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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 1 2014 OFFICE: NEBRASKA SERVICE CENTER FILE:

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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before us at the Administrative Appeals Office (AAO) on appeal. We 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 an obstetrics and gynecology resident at the 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 legal brief and copies of previously submitted materials.

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, 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 Dep't 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 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, Immigrant Petition for Alien Worker, on March 19, 2013. To explain why she seeks a national interest waiver, the petitioner submitted a letter from Dr [redacted] an associate professor at the [redacted] stated:

> [The petitioner] is currently in the United States in H-1B status along with her husband . . . , who is also a physician and working as a resident at the [redacted] . . . The couple is extremely dedicated, excited and committed to continue in their work in the United States to find new and improved

> ways to treat low income patients in a more cost-efficient and culturally effective manner in support of our country's efforts to make health care more available and more affordable.
>
> . . . Unfortunately, they will exhaust their six years of H-1B status before completing their residency and fellowship programs . . . [and] will have no choice but to switch to J-1 status, which carries a two-year home residency requirement. . . .
>
> [S]ince Argentina has universal health care and does not have the same types of cultural challenges that are present in the United States, [the petitioner and her spouse] would much prefer to remain in the United States and help our country improve its health care system. . . .
>
> [The petitioner] is not eligible to pursue other forms of permanent resident status, including through labor certification or as an outstanding researcher because as a resident, she does not have a permanent position at our University which would allow her to apply for permanent residence in either of these categories.
>
> If [the petitioner] is granted permanent residence in the United States, she is committed to working for community hospitals that serve indigent individuals. From the time she was in medical school in Argentina, volunteering in an emergency room, to her current research on Latino perspectives on infertility treatment and pregnancy planning, [the petitioner] has been dedicated to doing everything she can to improve health care for all. She would like to continue to work toward the goal of finding ways to make health care more accessible and affordable, especially for the low-income population in the U.S. Additionally, she would like to continue developing culturally sensitive and effective ways to treat the Spanish-speaking immigrant population. The approaches and programs that she is developing, and will continue to develop, will not be limited to our institution. Rather, these approaches and programs will benefit medical clinics, hospitals and other medical institutions throughout the United States to treat Spanish-speaking immigrant populations.

The assertion that the petitioner is still undergoing professional training, and therefore does not yet qualify for permanent employment in her field, does not exempt her from the job offer requirement. Similarly, the petitioner's desire to avoid J-1 nonimmigrant status, and the restrictions and obligations such status would entail, is not grounds for granting the national interest waiver.

With respect to the petitioner's wish to work with underserved populations, section 203(b)(2)(B)(ii) of the Act makes the national interest waiver available to certain physicians who commit to practicing in designated shortage areas. The USCIS regulations at 8 C.F.R. § 204.12 set forth the evidentiary requirements for such a waiver. The petitioner has not submitted the required evidence or specifically claimed that she seeks the waiver under those terms. The general assertion that the petitioner seeks to work with the underprivileged does not qualify her for the waiver under either

section 203(b)(2)(B)(ii) of the Act or *NYSDOT*. Clinical practice affects a relatively small, local patient base, and therefore lacks the national scope necessary to satisfy the second prong of the *NYSDOT* national interest test. The benefit from medical research, however, has national scope, as the results from such research are disseminated to other practitioners through conferences and journals. Regarding the petitioner's research work, Dr. stated:

> [The petitioner] worked with my group at Health Sciences Center as a professional research assistant from December 2007 until April 2009. In this position, she was the co-author [of] the study: . . . We know that there is a correlation between diabetes and women with complications in pregnancy. One of the initial questions for the study was why Latina women with diabetes do not plan their pregnancies when they are expected to be complicated.

Dr. stated that the petitioner interviewed study participants, "completed life history calendars," and reviewed the collected data, concluding "that the Latina population is afraid of doctors and do[es] not trust them very much. This is a huge cultural issue that needs to be addressed if the U.S. is going to reduce the rate of birth defects and complications in diabetic pregnancies." Dr. stated: "The goal is to use the data to clarify these cultural issues and then determine what the medical community can do to deal with this reality." She did not indicate that these findings had yet had a wide impact. Rather, she stated: "The results of this research ha[ve] already made a positive impact on the care of diabetic women at Denver Health . . . , and will ripple through the U.S. health system as well, as [the petitioner] continues to expand and present her work."

