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

[redacted]

DATE: DEC 0 5 2014 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office 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 a college/university instructor. At the time she filed the petition, the petitioner was a communication studies instructor at 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. The director also found that the petitioner had failed to submit documentation required as part of the waiver application.

On appeal, the petitioner submits a statement, asserting that the director did not fully consider the evidence submitted in support of the petition.

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, but found that the petitioner had not established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest, or that the petitioner had properly applied for the waiver.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. Form ETA-750B is now obsolete, but sections J, K and L of the successor form, ETA Form 9089, Application for Permanent Employment Certification, fulfill the same purpose. The petitioner's initial submission did not include either form. The director issued a request for evidence (RFE) on October 17, 2013. The director instructed the petitioner to "submit Form ETA-750B . . . or Form ETA-9089 . . . Parts J, K and L." The petitioner responded to the RFE, but did not submit either of the requested forms.

In the denial notice, dated April 25, 2014, the director stated: "the petitioner did not submit a Form ETA-750B (or ETA Form 9089, Parts J, K, and L) as requested in the RFE. Therefore, since the petitioner did not submit this required evidence, Form I-140 must be denied." The petitioner, on appeal, does not address this finding. We therefore affirm the finding that the petitioner did not properly apply for the national interest waiver. Because the director also issued a separate finding on the merits of the petitioner's waiver claim, we will address those merits below.

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, Pub. 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 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 May 14, 2013.[1] In an accompanying statement, the petitioner stated:

> I [seek] to continue my research and policy advocacy in education administration and student mentorship initiatives. Recent financial concerns in higher education . . . have created extraordinary challenges for colleges to deliver on the promise of higher education. . . .
>
> [I]t is imperative that we serve our primary constituents honorably by first admitting that we are currently unable to adequately meet their needs and engage in a process of inquiry to recommend several possible solutions, to curb academic inflation, and expand the skill set of the workforce in a cost effective and sustainable manner.
>
> These may sound like lofty goals but I have in the past two years and eight months dedicated my time effort and energy to collect data, rally stakeholders, and meet the needs of my current students to achieve this goal. . . .
>
> [S]everal colleges have decided to further decrease the hours of contingent or adjunct faculty members to ensure they do not qualify for benefits. This means there will be an additional direct cost to the federal budget from institutions of higher education wishing to avoid adequate compensation. In addition it will then become more cost

[1] On Part 4, line 5 of Form I-140, the petitioner acknowledged that she is in removal proceedings. Her initial submission included a copy the February 26, 2013 denial notice from a Form I-130, Petition for Alien Relative, that her U.S. citizen spouse had filed on her behalf. In that decision, the Field Office Director, Irving, Texas, stated: "the Service concludes that [the] marriage is one entered into so that the beneficiary can obtain an immigration benefit." This finding appears to invoke section 204(c) of the Act, 8 U.S.C. § 1154(c), which prohibits the approval of any petition for an alien who has entered into a marriage with a citizen or permanent resident of the United States, or attempted or conspired to enter into such a marriage, for the purpose of evading the immigration laws. Because the petition is not otherwise approvable, we need not make a formal 204(c) determination at this time.

> effective to be a student than a faculty member, as graduate students receive health benefits and in most cases higher rates of compensation than contingent faculty, further driving academic inflation and possibly impacting student outcomes in both the short and long term.
>
> I have included independent data demonstrating the scope of this problem and pray that you afford me the opportunity to continue this work. I intend as a rhetorical act to complete this seminal work, before completing my doctoral degree, as a means of demonstrating the problem of academic inflation. Upon completion, the findings will be sent to the United States Department of Education, as well as state and federal legislators to facilitate the implementation of effective policies.

The petitioner stated her intention to furnish her findings to government authorities, but she did not indicate what those findings were, or establish that she has already devised a solution that has proven to be effective. The petitioner submitted a three-page overview of the "[redacted] through which the petitioner seeks to provide "[l]ong term solutions to academic inflation and sustainable policy guidelines" and "[l]ong and medium term solutions to student debt crisis and a new mentorship model," among other benefits. The document described all four phases of the initiative in the future tense, indicating that, at the time of its writing, Phase I had not yet begun.

Background materials described the situation facing contingent faculty, but did not establish what impact, if any, the petitioner has had on this field.

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). 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). Therefore, the petitioner's stated intention to seek a still-unknown solution at some future time is not a sufficient basis for approving the national interest waiver. Furthermore, the petitioner seeks an employment-based immigrant classification, but she did not explain how this research would relate to ongoing employment as a university instructor.

As evidence of earlier graduate-level research projects, the petitioner submitted a paper with the title [redacted] but the petitioner did not establish the impact of this research or establish any connection between her past work and her intended future initiative. Other submitted materials, such as copyright notices for music and poetry, have no demonstrated relevance to the matter at hand.

The petitioner submitted several letters in support of the petition. Dr. [redacted] is a professor and executive dean at [redacted] where the petitioner taught from August 2010 to August 2011. Dr. [redacted] stated:

> [The petitioner seeks to] continue her research and policy advocacy for Higher Education funding and student success. . . .
>
> Unlike other adjunct faculty members who may become dissatisfied with limited earning potential and the responsibility of caring for widely diverse groups of students, [the petitioner's] passion is repairing the system by creating public awareness to drive funding opportunities and connecting stakeholders on multiple levels. She is currently working on proposals for the United States Department of Education and The Equity and Excellence Commission to provide solutions to serious funding and operational concerns.

