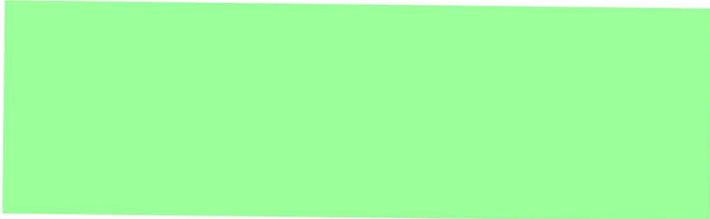


(b)(6)

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



DATE: APR 25 2014 OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

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:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
f Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will sustain the appeal and approve the petition.

The petitioner seeks to classify the beneficiary 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, a public university, seeks to employ the beneficiary as a clinical professor in the petitioner's Division of Occupational and Environmental Medicine (OEM). 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 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, the petitioner submits a statement, letters from officials of the petitioning employer and other witnesses, and background evidence.

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 beneficiary 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, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 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, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm’r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish 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.

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. *Id.* at 219. The petitioner’s assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term “prospective” is included 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.*

The 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, Immigrant Petition for Alien Worker, on October 1, 2012. In an accompanying letter, Professor [redacted] chief of the petitioner’s Division of Occupational and Environmental Medicine, stated:

[The beneficiary] is a highly recognized figure in the field of Occupational and Environmental Medicine. . . . He has developed model medical surveillance

programs, immunization programs, and post-exposure and emergency response programs for infectious agents in health care facilities, laboratory animal research, and other work settings. Some of these are now in widespread utilization both nationally and internationally. . . . He is the past President and continues to serve in various leadership capacities in the [REDACTED] which is the leading association dedicated to improving the practice of occupational and environmental health. He continues to consult with a broad range of university institutions, private companies, and governmental bodies on both the enhancement of measures promoting health in the workplace as well as dealing with workplace-related illnesses and healthcare policies.

. . . [The beneficiary] has been a leading figure in certain specific initiatives to develop national programs in the field of occupational and environmental health. In the aftermath of a widely publicized incident in San Francisco harbor, he developed medical surveillance standards for marine pilots serving coastal communities. This study was undertaken at the request of the U.S. National Transportation Safety Board (NTSB) and resulted in [the beneficiary] formulating recommendations on new approaches to medical surveillance of boat pilot health and capabilities. . . . At present, his recommendations are in the process of implementation by [REDACTED] the American Marine Pilot Association and the U.S. Coast Guard, so as to establish without question the national importance and reach of his work.

In addition, [the beneficiary] has done nationally important work in the development of scalable emergency response to local and regional exposures to infectious agents, on standards related to dealing with violence against home health and hospice workers, on modeling responses to the SARS [Severe Adult Respiratory Syndrome] virus, on initiatives to deal with various other communicable diseases (most notably, H1N1), and on developing protocols and programs dealing with structuring hospital emergency operations and hospital command systems in the event of healthcare crises stemming from workplace activity, including health care provider exposures through the care of the public, especially in outbreak situations. . . .

He is engaged in a wide range of services related to developing high and beneficial standards of health and safety at the workplace. At core, his work deals with the prevention and management of illness, injury, or disability that is related to the workplace. In addition to developing a broad range of healthcare standards, protocols, and initiatives within the [REDACTED] system, he has and continues to perform scholarly and public policy work of national importance. He has done specific research studies that have resulted in new protocols, standards of conduct, screening procedures, and preventive and therapeutic initiatives that address various workplace-related illnesses, injuries, and disabilities. He has and continues to work with various international organizations – most notably, the International Labor



Organization (ILO) – as well as federal, state, academic, and professional organizations to develop standards and approaches related to the physical, mental, and social well-being of workers. . . . His contributions are not speculative; rather, he has an established record of achievement and professional attainment that has contributed to the enhancement nationally of workplace standards and protocols related to the enhancement of worker healthcare. . . .

[The petitioner’s] Division of Occupational and Environmental Medicine . . . has taken a leadership position in academic Occupational and Environmental Medicine since the passage of the OSHA Act [Occupational Safety and Health Act]. . . .

