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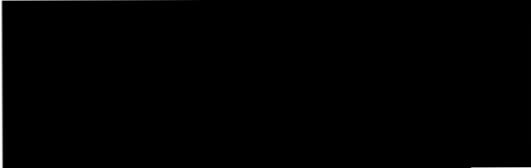
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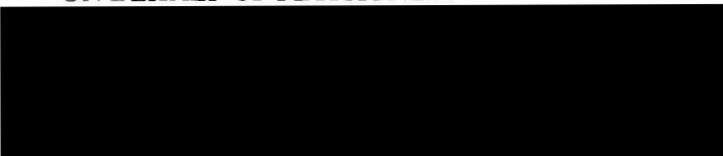
FILE: [Redacted]  
SRC 07 003 52506

Office: TEXAS SERVICE CENTER Date: **MAY 12 2008**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

2 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a financial analyst. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner does not qualify for the classification sought and that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the petitioner is an alien of exceptional ability, that financial analysts as a whole are in the national interest and that the AAO has “repeatedly and consistently” approved national interest waivers for financial analysts. The petitioner submits new evidence, little of which relates to the petitioner’s achievements in his field. For the reasons discussed below, we uphold all of the director’s findings.

Section 203(b) of the Act states in pertinent part that:

(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) . . . the 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.

### **Eligibility for the Classification Sought**

The first issue is whether the petitioner qualifies as either a member of the professions holding an advanced degree or as an alien of exceptional ability.

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: “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.” *Id.*

The petitioner initially submitted his “Graduation Diploma” in Economics from Babes-Bolyai University of Cluj-Napoca in Romania representing a four-year program. The petitioner did not submit an evaluation of this credential. In response to the director’s request for additional evidence, the petitioner submitted an evaluation from Park Evaluations and Translations concluding that the petitioner’s diploma is equivalent to a U.S. Bachelor of Arts degree in Economics. The petitioner also submitted his self-serving curriculum vitae listing practical training from July 2003 through August 2003 and manager trainee experience at Subway and Burger King from April 2004 through the present. Evidence of experience “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 by the alien.” 8 C.F.R. § 204.5(g)(1).

Moreover, the employment listed on the beneficiary’s curriculum vitae conflicts with other evidence in the record. The beneficiary first entered the United States in March of 2005 to begin a period of training with a Subway franchise. His period of training as a J-1 nonimmigrant was authorized from April 2005 through September 2006. According to the Form G-325 Biographic Information that accompanied the beneficiary’s Form I-485 Application to Register Permanent Residence or Adjust Status, the beneficiary left Subway in October 2005 and engaged in employment with Burger King from November 2005 through September 2006. Thus, the record contains inconsistencies regarding the beneficiary’s dates of employment at Subway and Burger King. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record contains no evidence resolving the above inconsistencies.

The petition was filed on October 4, 2006. Thus, it would have been impossible for the petitioner to have acquired five years of post baccalaureate experience between receiving his degree in August 2003 and filing the petition in October 2006. The director concluded that the petitioner had not demonstrated that he had a baccalaureate degree plus five years of post baccalaureate experience as a financial analyst and, thus, was not eligible for classification as a member of the professions holding an advanced degree.

On appeal, counsel asserts that the position of financial analyst requires a baccalaureate and is therefore a professional position. Regardless, the petitioner does not hold an advanced degree as defined at 8 C.F.R. § 204.5(k)(2). Thus, he cannot qualify as a member of the professions holding an advanced degree.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow:

- (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 for services, which demonstrates exceptional ability.
- (E) Evidence of membership in professional associations.
- (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

In response to the director's request for additional evidence, counsel asserts that the petitioner is an alien of exceptional ability because:

1. The alien has a degree relating to the area of exceptional ability;
2. The alien has commanded a salary or remuneration demonstrating exceptional ability; and
3. The field in which the beneficiary is employed is an area of substantial merit.