Dr. described a second project that the petitioner "conducted when she was a professional research assistant and health counselor for the Health Science Center's Comprehensive Women's Health Center from August 2008 to June 2011":

> Her project involved the provision of long-acting reversible contraception to women following their first trimester pregnancy terminations, and then long-term follow-up examining the satisfaction and continuation rate of long-acting reversible contraception when obtained post-abortion. In other words, [the petitioner] was trying to figure out if women having abortions are given the opportunity to immediately acquire birth control that lasts from 3 to 10 years, how many will take that opportunity, how satisfied are they with the birth control over time, and how long do they keep it. . . .
>
> This study was recently closed because all of the data has been gathered. Now [the petitioner] needs to perform the analysis and report the results to the wider medical community.

A third project "focused on the Latino perspective of infertility treatment and whether cultural, social and/or religious factors impact the utilization of assisted reproductive technologies." The

petitioner "found . . . a lack of information and a lack of understanding of the U.S. health care system among Latinos." When the petitioner presented her findings at a conference in 2011, "[t]he physicians at the presentation were very impressed and at the same time, very surprised at her research data."

Dr. [redacted] stated that the petitioner intended to carry out further research, but did not identify any research that the petitioner has undertaken after 2011. Likewise, the petitioner's own *curriculum vitae* identified the three projects that Dr. [redacted] described, but no later research. The petitioner submitted materials relating to the research projects, such as printouts of electronic slides, but she did not submit evidence to establish the field's reception of her research work.

The director issued a request for evidence (RFE) on July 30, 2013. The director requested further evidence to demonstrate that the petitioner's future work will produce benefits that are national in scope. To establish the impact of her past research work, the director instructed the petitioner to submit evidence that others have cited her published research. (The petitioner's initial submission did not indicate that she had published any research. Her materials identified three research projects, two of which had led to conference presentations, while the petitioner was still organizing the data from the third.)

In response to the RFE, the petitioner described her clinical duties and stated:

> In addition to my work at the hospitals, I conduct research. Dr. [redacted] and I are currently expanding on our study on [redacted] and I am working on an abstract paper for a journal. . . .
>
> From the initial 32 participants of the study, 25 agreed to participate in a second semi-structured interview with me lasting 30 to 90 minutes. During this second visit, I used open-ended questions and probes regarding constructs that are particularly meaningful to Latina diabetics who are making reproductive decisions. . . .
>
> Through this data, we will be able to understand Latinas' diabetic reproductive choices, including family planning, birth control use, cultural beliefs of contraception, partner role, and diabetes influence at the time of planning future pregnancies. This information is essential to be able to develop plans of care for Latina diabetic women and address preconception counseling, access to birth control, pregnancy planning and so forth.

The petitioner submitted no evidence to show that the study described above had resulted in changed practices (for example, through the issuance of new guidelines) throughout the field. Because the study was still ongoing, it is not evident that the study had yet had the opportunity to influence others in the field.

The petitioner described a newer study, a [redacted]" The petitioner did not indicate that any research had yet taken place in this study. Rather, she stated: "we are actively recruiting patients and no data has been analyzed yet." Preliminary documentation regarding the study is dated May 30, 2013, more than two months after the petition's filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1), (12). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The study in question had just begun when the petitioner responded to the RFE; the petitioner's expectation of future significant results does not establish that she was already eligible for the waiver at the time of filing.

Professor [redacted] director of Obstetrics and Gynecology at the [redacted] stated that [redacted] a university-affiliated hospital, "care[s] for many immigrant women who speak Spanish as a primary language," and that the petitioner's understanding of the Spanish language and culture help her to care for those patients. This observation attests to her local impact as a clinician, but does not show that the petitioner meets the *NYSDOT* guidelines for the national interest waiver.