While a principal accountability in [the beneficiary’s] position is to provide direct clinical services to workplace related injuries and illnesses as well as to formulate this institution’s policies and programs dealing with workplace related injury and illness, the work he is doing serves as a model and clinical laboratory to other institutions in the field of occupational and environmental healthcare concerns. We are a leading center of initiatives in the field of occupational and environmental health, and . . . this forms the bases for [the beneficiary’s] active participation in a multitude of initiatives on a national and global level to develop and implement programs of importance and sustenance related to workplace health and safety measures.

Several other letters accompanied the initial filing of the petition. Professor [redacted] who holds professorships at the petitioning institution and the [redacted] and also directs the Health Services Department at [redacted] stated that the beneficiary “has made important advances in our ability to take preventive action and respond appropriately to many infectious agents.” Prof. [redacted] stated that the beneficiary’s “leadership in professional organizations and government service . . . reflect his status in the occupational medicine community.”

[redacted] president of the [redacted] stated:

[The beneficiary] serves as a member of our [redacted]

One of the oversigned responsibilities of the Board is an annual determination of each licensee’s physical and mental fitness to serve as a [redacted]. . . . In the aftermath of the [redacted] collision with the San Francisco-Oakland Bay Bridge and resulting release into the Bay of over [redacted] the Board’s Incident Review Committee conducted an investigation of the incident and determined that there had been pilot error. The pilot navigating the vessel had health problems that were not known to the Board, and that likely affected his judgment and ability to navigate. . . . [T]he Board determined that it should

conduct a review of its pilot fitness standards and procedures and make changes if appropriate.

[The beneficiary] was engaged by the Board to perform a thorough examination of the Board's pilot fitness standards and fitness oversight procedures and to make recommendations for improvements. His report and recommendations . . . form a foundation upon which the Board is making important changes to its pilot fitness oversight. . . .

Those changes, presently the subject of administrative rulemaking, already have attracted considerable attention among pilotage regulators and pilots on the Pacific Coast and across the United States. The changes will become a template and likely will be followed by regulators in many other ports. [The beneficiary's] work is of national significance.

The cover page of the [redacted] bears the beneficiary's name, confirming the beneficiary's major role in preparing the study.

Professor [redacted] of [redacted] stated: "Through his involvement in professional organizations [the beneficiary] has gained a national reputation as a person of high integrity, well organized, a good thinker, and a person who gets things done. This is evidenced by his rise to leadership in all the different organizations he has been involved with."

Dr. [redacted], associate professor and director of the Occupational Health Nursing Program at the [redacted], stated:

[The beneficiary] is a superb and renowned figure working in the field of occupational and environmental health. . . .

[The beneficiary's] work focuses on enhancing standards of safety, health, and healthcare prevention in the workplace. He has performed valuable studies on clinical response protocols to the H1N1 Influenza Pandemic, developed a SARS Occupational Response protocol, and his work with the Board of Pilot Commissioners is already leading to national change in medical surveillance regulations. [The beneficiary's] work related to SARS and H1N1 is highly regarded and used throughout the country by healthcare institutions to design strategies to prevent exposure risk. In addition, I would like to draw particular attention to [the beneficiary's] work to curb violence against home health and hospice workers. . . . His groundbreaking work provided an analysis of the policies and practices of home health care and hospice agencies so as to develop appropriate initiatives to recognize, address, and ultimately minimize the threats to this particular occupational group. His study acts as foundational work to continuing research, and fills out the nature of

violence in the health care sector to home care and hospice workers. There is no other work in the literature on this topic.

Dr. [REDACTED] executive director of the [REDACTED] [REDACTED] stated:

The clinic at [the petitioning university] was a founding member of [REDACTED] [The beneficiary] has demonstrated a commitment to [REDACTED] principles, and has worked to strengthen the clinical program at [the petitioning university] since his arrival there.

. . . I have worked closely with [the beneficiary] over the past six years on a number of projects important to both [REDACTED] and to the overall OEH issues. This has included such varying issues as the American Conference of Governmental Industrial Hygienists threshold limit values, developing the plan to work in the Gulf Coast to help improve the OEH infrastructure, the [REDACTED] patient bill of rights, discussions over the need and limitations of mandatory vaccines for health care workers, recruiting students into OEH careers, and maintaining standards for all OEH professionals. I work with any number of academics who write about these issues and others. [The beneficiary] goes a step further and works to implement them.