The director noted that the third "criterion" listed by counsel is not one of the regulatory criteria included at 8 C.F.R. § 204.5(k)(3)(ii), quoted above. Thus, the director concluded that the petitioner only claims to meet two of the regulatory criteria, of which an alien must meet at least three. The director then concluded that the petitioner had not demonstrated that he has an academic degree indicative of a degree of expertise above that ordinarily encountered in the field and had not submitted any evidence of his salary or other remuneration. On appeal, counsel merely reiterates that

the petitioner is an alien of exceptional ability without addressing the director's concerns that the third criterion claimed is not a regulatory criterion for aliens of exceptional ability and that the petitioner did not submit any evidence relating to his salary. We will evaluate the evidence of record.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." Moreover, section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

As stated above, the petitioner has the foreign equivalent of a U.S. baccalaureate in economics. The petitioner submitted evidence from the Department of Labor's Occupation Outlook Handbook (OOH), published on the Internet, indicating that a baccalaureate in finance, accounting, economics or business administration is the minimum academic preparation for financial managers, with many employers now seeking graduates with a Master's degree. OOH further indicates:

A college education is required for financial analysts and is strongly preferred for personal financial advisors. Most companies require financial analysts to have at least a bachelor's degree in business administration, accounting, statistics, or finance. Coursework in statistics, economics, and business is required, and knowledge of accounting policies and procedures, corporate budgeting, and financial analysis methods is recommended. A master's degree in business administration is desirable. Advanced courses in options pricing or bond valuation and knowledge of risk management also are suggested.

In light of the information provided by the petitioner, it is clear that the beneficiary's degree in economics, while possibly qualifying him for a position as a financial analyst, does not represent a degree of expertise above that ordinarily encountered in the field of financial analysis. Even if we concluded that the petitioner's degree does serve to meet this criterion, the petitioner failed to submit evidence relating to any other criterion.

Regarding counsel's assertion that the petitioner's remuneration can serve to meet the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D), the OOH materials submitted reflect that the middle 50 percent of financial analysts earn between \$47,410 and \$82,730 annually. The top ten percent earn more than \$113,490 annually. It can be expected that a financial analyst with a salary or other remuneration that demonstrates exceptional ability would earn at least in the upper range of the middle 50 percent. The petitioner has not established that his salary as a manager trainee for a Burger King franchise or

in any other position falls within the upper range of the middle 50 percent of financial analysts, documented to be \$82,730.

While counsel did not explicitly assert that the petitioner has the ten years of experience necessary to meet the regulatory criterion at 8 C.F.R. § 204.5(k)(3)(ii)(B), he did assert: “Given [the petitioner’s] job experience and educational background, he clearly qualifies as an individual with exceptional ability in the field of Business.” The regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) clearly states that experience can only serve as evidence of exceptional ability when it amounts to at least 10 years. The petitioner did not submit the letters from employers required to establish employment, 8 C.F.R. § 204.5(g)(1); 8 C.F.R. § 204.5(k)(3)(ii)(B), and the petitioner does not even claim 10 years of experience on his resume. Counsel has not explained how the petitioner’s far less than 10 years of experience in manager trainee positions is indicative of exceptional ability as a financial analyst.

Finally, the merit of the petitioner’s profession is not relevant to whether the petitioner qualifies as an alien of exceptional ability. Specifically, it is not one of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Rather, it appears that counsel is confusing the requirements for a national interest waiver, discussed below, with those required to demonstrate exceptional ability. We stress that the two issues, eligibility for the classification sought and whether the job offer should be waived in the national interest, are entirely separate inquiries with separate evidentiary requirements.

As the petitioner has not demonstrated that he is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue in order to issue a more comprehensive decision.

### **National Interest Waiver**

Neither the statute nor pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of the phrase, “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 217-18 (Commr. 1998)(hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

At various points in the proceeding, counsel has suggested that *NYSDOT*, 22 I&N Dec. at 215 - 223 is not a valid authority, that a blanket waiver is appropriate for managers or at least financial analysts and that exceptional ability, in and of itself, warrants a waiver of the alien employment certification in the national interest. None of these assertions are sufficiently supported by relevant legal authority.