Dr. went on to describe the importance of the problem, but not the petitioner's research or her proposed solutions. A solution may well serve the national interest, but an unfinished attempt to find such a solution does not warrant permanent immigration benefits.

who identified herself as "a college professor" but provided no other details, stated that the national interest waiver "will allow [the petitioner] to perform significa[nt] research examining major labor issues within the higher education system." She did not describe the petitioner's existing research on the subject, or claim that the petitioner has done any such research.

The remaining letters are from individuals who attested to the petitioner's personal character, but did not address the stated grounds for seeking the waiver. These individuals did not claim expertise or employment in education or related fields; one individual is " " and another is "a corrections officer."

In the October 17, 2013 RFE, the director acknowledged the intrinsic merit of the petitioner's intended occupation, but found that the petitioner had not shown that her intended future work met the remaining two prongs of the *NYSDOT* national interest test. The director also instructed the petitioner to "submit a letter of proposed employment from a U.S. employer, a contract or a statement detailing how the [petitioner] intends to continue [her] work in the U.S." This request was justified because the petitioner had specifically stated her intention to work at a "college [or] university," an arrangement which necessarily would require an institution willing to employ her.

In response, the petitioner stated:

> As an advanced degree holder, faculty member, doctoral candidate, and research assistant, I have been working on a few large projects of national interest concurrently. Two of the projects will impact over 50 million Americans, and are in the initial stages of development. The first of the two issues of national interest is the expansion of bilingual education paradigms to meet growing demand in the domestic and international markets. . . . My work will help educators identify and mentor students, which will produce millions of dollars in profit . . . for decades to come. . . .

> The second project of national interest is the contingent labor trend in higher education, which diminishes the effectiveness of faculty and student interactions. This project will impact thousands of American faculty members and over 30 million students, and is in its initial stages of pre-funding development. . . .
>
> Vulnerable intellectual property rights make it difficult to divulge the initial phase of my inquiry. . . . [T]hese projects will eventually gain funding, with substantial private and public sector applications.

The petitioner had not previously mentioned the bilingual education project. The petitioner submitted materials showing that accepted the petitioner into a doctoral program in June 2013, a month after she filed the petition. Although many graduate students pursue ancillary employment, graduate study itself is not employment or a basis for employment-based immigration benefits. As with her initial statement, her RFE response statement referred not to any project with known, proven results, but to preliminary research, with no evidence to support the petitioner's predictions about the impact that her future work will eventually have.

Although obtaining research funding would not, by itself, establish eligibility, the petitioner did not claim even to have reached that preliminary stage, instead asserting that her "projects will eventually gain funding," without identifying the funding sources or documenting their agreement to provide those funds. The petitioner's waiver claim rests not on the results from any completed research project, but on speculation that projects now at the preliminary stages will eventually produce important results. The petitioner established no past track record of influential research to justify these conclusions about her future work.

The director denied the petition on April 25, 2014. The director listed various exhibits that the petitioner had submitted with the petition and in response to the RFE. The director concluded that the petitioner had established the intrinsic merit of her intended employment, but had not shown that its benefit would be national in scope, or that the petitioner had established a record of prior achievement that would support her claims of future benefit to the United States. The director concluded that only the petitioner's own students would directly benefit from her work as a teacher.

On appeal, the petitioner states:

> In this case the project is the original ongoing work of the [petitioner], and it is not possible for another U.S. worker to do this work without violating the [petitioner's] intellectual property rights. . . . Additionally, the assertion that only students in the state of Texas would benefit from her extraordinary skill is flawed, since millions of American students around the country . . . would benefit from the proposed system that this project seeks to implement.

The petitioner adds that it would "create undue hardship" for her to seek to implement the project through an employer, because this, too, would compromise her intellectual property rights. The

petitioner has not described "the proposed system that this project seeks to implement," and there is no evidence that this system would, in fact, effectively mitigate the problems that it seeks to address. The petitioner contends that the director failed to consider that her work will benefit "millions of American students," but without evidence that her work has benefited anyone, this claim is entirely speculative. 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)).

The petitioner states:

> According to United States Census in 2009, only 10.3 percent of the U.S. population had a graduate degree or higher. As a holder of an advanced degree from an American institution, [the petitioner] has demonstrated that she is an immigrant with extraordinary ability. Additionally her community engagement, submitted recommendations, and awards demonstrate that she is performing at a level that is above average.

The petitioner seeks an immigrant classification that presumes an advanced degree; she cannot use that same degree as evidence of "extraordinary ability" within the classification. Section 203(b)(1)(A) of the Act established a separate immigrant classification for "[a]liens with extraordinary ability . . . which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." The petitioner did not seek that classification on Form I-140, and the record does not contain extensive documentation of sustained acclaim.

As for the claim that "she is performing at a level that is above average," 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. Section 203(b)(2)(A) of the Act states that aliens of exceptional ability are subject to the job offer requirement; they do not automatically qualify for the national interest waiver. Thus, even if the petitioner had established "above average" performance, and thus exceptional ability, she would still need to demonstrate that she qualifies for the waiver she seeks.

The petitioner contends that, as a doctoral student, "she is an exemplary immigrant worthy of further consideration leading to acceptance of the petition." The petitioner seeks an employment-based immigrant classification. Graduate study is not employment, but rather temporary training in preparation for future employment. The law makes separate provisions for nonimmigrant status during graduate study; it is not a basis for permanent immigration benefits. Also, as noted above, an advanced degree, itself, is not a basis for granting the national interest waiver. Therefore, it stands to reason that pursue of such a degree is, likewise, not sufficient to establish eligibility for the waiver.

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. at 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.

We will dismiss the appeal for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.