U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 18 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a mathematics teacher with [redacted]
At the time he filed the petition, the petitioner chaired the [redacted] He is now on the faculty of [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and supporting exhibits.

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

> (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.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "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).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] 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.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is 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.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on January 13, 2012. In an introductory statement, counsel stated:

> [The petitioner's] petition for waiver of the labor certification is premised on his **Masters Degree in Mathematics with some solid Doctorate credit obtained, over seventeen (17) years of dedicated and progressive teaching experience exclusively in Mathematics . . . , the major awards and recognitions received by him, and most especially the contribution in Mathematics education which he selflessly shares [with] everyone on his website . . . , students and Mathematics teachers alike.**

> In 2007, [the petitioner] was instrumental in **raising dramatically the scores and proficiency of his students in the** [redacted] On top of these, he has been serving as **webmaster and administrator** of his school's well improved website. . . . **He also authored articles in professional journals.**
>
> Among his distinctions as a Mathematics teachers [*sic*], [the petitioner] was the [redacted]

(Counsel's emphasis.) Counsel also noted that the petitioner was a graduate student's master's thesis advisor, and served on the thesis defense committee of another student. These events, however, took place while the petitioner was on the faculty of [redacted] in the [redacted], and such duties appear to be expected of university faculty. There is no evidence that the petitioner will return to similar employment in the United States.

The unsupported assertions of counsel do not constitute evidence. *See 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). Therefore, it is necessary to examine the evidence the petitioner submitted in support of the above claims.

The petitioner submitted printouts and CD-ROMs of content from his personal web site, which he called a "public service to make math education accessible to everyone." The materials establish the existence of the site, but they do not establish the extent, if any, to which others rely on the site. The petitioner did not, for example, submit statistics to show how many unique visitors the site receives in a given month or year, or materials showing that established third-party educational web sites have recommended or linked to the petitioner's site. Because of the nature of the internet and the world wide web, virtually any web site has the potential to reach a national or international audience, but no one site offers national benefit simply by existing and being available for use. The absence of evidence of widespread use of the petitioner's site is, therefore, a significant omission.

Regarding counsel's claims of "major awards and recognitions," the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F) states that "evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations" can form part of a claim of exceptional ability. Exceptional ability, in turn, does not guarantee the waiver, because the statute clearly subjects aliens of exceptional ability to the job offer requirement. Therefore, the very existence of "awards and recognitions" does not necessarily imply eligibility for the waiver. By characterizing the "awards and recognitions" as "major," counsel effectively claimed that these particular awards are especially significant and therefore merit special consideration. The evidence submitted, however, does not stand up to that assessment.

The two earliest awards, a "Scholastic Achievement Award" and a certificate from an "Essay Writing Contest," both date from early 1990 when the petitioner was 16 years old and had not yet begun his college education. The petitioner was not yet qualified to engage in any profession, and these awards are not evidence of eligibility for the national interest waiver.

A copy of a June 27, 1999 certificate reads, in part:

> HIGHEST LEADERSHIP AWARD
>
> Know all men by these presents that [the petitioner] has been chosen by the of this institution of in the City of Naga, Republic of the Philippines.

The certificate did not identify "this ," and the petitioner provided no other information about the award. The award does not specifically mention teaching, and therefore the petitioner has not shown its relevance to the proceeding at hand.

A printed, undated page lists the order of events at an unidentified ceremony. The petitioner is one of four individuals named under "Awarding Number and acceptance spech [*sic*] of the Awardees." The document does not specify whether the petitioner and the others were, themselves, the awardees, or the presenters of the awards. Furthermore, the document does not identify the awards, and there is no evident indication that the awards are necessarily education-related.

The remaining certificates relate to math teaching, but the petitioner has not shown that any of them are "major awards [or] recognitions." awarded the petitioner a "Certificate of Recognition . . . for having won Third Place in 3rd level competition in the

A certificate from the (the certificate does not specify whether the department was local, regional or national) acknowledged that the petitioner was "the trainor [*sic*] of the team that won 1st Place in the Region 5 Division Team Finals for 4th Year in

An August 2007 "Certificate of Excellence . . . acknowledges that [the petitioner] of has been awarded this certificate for Making Outstanding Gains on the 2007 Math MSA." The lone signature on the certificate belongs to the "Principal," indicating that the certificate is from the school named on the certificate. The certificate indicates that the petitioner's students improved their scores on the but that does not make the certificate a "major award." All of the certificates that mention mathematics indicate that the petitioner has been an effective teacher or coach of students directly in his charge, but they do not show that the petitioner has had a broader impact on math instruction either in the Philippines or in the United States.

Other certificates, in a separate section of the record, attest to the petitioner's education and experience, but do not self-evidently distinguish him from other math teachers to an extent that would warrant the special immigration benefit of the national interest waiver.

Letters and evaluations from the petitioner's students show that they hold him in high regard, and an October 2005 recommendation letter from one of the petitioner's former professors (in a subject other than mathematics) attests to his personal character.

Counsel had stated that the petitioner had "authored articles in professional journals." Publication of scholarly work is a means of disseminating one's findings, and thereby can confer benefits that are national in scope, provided that the publications carrying the articles see national distribution. The petitioner, however, did not show such distribution for the journals that carried his papers. Rather, the journals appear to be internal publications. The masthead describes the journal as the "Official Publication where the petitioner worked at the time of publication. His contribution to that journal consisted of the abstract of his master's thesis. Several other papers appeared in described as ' Those papers are all statistical analyses of student performance and demographics, matters of internal interest to instructors at the university. By design, the internal publications in the record are of very limited circulation. The petitioner did not submit examples of anything that could justify the term "articles in professional journals."