#### Validity of *NYSDOT*, 22 I&N Dec. at 215 - 223

The petitioner's initial submission included no evidence other than the petitioner's education credentials. On October 30, 2006, the director advised the petitioner of the requirements set forth in *NYSDOT*, 22 I&N Dec. at 217-218. In response, counsel simply asserted that the petitioner is an alien of exceptional ability. The director applied the standards set forth in *NYSDOT*, 22 I&N Dec. at 215 - 223 and concluded that the petitioner had not established that a waiver of the job offer was in the national interest. On appeal, counsel initially asserted that the national scope standard set forth in that decision is "too vague to be meaningful" and, thus, "should be disregarded." Counsel later asserts that *NYSDOT*, 22 I&N Dec. at 215 - 223, "is the functional equivalent of a regulation inasmuch as it has general applicability and is tantamount to rule making. Accordingly, it was not promulgated in accordance with the Administrative Procedure Act, there is no legal regulation and it should not be applied, at least in this case."

The regulation at 8 C.F.R. § 103.3(c) provides that decisions designated as precedents are binding on all Citizenship and Immigration Services (CIS) employees. Thus, neither the director nor this office has the discretion to disregard any part of *NYSDOT*, 22 I&N Dec. at 215, a properly designated decision. Moreover, precedent decisions, which are authorized in the regulation at 8 C.F.R. § 103.3(c) are designed to be followed in all proceedings involving the same issues. 8 C.F.R. § 103.3(c). Thus, the "general applicability" of *NYSDOT*, 22 I&N Dec. at 215, is the entire purpose of a precedent, not a reason to disregard it. Significantly, a similar argument was rejected in federal court as follows:

Plaintiff also argues that the adoption of *NY[S]DOT* as a precedent decision is a violation of the APA's notice and comment requirement. *See* 5 U.S.C. § 553(b) & (c). However, notice and comment proceedings are not required when an agency adopts an interpretive rule. *See* 5 U.S.C. § 553(b)(A). *NY[S]DOT* is clearly interpretive because it does not create new rights or duties, but rather "provides a reasonable and predictable interpretation" of the statute. *See Mejia-Ruiz v. INS*, 51 F.3d 358, 364 (2d

Cir.1995). Thus, Plaintiff's claim of a violation of the APA's notice and comment requirement fails as well.

*Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). As we concur with the director that *NYSDOT*, 22 I&N Dec. at 215 - 223 is the controlling authority for determining whether a waiver of the job offer is warranted in the national interest, we will now consider the evidence under the standards set forth in that decision.

### Blanket Waivers

Counsel further asserts:

Managers in the professional class are exempt from the labor certification requirement and therefore, the AAO's position that the employer must show they would experience a hardship if he could not hire the alien as opposed to a qualified U.S. worker is based upon an erroneous premise.

Counsel provides no legal authority to support this extremely broad assertion and we know of no legal provision or case law exempting managers in the professions from the labor certification.<sup>1</sup> The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Less broadly, counsel has also asserted that financial analysts work in demanding positions that serve the national interest and relies on a non-precedent decision for the proposition that the AAO has "repeatedly and consistently" reversed denials of waivers for financial analysts. Counsel provides no explanation for rejecting a precedent decision which, by regulation, is binding on all CIS employees, in favor of a single non-precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Moreover, counsel has not demonstrated that the facts in this matter are remotely similar to the case he cites, which included multiple letters in support of the petition explaining how the alien in that case had developed influential models. At most, the cited AAO decision shows that the AAO has acknowledged the intrinsic merit of financial analysis, as well as the national scope that a financial analyst can attain when employed under certain circumstances. The petitioner has not shown that

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<sup>1</sup> We acknowledge the existence of a separate immigrant classification at section 203(b)(1)(C) of the Act, pertaining to certain multinational executives and managers, which does not require labor certification. (Aliens cannot self-petition under section 203(b)(1)(C) of the Act.) In the present proceeding, however, the petitioner has sought classification as an alien of exceptional ability in business under section 203(b)(2) of the Act. Neither that section of law, nor the related regulations at 8 C.F.R. § 204.5(k), indicates that "[m]anagers in the professional class are exempt from the labor certification requirement." Furthermore, counsel has not demonstrated that financial analysts are "[m]anagers in the professional class."

such circumstances apply in the present proceeding; the petitioner has offered only the unsubstantiated claim that he is a manager trainee who desires to work as a financial analyst.

