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: MAY 27 2014

OFFICE: TEXAS SERVICE CENTER

FILE: [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 us 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 progressive post-baccalaureate experience equivalent to an advanced degree. 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 the defined equivalent of 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 statement and supporting exhibits.

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

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding the defined equivalent of an advanced degree under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). 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, 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 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 May 24, 2013. The petition included Form ETA-750B, Statement of Qualifications of Alien, as required by the regulation at 8 C.F.R. § 204.5(k)(4)(ii). On that form, the petitioner identified her prospective employer as the but stated that she intends to continue to reside in Virginia, 1,200 miles east-northeast of , Texas. On the same form, the petitioner stated that she previously taught at in , Virginia, from February 2007 to August 2012, and for the from September 2012 to February 2013.

In a statement accompanying her petition, the petitioner listed six criteria from the "USCIS.portal site," claimed to meet five of them, and stated that she therefore qualifies for the national interest waiver. The listed criteria actually paraphrase the standards for exceptional ability listed under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii). Section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are typically subject to the job offer requirement; the petitioner cannot establish eligibility for the waiver by showing exceptional ability in her field.

The petitioner stated that "granting this waiver will not deny or displace a US citizen or permanent resident," because "not many able US Citizens and permanent residents would be willing to work and stay in a school when the performance levels of students are not very high." A shortage of qualified US workers is generally not grounds for approving the waiver, because the labor certification process exists to address such shortages, and to test claims that qualified U.S. workers are unavailable. *See NYSDOT*, 22 I&N Dec. at 218, 222.

The petitioner offered general assertions about how education benefits society, stating, for example: "I am helping kids prepare for college, so that they can become doctors, engineers, scientists, etc." These assertions address the intrinsic merit of teaching, but there is no blanket waiver for teachers. Congress defined teachers as members of the professions under section 101(a)(32) of the Act, and applied the job offer requirement to members of the professions at section 203(b)(2)(A) of the Act. Therefore, the plain wording of the statute shows that teachers are generally subject to the job offer requirement, and general claims about the overall importance of teaching and education cannot suffice to qualify a particular teacher for the national interest waiver of that requirement. In the absence of legislation to create a blanket waiver for a given occupation (such as section 203(b)(2)(B)(ii) of the Act, which created such a waiver for certain physicians), eligibility for the waiver ultimately rests on the individual merits of the foreign worker seeking the waiver. *See NYSDOT*, 22 I&N Dec. at 217.

With respect to her individual merits, the petitioner stated:

> I believe[] that I am no ordinary teacher and I deserve to receive the benefit under the National Visa Waiver Program (NIW) [*sic*]. . . .
>
> My employment at [redacted] was a milestone. . . . The school where I am teaching may not be the poorest school when it comes to academic achievement but it was one of the low performing schools especially in the Sciences. . . . During my stay at [redacted] I designed experiment[s] and syllabus for the science department of the school. . . . My teaching strategies and programs, helped improve student's [*sic*] performance in the classroom and also in their state given examination. . . .
>
> My employment at [redacted] gave me another opportunity to show that I have something to offer beyond the ordinary. The Physics C-Mech course syllabus that I prepared was applauded by the College Board; they recognized that I am providing my student[s] with academic rigor and college-level experience. . . .

The petitioner submitted several pages of statistics regarding from the web site of the The significance of this data is not always apparent. The table "Accreditation Adjusted Pass Rates" shows a decline in one-year pass rates in four out of five subjects from 2010-2011 to 2011-2012, with no change in the fifth subject (mathematics). The "Science Performance" table shows a decline in test scores from 2009-2010 to 2011-2012. Grade 8 science pass rates for all students rose from 94% in 2009-2010 to 95% in 2010-2011, but fell to 91% the following year. The petitioner did not explain how the submitted statistics demonstrate the improvement that the petitioner claimed.

The petitioner also submitted undated printouts, reporting the test scores of the petitioner's students. One set of scores shows six labeled "Fail," 30 "Pass/Proficient," and 26 "Pass/Advanced." Another set of scores shows one "Fail," 41 "Pass/Proficient," and 16 "Pass/Advanced." A third list, organized alphabetically by student name, shows numerical test scores with no explanation of their significance (such as cutoff numbers for passing). The petitioner did not show how these three printouts relate to one another.

To support her claim that her syllabus "was applauded by the College Board," the petitioner submitted a letter from , vice president of the The letter reads, in part:

> The College Board is pleased to announce that your Physics C-Mech course syllabus is authorized to use the AP® designation for the 2012-2013 academic year at The College Board applauds and recognizes your efforts to provide your students with the academic rigor and college-level experience that is the promise of AP.
> . . .
>
> What Does Authorization Mean?
> The authorization of your syllabus is an official recognition by the College Board that it meets or exceeds the expectations colleges and universities have for your AP subject.

Mr. 's letter appears to be a "form" letter, issued to teachers who seek to offer AP courses. The letter shows that the petitioner's syllabus qualifies as an AP course, but it is not evidence that the petitioner's work has attracted wider attention or influenced the teaching of high school physics. There exists no blanket waiver for all teachers of AP courses, and the evidence submitted does not show how the petitioner is different from other such teachers.

The petitioner submitted copies of recommendation letters from officials at the schools where she has worked. The witnesses were complimentary toward the petitioner, but did not claim or demonstrate that her work has had an impact outside of the individual schools, or has influenced the field as a whole.

The director issued a request for evidence on July 13, 2013, instructing the petitioner to submit evidence to meet the three prongs of the *NYSDOT* national interest test. In response, the petitioner stated that she "underwent a tedious screening process before getting the job," and then "came up with the syllabus and experiments" used in her class. The director did not dispute that the petitioner

is a qualified and productive teacher, but eligibility for the waiver requires more than showing that she is a good science teacher.

