility under the *Dhanasar* framework. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "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).

III. CONCLUSION

The record does not establish that the Petitioner qualifies for the EB-2 classification. We conclude that the Petitioner has not established eligibility for a national interest waiver. The petition will remain denied.

ORDER: The appeal is dismissed.