Alongside the above internal publications, the petitioner submitted examples of his work as the webmaster for Screenshots reproduced in the record include photographs from various school events. The petitioner also designed web pages for the school's sports program, its As noted previously, web presence does not necessarily or inevitably lead to influence on a national scale, and the petitioner submitted no evidence to show greater impact from his web design work.

The director issued a request for evidence on June 25, 2012, instructing the petitioner to "submit evidence to establish that [his] past record justifies projections of future benefit to the nation" (director's emphasis), and that the petitioner has "a past record of specific prior achievement with some degree of influence on the field as a whole."

In response, counsel listed many of the petitioner's prior evidentiary submissions, and states that the "above awards and recognitions are difficult to ignore as solid evidence of [the petitioner's] competency to influence the improvement of Mathematics Education in the United States of America." Counsel did not elaborate further. The listed exhibits included materials, such as the petitioner's 1990 essay contest award, that have no demonstrated relationship to math education at all. None of the submitted exhibits establish that the petitioner has, so far, "influence[d] the improvement of Mathematics Education in the United States of America" except at the most local level at a handful of schools in Even then, the record does not show that claimed improvements at schools where the petitioner used to work (such as have continued following the petitioner's departure from those schools. This is an important factor because, if the petitioner's influence is limited to those students whom he personally teaches, then he cannot satisfy the "national scope" prong of the *NYSDOT* national interest test.

Counsel stated: "today's United States workers or Mathematics Teachers are not as competitive as the foreign teachers who are already in the country since not all of them were educated by 'Highly Qualified Teachers.'" This assertion relies on the presumption that all "foreign teachers" "were educated by Highly Qualified Teachers." Counsel cited no evidence to support that claim, and, as stated earlier, counsel's unsupported claims have no weight as evidence. Furthermore, counsel essentially contended that "foreign teachers," as a class, are eligible for a blanket waiver of the job offer requirement. As members of the professions, teachers are included in the statutory clause at section 203(b)(2)(A) that includes the job offer requirement.

Rather than discuss the petitioner's merits in any detail, counsel begins from the assumption that the petitioner is a "Highly Qualified Teacher" and that the labor certification process is inherently ill-suited for such individuals. The same statutory clause cited above also subjects aliens of exceptional ability to the job offer requirement (including labor certification). Therefore, there can be no argument that exceptional ability as a teacher should presumptively qualify any given alien, or "foreign teachers" as a class, for the national interest waiver.

Counsel asserted, at length, that there is a crisis in teaching science, technology, engineering and mathematics (STEM) in the United States, and that "Highly Qualified Teachers" address this urgent need. Counsel did not establish the effect that the petitioner has had on this issue in the several years that he has already been teaching in the United States.

Counsel stated that another self-petitioning teacher received a national interest waiver, and asked that the present petition "be treated in the same light." While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions by the AAO or by Service Centers are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted.

The petitioner submitted copies of previously submitted documents, as well as background materials regarding STEM education. The petitioner also submitted new certificates and witness letters, reflecting the petitioner's most recent efforts in the United States. The petitioner asserted that these materials establish his influence on the field of mathematics teaching. The submitted materials are broadly similar to the exhibits submitted previously, showing that the petitioner has performed his work successfully and earned the respect of fellow teachers and administrators, but falling well short of demonstrating any significant impact beyond the schools and districts where he has worked.

The director denied the petition on November 8, 2012, stating that the petitioner had failed to meet the *NYSDOT* guidelines to show eligibility for the waiver. On appeal, counsel notes that Congress passed the No Child Left Behind Act three years after the issuance of NYSDOT as a precedent decision, and that therefore "[t]here is no longer vagueness or obscurity" on the question of whether "highly qualified teachers" serve the national interest. Counsel, however, identifies no special legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

The assertion that the No Child Left Behind Act is tantamount to a retraction or modification of *NYSDOT* is not persuasive; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not made a persuasive claim that the No Child Left Behind Act indirectly implies a similar legislative change.

Turning to immigration legislation, counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "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 . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States."

(Counsel's emphasis.) Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the section of relevant law that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, separately or in combination, create or imply any blanket waiver for teachers, and any attempt to fashion such a waiver out of the wording of the statutes must therefore fail.

Counsel asserted that the director "erred in disregarding evidence demonstrating the national scope of petitioner's proposed benefit through her [*sic*] effective role in serving the national educational interest of closing the achievement gap." Closing that gap is a national goal, but it does not follow that the petitioner's efforts toward that goal are, themselves, national in scope. Counsel did not show that the petitioner's individual work significantly "clos[ed] the achievement gap" at a national level, rather than locally in one district, one school, or one classroom.

Regarding the "achievement gap," counsel provides statistics from [redacted] The petitioner used to work for that district, but left several years before filing the petition and has voiced no intention of returning. Counsel does not explain why this information is relevant to the petitioner's waiver claim. The AAO notes that, according to the statistics cited by counsel, "[redacted] ranked near the bottom" at all assessed grade levels in 2012. This data does not suggest that the petitioner's teaching efforts for [redacted] before 2012 had an appreciable lasting effect. Counsel does not explain how the petitioner's future work will "clos[e] the achievement gap" when there is no evidence that his past work has done so.

In the section of the brief regarding [redacted] counsel repeatedly refers to the male petitioner with feminine pronouns, and states erroneously that he teaches "Reading, Science and math for children with special needs."

Counsel denounces the labor certification process as "tedious," but the national interest waiver is not merely a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT*, 22 I&N Dec. 223.

As is clear from a plain reading of the statute, engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather 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 labor 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.

ORDER: The appeal is dismissed.