Dr. [REDACTED] associate professor and medical director of Occupational Health at [REDACTED] [REDACTED], served with the beneficiary on the [REDACTED] Board of Directors and, like the beneficiary, previously served as its president. Dr. [REDACTED] stated:

[The beneficiary] has already made great contributions to the field of OEM before he came to the U.S. from Canada, where he held leadership roles in occupational health at provincial and national levels. In addition to this experience in health policy development, he gained special operational expertise from his experience in guiding Canada's response to the SARS epidemic. . . .

In his current position, he provides an essential service at the local level, directing the employee health programs that ensure the health and safety of healthcare workers at the [petitioning] medical center. . . . He is particularly interested in reducing the impact of chemical, biological and physical agents, and has active roles in various institutional, governmental, and service organizations. Among these is his work to direct the national needle-stick "PEP" hotline, which provides real-time access to guidance from content experts for immediate evaluation and treatment of healthcare workers and emergency response personnel who may have suffered exposure to infectious agents. His leadership at the national level is also exemplified by his recent service as President of the [REDACTED] [REDACTED] where he was influential in reviewing the [REDACTED] List, a resource that is recognized internationally as a useful guide to the initial clinical assessment of workers with hazardous chemical exposures.

Professor [REDACTED] chair of the Department of Occupational Health Sciences at the [REDACTED] and board president of the [REDACTED] credited the beneficiary with "important teaching contributions to the Occupational Medicine Residency at his institution," and stated that the beneficiary "will be chairing an upcoming national meeting in November of 2013 on occupational and environmental factors in neurologic disease and updates in occupational and environmental medicine."

Some of the witnesses' claims lack corroboration. For example, Prof. [REDACTED] had asserted that the beneficiary's "recommendations are in the process of implementation by . . . the American Marine Pilot Association and the U.S. Coast Guard," but the record contains no evidence from those entities to corroborate that claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Other claims are better supported. The petitioner submitted copies documentation showing a one-year grant from the [REDACTED] and a subcontract from the [REDACTED] to study "Violence Among Home Health and Hospice Care Workers." The petitioner also submitted documentation of conference presentations and courses arising from the beneficiary's work, as well as partial copies of reports and articles written by the beneficiary. [REDACTED] published by the [REDACTED], credited no author, but identified the beneficiary as one of several "Experts appointed after consultation with the Employers' group" who participated in a March 2000 meeting that finalized and adopted the code. The record also identified the beneficiary as chair of the [REDACTED], and confirmed his membership on several other committees.

The director issued a request for evidence on January 30, 2013. The director requested "documentary evidence to establish that [the beneficiary has] a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director specifically asked for copies of articles that cited the beneficiary's published work.

In response, Prof. [REDACTED] asserted that the petitioner's record of influential achievements includes [REDACTED] listed "five of [the beneficiary's] most important and influential studies," only one of which was published as a journal article; the rest are reports and studies commissioned by particular organizations. One of those papers, [REDACTED] published by the [REDACTED], identified the beneficiary as one of 16 members of the Subcommittee on the [REDACTED]

The director denied the petition on July 3, 2013, stating:

The Service does not dispute that the beneficiary's services are beneficial to his institution and its clients/patients, but the beneficiary has not shown any measurable influence on the field at a national level. The record contains no indication as to what level of national benefit can be ascribed specifically to the beneficiary that would set him apart from other clinical professors.

Clinical patient treatment lacks national scope, as the direct benefits of this physician's service are limited to the physician's clientele. Published medical research has a wider effect, because research findings can be implemented by others, but the record contains limited information about the scope of the beneficiary's research activities. In addition there is no evidence to attest to the scope and nature of the beneficiary's skill or record as a professor. . . .

The Service finds that it has not been demonstrated that the beneficiary's publishing history, in terms of numbers of published articles, exceeds that expected of successful scientists. Regarding influence on the field, the evidence submitted does not establish that the petitioner's [*sic*] research has been widely cited.

