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: JAN 09 2014 OFFICE: TEXAS 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:

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 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 high school math teacher in Since August 2007, the petitioner has taught 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.

On appeal, the petitioner submits a brief and copies of 2012 public school progress reports at the state and county levels. The petitioner indicates on appeal that he is appealing the petition *pro se*. Previously, his attorney of record was (hereafter "former counsel").

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 (IMMACT 90), 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 June 29, 2012. In an accompanying statement, former counsel stated that the "petition for waiver of the labor certification is premised on [the petitioner's] Masters Degree in Education, about nineteen (19) years of dedicated and progressive teaching experience in STEM [science, technology, engineering, and mathematics] Education, the awards and recognitions received by his [*sic*], among others."

Academic degrees, experience, and recognition for achievements are all elements of an exceptional ability claim under the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F), respectively. Because the threshold for exceptional ability is lower than the threshold for the national interest waiver, evidence of exceptional ability does not necessarily establish eligibility for the waiver.

Former counsel's statement included an exhibit list, identifying eight "awards and recognitions" from as follows:

- An undated document thanking the petitioner "for serving as a Middle States Committee Chair." The document reads, in part: "Your selection as a Committee Chair was based on your professionalism and continued support of the culture and climate change at
- A July 2009 "Teacher Appreciation" certificate, presented to the petitioner "for Patience and Endurance in the Classroom."
- Three certificates for "Perfect Attendance," dated June 2009, December 2009 and March 2010.
- Two "Summer School Acceptance & Confirmation" forms, respectively from 2009 and 2011, indicating that the petitioner "accept[ed] a position as a/an Math teacher for 'Jumpstart to Graduation' Summer School Program at
- Most Likely to Give a Test Award, Program, May 2012

The petitioner did not establish the significance of these certificates outside of

The petitioner submitted letters from administrators and teachers at as well as from students and parents of students. The witnesses praised the petitioner's skills and character, but did not establish that the petitioner's work has influenced the field.

The director issued a request for evidence on February 11, 2013. The director stated: "The petitioner must establish that the beneficiary has a past record of specific prior achievement with some degree of influence on the field as a whole." The director also instructed the petitioner to submit documentation to establish the significance of awards that the petitioner has received.

In response, the petitioner submitted background materials regarding STEM education and federal education initiatives, as well as a statement from former counsel. Former counsel stated that, using a "strict implementation of *In the Matter of New York Department of Transportation*, the USCIS-Texas Service Center has determined National Interest Waiver self petitioner teachers' evidences as insufficient and accordingly denied the applications." Former counsel asserted that the director "has discretion to enforce said precedent," *i.e. NYSDOT*. Following published precedent decisions is not a matter of discretion. Rather, such decisions are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). Former counsel stated: "the Service has legal and factual bases to approve teachers' National Interest Waiver applications without offending the principles enunciated in the *Matter of New York Department of Transportation*."

Former counsel quoted remarks made by then-President George H.W. Bush when he signed IMMACT 90: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Former counsel interpreted this passage to mean that Congress created the national interest waiver for educators, but the job offer requirement for which the petitioner seeks a waiver was, itself, an integral provision of IMMACT 90. President Bush's quoted remarks did not specifically mention the national interest waiver, and there is no evidence that the remarks referred particularly to the waiver, rather than to IMMACT 90 as a whole. The national importance of "education" as a concept, or "educators" as a class, does not lend national scope to the work of a single schoolteacher.

Former counsel asserted that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claimed that Congress subsequently filled that gap with the passage of the No Child Left Behind Act of 2001 (NCLBA), Pub.L. 107-110, 115 Stat. 1425 (Jan. 8, 2002):

> Congress has in effect remarkably engraved the missing definition upon the concept of 'in the national interest,' centered on the 'Best Interest of American School Children.' More importantly, U.S. Congress also provided the means to achieve this now defined 'in the national interest,' i.e., 'Hiring and Retaining Highly Qualified Teachers.' Interestingly, "NCLB Act" also specified the 'Standard of a Highly Qualified Teacher.'
>
> Indeed, the "NCLB Act" has elucidated the previously dark avenue for educator-national interest waivers.
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> With this, the Service now has a definite working took in defining what is 'in the national interest' including the clear standard on what qualifications must be required from NIW [national interest waiver] teacher self-petitioners, as mandated by No Child Left Behind Act of 2001. There is no longer vagueness or obscurity like what happened in the New York State Department of Transportation case, which left the Immigration Service with over-reaching discretion in imposing even the impossible from NIW teacher self-petitioners.

Most of former counsel's statement consists of variations on the claim that the NCLBA amounts to a legislative mandate for a blanket waiver for highly qualified teachers. The phrase "national interest" does not appear in the text of the NCLBA. The term "best interest," with respect to children, appears only in provisions relating to homeless students. The NCLBA contains no mention of the national interest waiver or any immigration benefits for foreign teachers, and it did not amend section 203(b)(2)(B) of the Act (which created the waiver). Former counsel contended that Congress specifically intended to make the waiver available to "highly qualified teachers" when it passed the NCLBA, and that "favorable decisions for the NIW teachers" is thereby "honoring the Congressional intent in No Child Left Behind Act of 2001." Former counsel, however, cited no specific language from the statute itself or its legislative history to support this claim.

Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). Here, the petitioner has not established that Congress intended to exempt teachers from the job offer requirement, either through section 203(b)(2) of the Act, the NCLBA, or any other federal legislation.

The NCLBA did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (Dec. 12, 1991) made the national interest waiver available to members of the professions holding advanced degrees, where previously it was available only to aliens of exceptional ability. Following the publication of *NYSDOT*, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (Nov. 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Thus, Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so on two occasions, first to correct an omission of language, and later in direct response to *NYSDOT*. Former counsel identified no other legislation that directly addresses the national interest waiver in this way. In the absence of a comparable provision in the NCLBA or any other education-related legislation, there is no basis to conclude that the legislation indirectly implied a blanket waiver for teachers. Without clearly expressed Congressional authority, USCIS will not designate blanket waivers on the basis of occupation. *See NYSDOT* at 217.

The NCLBA and other federal initiatives establish that the federal government places a priority on improving the quality of education, but former counsel did not establish that any of these programs had the express or implied result of changing immigration policy toward teachers. Section 203(b)(2)(A) of the Act remains in effect, and therefore teachers, "highly qualified" or otherwise, remain subject to the job offer requirement.

Former counsel claimed that the labor certification process would pose a "dilemma" because the petitioner's qualifications exceed the minimum requirements for the position, and "the employer is required by No Child Left Behind (NCLB) Law . . . to employ highly qualified teachers." Former counsel did not show that these two considerations are incompatible. Section 9101(23) of the NCLB Act defines the term "highly qualified teacher." By the statutory definition, a "highly qualified" school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

Section 9101(23)(A)(ii) of the NCLB Act further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or

provisional basis." Former counsel did not explain how the above requirements are incompatible with the existing labor certification process, and the petitioner submitted no evidence that the labor certification has resulted in the widespread employment of teachers who are less than "highly qualified." The minimum degree requirement is the same for labor certification as it is for a highly qualified teacher (*i.e.*, a bachelor's degree).

Former counsel stated that the petitioner had already "presented the following evidences of his achievements." Former counsel then listed the petitioner's previously identified certificates. Former counsel did not explain how certificates praising the petitioner's "perfect attendance" and naming him "Most Likely to Give a Test" were "evidences of his achievements." The director, in the request for evidence, had instructed the petitioner to submit evidence of the awards' significance. Simply listing them again cannot suffice in this regard.

The director denied the petition on May 23, 2013, stating that the petitioner had met only the first (intrinsic merit) prong of the *NYSDOT* national interest test. The director stated that the petitioner "is a dedicated educator," but that the evidence submitted does not demonstrate national scope or establish that the petitioner "has a history of demonstrable prior achievements with some degree of influence on the field as a whole."

On appeal, the petitioner asserts: "the national educational interest should underpin the application of the *NYSDOT* factors." The petitioner quotes various materials from the legislative history of IMMACT 90, noting several references to "educators." IMMACT 90 mentioned educators, and it created the national interest waiver, but did not create a blanket waiver for educators. Rather, the legislation specified that teachers, as members of the professions, are subject to the job offer requirement at section 203(b)(2)(A) of the Act.

The petitioner contends that *NYSDOT* contains "ambiguity as to the precise parameters for implementing the job offer waiver," but "Congress has unequivocally spelled out in the NCLB the national interest underpinning public elementary and secondary education." Public education as a whole serves the national interest, but this attests to the intrinsic merit of the petitioner's occupation. It does not give national scope to the work of any one secondary school teacher, and it does not pertain specifically to the petitioner or establish his impact and influence on his field. The petitioner, like former counsel, offers several variations on the claim that IMMACT 90 and the NCLBA collectively imply a blanket waiver for teachers, or at least for "highly qualified teachers" as the NCLBA defines that term. The NCLBA does not contain any immigration provisions, and it does not mention the national interest waiver or the phrase "national interest" in any context. The intrinsic merit of education, however explained, meets only the first prong of the three-pronged *NYSDOT* national interest test.

The petitioner claims that "an automatic application of the *NYSDOT* factors to an NIW application connected with a job in a public school district, without appropriate consideration of the NCLB, would be inapposite." Noting that the beneficiary in *NYSDOT* was a civil engineer, the petitioner states: "In adjudicating NIW applications, the USCIS applies the *NYSDOT* threshold factors across the board, that is, regardless of the type of profession to which the alien belongs and the specific employment sector in

which the alien professional seeks to work." *NYSDOT* involved a civil engineer, but the three-pronged national interest test is deliberately broad; it was not optimized for civil engineers or designed with only civil engineers in mind. Apart from the physician provisions at section 203(b)(2)(B)(ii) of the Act (which postdate *NYSDOT*), there is no provision in the statute that would entitle workers in some professions (such as teaching) to a different national interest standard than workers in other professions (such as engineering). While the NCLBA does not contain any immigration provisions and did not create a blanket waiver for teachers, *NYSDOT* is a published precedent decision and, as such, is binding on all USCIS employees under 8 C.F.R. § 103.3(c). Therefore, applying *NYSDOT* to teachers is not "inapposite."