What counsel is asserting essentially amounts to a blanket waiver for all managers in the professions or at least financial analysts. Significantly, section 203(b)(2)(B)(ii) of the Act created a blanket waiver for certain physicians. **This statutory provision proves two important points.** First, it demonstrates Congress' ability and willingness to create blanket waivers. Thus far, Congress has not done so for financial analysts. Second, the existence of this specific blanket waiver argues against the existence of *implied* blanket waivers; otherwise, section 203(b)(2)(B)(ii) of the Act would arguably be superfluous. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5<sup>th</sup> Cir. 1987).

The Department of Labor has acknowledged that some occupations warrant a blanket certification. Specifically, 20 C.F.R. § 656.10 provides:

The Director, United States Employment Service (Director), has determined that there are not sufficient United States workers who are able, willing, qualified, and available for the occupations listed below on Schedule A and that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. An alien seeking a labor certification for an occupation listed on Schedule A may apply for that labor certification pursuant to § 656.22.

An occupation's listing on Schedule A modifies, but does not waive, the labor certification process for aliens in that occupation. Furthermore, the list of Schedule A occupations at 20 C.F.R. § 656.22 does not include managers in the professions in general or financial analysts specifically.

Consistent with the above discussion, it is our position to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *NYS DOT*, 22 I&N Dec. at 217. Thus, we are not persuaded that a blanket waiver exists for all financial analysts. Rather, the petitioner must demonstrate that his own qualifications and past record in the field justify the waiver.

#### Exceptional Ability

Counsel has implied that exceptional ability, in and of itself, justifies a waiver of the job offer in the national interest. As discussed above, the petitioner has not established that he meets any of the regulatory criteria for that classification. Regardless, section 203(b)(2)(A) of the Act states that visas shall be made available to advanced degree professionals *and* aliens of exceptional ability *whose services are sought by an employer in the United States*. Section 203(b)(2)(B) of the Act provides for a discretionary waiver of the job offer in the national interest. We must presume that, by stating an

explicit requirement for aliens of exceptional ability and then allowing for a discretionary waiver, Congress did not mandate that that requirement be waived for all aliens of exceptional ability. This reasoning is clearly explained and emphasized in *NYSDOT*, 22 I&N Dec. at 218. The AAO stated:

Because, by statute, “*exceptional ability*” is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the “achievements and significant contributions” contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F).

*Id.* (Emphasis added.) Later in the decision, the AAO once again stated that exceptional ability, by itself, does not justify a waiver of the job offer/alien employment certification requirement. *Id.* at 222. Thus, counsel’s implication that exceptional ability on its own is sufficient grounds for a national interest waiver is legally flawed.

Analysis Under the Standards of *NYSDOT*, 22 I&N Dec. at 215 - 223

The director did not contest that the employment of a financial analyst has intrinsic merit or that the benefits would be national in scope. Previously, neither counsel nor the petitioner has attempted to explain how a manager trainee or even a financial analyst for a single Burger King franchise would provide benefits that are national in scope. On appeal, the petitioner submits a letter from Dr. [REDACTED] of the State University of New York (SUNY) at Buffalo. Dr. [REDACTED] lists the responsibilities of a franchise manager and notes that Burger King “is a large international chain of fast food restaurants, desserts and sandwiches.” The petitioner, however, does not propose to work for Burger King, the international entity, but a local franchise. We are not persuaded that such employment will provide benefits that are national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien’s own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a “unique background.” *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner’s contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra element of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner’s achievements, we note that original

innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The director specifically requested evidence of the petitioner's influence in the field of financial analysis, such as expert letters or evidence of published work that has been well cited. The petitioner provided no such evidence in response. As noted above, the petitioner has not even provided letters from his employers confirming his employment experience.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.