The cover letter submitted with the petitioner's response to the RFE stated that other newly submitted "evidence also demonstrates, to some degree, her influence on her field of employment as a whole." All of the listed exhibits, however, originate from the [redacted] or affiliated hospitals. The listed exhibits include the aforementioned May 2013 research proposal; internal [redacted] communications, praising the petitioner's professionalism; a highly favorable Medical Student Evaluation Report; and two certificates from the [redacted] Department of Obstetrics and Gynecology. One certificate is an undated Resident Teaching Award, recognizing the petitioner for "enhancing medical student's [*sic*] learning experiences during their 3rd & 4th years in medical school." The other certificate, dated April 1, 2013, reads: "[redacted] The record contains no further information about this award, to clarify whether the petitioner improved her own exam score or those of medical students training under her.

The director denied the petition on November 27, 2013, stating that the petitioner's occupation has substantial intrinsic merit, but that the petitioner had not satisfied the other two prongs of the *NYSDOT* national interest test. The director stated: "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 . . . , but the record contains limited information about the scope of the beneficiary's research activities." The director acknowledged the petitioner's past research activity but found that the petitioner has not shown that her research work has influenced the field.

On appeal, the petitioner submits a brief, asserting that her medical research produces benefits that are national in scope. The brief then described the research in some detail, but such discussion is unnecessary to establish that the benefit from medical research is national rather than local in scope.

The director acknowledged this general truth, but found that the petitioner had not submitted enough "information about the scope of [her] research activities." The "national scope" prong of the *NYSDOT* national interest test concerns the occupation, rather than the petitioner's individual activities within that occupation. Medical research, disseminated through publication or presentation, produces benefits that are national in scope, and therefore the petitioner's medical research activities satisfy that prong of the *NYSDOT* national interest test. The petitioner asserts that she intends to continue performing medical research in the future. The director did not dispute this assertion, but found that the petitioner had not established the impact of her research. The director was correct to question the impact of the petitioner's research, but this is an issue for the third and final prong, to be discussed below. We therefore withdraw the director's finding that the petitioner has not satisfied the second *NYSDOT* prong.

The appellate brief includes a discussion of the threshold for the third *NYSDOT* prong, drawn from unpublished AAO decisions. The petitioner submits no evidence to establish that the facts of the instant petition are analogous to those in the cited unpublished decisions. 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 are not similarly binding. The brief contends that the petitioner's evidence "clearly satisfies the appropriate standard" (*i.e.*, "some degree of influence on his or her field as a whole based on a demonstrated past record of achievement"), but that "USCIS discounted the significant evidence submitted."

To establish the petitioner's influence on her field, the brief indicates that the petitioner's "research was instrumental to the study which led to a conference presentation and a journal article. Publication and presentation establish that the petitioner's work is available to others in the field, but they do not, by themselves, show that the petitioner's work has influenced others in the field.

The brief states:

> The significance of her research and the influence it has on her field is further demonstrated by the fact that [the petitioner] has been given the unique opportunity to conduct additional data analysis related to this study although she is no longer working as a professional research assistant. This is unheard of in residency programs and [the petitioner] was only granted this special opportunity because of her stellar research background and the potential importance of her findings.

The petitioner submits no evidence on appeal to support the above claims. 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)). Furthermore, even if the University of Colorado took unprecedented steps in having the petitioner continue her study, this would not be evidence of recognition or impact outside of the

The brief asserts that the petitioner's "critically important research related to the impact of delayed cord clamping on term infants and preterm infants . . . will provide crucial information on whether this practice will provide any benefits to infants at higher altitudes." The study had not yet produced any results, and therefore speculation about the importance of the eventual results is premature. As noted previously, this project apparently did not start until after the petition's filing date, and therefore it cannot establish that the petitioner already qualified for the benefit sought as of the time of filing as required by 8 C.F.R. § 103.2(b)(1). *See also Matter of Katigbak*, 14 I&N Dec. at 49.

The brief then repeated the list of materials submitted in response to the RFE, referring to the exhibits as "evidence of her degree of influence on her field." The brief offered no explanation as to how the documents, all originating from the demonstrate the petitioner's influence on her field as a whole.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT*, 22 I&N Dec. 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

As is clear from 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 labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. 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 not met that burden.

ORDER: The appeal is dismissed.