The petitioner asserts that the director erred in finding that the benefit from his employment would not be national in scope, and asserts that the director "cited the third footnote in *NYSDOT* as providing the guiding principle" in the decision even though that footnote is "a superfluous comment." The footnote served as an illustrative example: "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." *NYSDOT* at 217, n.3. The petitioner, on appeal, has not established that this example does not apply.

Under section 291 of the Act, 8 U.S.C. § 1361, a party seeking an immigration benefit bears the burden of proof to establish eligibility for that benefit. There is no presumption of eligibility. The petitioner, on appeal, seeks to meet this burden by stating "it is [in] the national educational interest of the United States that all children have the opportunity to obtain a high-quality education." This assertion concerns the intrinsic merit of education; it affects "all children" through the collective efforts of all teachers, rather than through the individual efforts of the petitioner or any one teacher. The petitioner quotes various sources indicating that individual teachers have a great impact on the education of their students, but this relates to the teacher's local impact.

The petitioner claims "a verifiable track record of being an effective frontline champion of the national educational interest of ensuring that all children reach proficiency on challenging State academic achievement standards and academic assessments by closing the achievement gaps between minority and nonminority students, and between disadvantaged and more advantaged children." To support this claim, the petitioner submits excerpts from the *Maryland Report Card 2012 Progress Report*, showing "2012 School Progress" for the state as a whole; and specifically. The petitioner states: "the results of the MSA-HAS [Maryland School Assessment and High School Assessment] Algebra/Data Analysis offer an independent and objective metric to determine whether I am effective in promoting the national educational interest of closing the achievement gaps in Math proficiency." These statistics show aggregate data, and do not distinguish the petitioner's impact from that of other teachers in Maryland,

The submitted statistics show some narrowing of the achievement gap at the statewide level, but they also show that, in some important areas, the county lags behind the state, and behind the county. For example (all figures shown as percentages):

	State	County	

Attendance Rate			
2011	92.3	90.2	85.0
2012	92.2	91.2	83.9
Cohort Graduation Rate, class of 2011			
Four-year	82.82	74.63	59.21
Five-year	85.51	78.91	67.32
Algebra/Data Analysis Proficiency Levels			
2011	83.6	67.9	55.7
2012	83.9	67.7	53.4

The last statistic shows a drop in math proficiency at from 2011 to 2012.

2012 School Progress Index measured the school's progress on ten "High School Indicators." The school met three of the ten goals, specifically English achievement, graduation gap reduction and dropout gap reduction. The report indicates that "scores will be broken into five strands. . . . Schools in Strand 1 will be schools meeting all targets and schools not meeting any of their targets will be in Strand 5." is in Strand 4.

The cited figures show where stood after the petitioner had worked there for five years. The petitioner did not submit earlier figures to show that his arrival at coincided with an accelerated rate of improvement in math scores there, or to show that he was largely responsible for any such improvement. The figures provided show a decline from 2011 to 2012. Whatever the petitioner's individual skills as a teacher, the available data do not show that his several years at have raised achievement levels at that one school or on a wider basis.

The petitioner claims that Maryland's "public school system was ranked first in the nation for the fifth consecutive year in Education Week's *Quality Counts 2013* report card on the state of American education." The petitioner does not establish that his work played a significant role in that accomplishment. The submitted statistics show that HSA math scores at are more than 30 points lower than the statewide average. The cited figures do not establish that the petitioner has had, or will have, a national impact on math education.

The petitioner states: "The presence of an effective highly qualified teacher in the classroom is the proverbial pebble that causes the ripple." If the petitioner means to state that educational reform will result from having highly qualified teachers in all classrooms, then he speaks of the cumulative effect of such teachers, rather than the individual effect from any one teacher. If, on the other hand, the petitioner means to state that he individually is sending out "ripples" to other classrooms and other school systems, then he must provide specific evidence to support that claim; statistical evidence that combines his work with that of other teachers is insufficient.

The petitioner claims to "have been at the helm of promoting college and career readiness in the students at " This claim, on its face, emphasizes the local impact of his work, by

defining that impact in terms of a single school. Furthermore, the submitted statistics show that graduation levels at [redacted] while rising, remain substantially below the county and state averages. The petitioner's employment at an underperforming school at a time when there is a trend toward improvement does not demonstrate or imply that the petitioner is largely responsible for that improvement. The record does not demonstrate that the petitioner's past performance as an educator stands out to an extent that warrants the special immigration benefit of the national interest waiver.

The petitioner cites the previously submitted witness letters as evidence of "a past history of achievement with some degree of influence on the field of public secondary education as a whole," but he does not show that the letters identified any specific influential achievements apart from test score improvements at one school. The petitioner repeats the assertion that individual teachers have great influence over individual students, but the petitioner does not show any influence over students except those in his classrooms at the specific schools where he has taught. The petitioner's own students represent a very small fraction of all high school students in the United States, and he has not shown that his work has had, will have, nationally significant results.

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 his influence be national in scope. *NYSDOT* 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 a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.