On appeal, the petitioner states that the beneficiary "has developed a record of high achievement," including the following "prominent achievements":

[H]e is past President of his profession's leading professional association; he was one of nine experts chosen worldwide to serve on the Expert Committee of the [redacted] in its promulgation of its code of practice entitled "[redacted]" which has to varying degrees been adopted worldwide; he is the lead figure in developing medical surveillance and professional standards for maritime bar pilots who guide trade vessels to and from coastal and inland waters, which have now been developed into regulations; he has developed protocols on a wide range of workplace-related concerns that have been implemented throughout the country; and he is a senior educator and co-chair of one of the nation's leading conferences in Occupational Medicine.

The petitioner contends that "the beneficiary's services are definitely national in scope" and that the director "rather arbitrarily limited the discussion to the alien beneficiary's patient-centered clinical work, rather than considering the full scope of his services."

The record supports the petitioner's assertion that the director gave undue emphasis to the beneficiary's clinical duties as a physician. The beneficiary is a qualified physician, but the petitioner had not based the waiver application on the beneficiary's treatment of individual patients, or on his routine duties as a university professor. Instead, the waiver request hinges on the

beneficiary's wider efforts as a prominent figure in the OEM field. The director, in the decision, did not acknowledge the beneficiary's leadership roles in national organizations. The director acknowledged that the petitioner had submitted witness letters, but did not discuss the contents of those letters.

Three prior witnesses provide new letters on appeal. Prof. [REDACTED] draws attention to the beneficiary's leadership positions in committees and organizations such as the [REDACTED] and asks "why this very impressive range of activities was simply not mentioned at all in the denial."

Prof. [REDACTED] stated: "I would like to focus on [the beneficiary's] work in developing standards and protocols that are being implemented on a national basis to enhance the safety of bay pilots." The appeal includes a copy of proposed regulations for the [REDACTED]

The accompanying Internal Statement of Reasons indicates that "the Board relied on [the beneficiary's] study," and stated: "A copy of the study is posted under the 'Regulations' tab on the Board's website."

Letters submitted with the initial filing of the petition in October 2012 had indicated that the proposed regulations were in development. The Board issued the Notice of Proposed Rulemaking on July 26, 2013, 23 days after the denial of the petition and a week before the filing of the appeal. The regulations, issued at the state level, would affect nautical traffic at three named bays on the California coast. In a new letter submitted on appeal, Mr. [REDACTED] claimed that the National Transportation and Safety Board and the U.S. Coast Guard have adapted the beneficiary's work for wider use, but the record contains no evidence from those entities or any other national-level body to confirm consideration of the study's recommendations, and no witness claimed authority to speak on behalf of those entities.

Although some witnesses' claims lack corroboration, the record offers better support for other claims, such as Prof. [REDACTED] assertion that the beneficiary has played a prominent role in national and international organizations such as the [REDACTED] and the [REDACTED]

Dr. [REDACTED] in her second letter, stated:

It is important to note that while many scientific disciplines publish their findings in presentations and academic journals, those who practice in the field of Occupational Medicine strive to translate their findings into policy-oriented results that affect entire and, often large, groups of people.

When judged in this light, it is immediately apparent that [the beneficiary] is one of the most successful, influential, and respected Occupational Medicine physicians in North America. . . . [H]e was a major architect in the development of various initiatives adopted by the [REDACTED].

While [the beneficiary] may not have published in his own name articles in peer reviewed publications, over the years, he has developed standards and policies – many of which have been adopted by the [REDACTED] – that profoundly and beneficially affect the nation as a whole in developing safer workplace standards and procedures.

The record does not support all of the claims put forth by the petitioner and by witnesses, but it supports enough of them to establish that the beneficiary has, for several years, played an active role at the highest levels of the OEM community, influencing national and international policy. The petitioner has established, by a preponderance of evidence, that the benefit from the beneficiary's employment is national in scope, and that the beneficiary's achievements have significantly influenced the field as a whole. The director's decision did not focus on this evidence, instead emphasizing elements such as clinical work that the petitioner had not claimed as favorable factors.

The evidence in the record establishes that the OEM community recognizes the significance of the beneficiary's past and present endeavors, beyond the intrinsic importance of the overall field. The benefit of retaining the beneficiary's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.