The petitioner asserted: "I am not just an ordinary teacher if compared to those with the same level of education, training and exposure as I [have] and I am still improving my craft as the needs of time changes." The petitioner observes that there is no geographical limitation on science education, but this does not mean that the efforts of a single teacher produce benefits that are national in scope. *See NYSDOT*, 22 I&N Dec. at 217 n.3.

The petitioner repeated the claim that qualified U.S. workers are unlikely to compete with her for employment. If this claim is true, then it means the petitioner would have a greater chance of receiving an approved labor certification. As such, it does not show that a waiver of the job offer requirement is in order.

The petitioner stated:

> I may not need an employer, because I can be an independent contractor, this way I can serve an even wider clientele as compared to me getting an employer, and it will only limit my work scope based on the scope of the curriculum followed.
>
> Should, labor certification be waived on my favor [*sic*], I can immediately start helping companies needing my expertise in the field of science specifically in Physics. With H1B [nonimmigrant status] I was only allowed to work for my sponsor, and [if] I . . . get an employer to petition for me for [an] immigrant visa, I will again be bound by my contract with them. However, with visa waiver [*sic*] on my side, once approved, I can start a tutorial business online and on site to help those students who are not enrolled in the school where I am teaching at, and those preparing for college entrance exams. The online physics tutorial will be able to reach students all over the country and even outside of U.S. This I cannot do once I am bound by one employer. I also, can provide employment given a chance, while I can still teach in a regular school set up, if I am able to open my own tutorial school, the scope of service I can offer will be wider. I can design more tools that are not limited by a school curriculum.

The petitioner initially stated that she intended to work for the [redacted] as a physics teacher. Her initial statement contained no indication that she would "be an independent contractor," operating "a tutorial business online" and running her "own tutorial school." The petitioner, therefore, has substantially revised her claims in an effort to meet the "national scope" prong of the *NYSDOT* national interest test. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998)

Furthermore, the petitioner has not established that she has any past experience as a contractor, online tutor, or school proprietor as described above. 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). Speculation about possible success in future ventures cannot show that the petitioner is now eligible for immigration benefits. With no demonstrated track record in the described ventures, there is no reliable basis to conclude that the petitioner will succeed at a level that would justify approval of the national interest waiver.

The petitioner submits copies of evaluations from In each evaluation area, the four possible rankings are "Unacceptable," "Needs Improvement," "Meets Expectations," and "Exceeds Expectations." The petitioner usually received the third ranking, "Meets Expectations," but occasionally received "Needs Improvement" ratings on specific areas, mostly relating to "Classroom Management." The petitioner did not show how these rankings support her claim to be "no ordinary teacher" and therefore deserving of an exemption from the job offer requirement that normally applies to professionals such as school teachers.

The petitioner submits statistics showing a significant increase in the "Number of Passed AP Physics Exams by Year in between 1993 and 2013. The statistics show only how many students passed the exams, not how many took the exams each year. Without that information, it is impossible to determine whether the increase is due to improved quality of AP education, or to an increase in the number of students taking the exams. The submitted information shows that the petitioner is one of 186 AP science teachers in the in 2012-2013, and the record does not show that the petitioner was disproportionately responsible for the increase in the number of passed exams from 2011-2012 to 2012-2013. (That increase was incremental compared to the much larger increase between 2010-2011 and 2011-2012, which preceded the petitioner's arrival in the district.)

Two new letters accompanied the petitioner's response to the request for evidence. The witnesses – both college professors – attested to the petitioner's participation in professional development activities. Cover letters from the that accompanied the petitioner's teaching licenses contain this passage: "License renewal is based upon an individualized professional development plan with the completion of 180 professional development points within a five-year validity period." The witnesses did not demonstrate that the petitioner's activities distinguished her from other Virginia teachers who, like the petitioner, must meet ongoing professional development requirements as a condition of continued licensure.

The director denied the petition on December 3, 2013, stating that the petitioner had satisfied basic licensing requirements to teach physics in Virginia and Texas, but being a qualified teacher does not establish eligibility for the waiver. The director found that the petitioner had not established that the benefit from her work will be national in scope, or that the petitioner has influenced her field as a whole.

On appeal, the petitioner protests that the director's decision referred to her as "an electrical engineer" and as a "middle school teacher." The petitioner states: "there is no denying that I am a high school teacher." The reference to electrical engineering, in the first sentence of the decision, is

clearly an error, but not one that prejudiced the outcome of the decision. The balance of the decision accurately relates to the present record of proceeding.

With respect to the references to "middle school," most of the petitioner's documented employment in the United States has been at the middle school level, in Virginia. She taught high school physics in Texas for part of one academic year before the expiration of her nonimmigrant status in February 2013. When she filed the petition in May 2013, the petitioner had returned to Virginia, where she had taught middle school. In her own introductory statement, the petitioner stated: "I am a middle/high school instructional teacher." The petitioner has not shown that the director's use of the phrase "middle school teacher" affected the outcome of the decision.

The petitioner repeats the assertion that she is "no ordinary teacher," and that she strives "to motivate even the one's [*sic*] with no drive to study to realize the importance of education." The petitioner notes that she previously submitted copies of her evaluations. The petitioner did not explain how those evaluations support her assessment of her abilities as a teacher whose "employment . . . was a milestone" and whose performance "exceeded the performance of [her] predecessors."

The petitioner states "there was already a pre judgement [*sic*] as to whether a Teacher will be able to qualify for the waiver, for as long as the impact is only in one school, labor certification is required. If this is the case no single school teacher may qualify for the waiver." As a matter of law, teachers, as members of the professions, are presumptively subject to the job offer requirement. It is clear from the plain wording of section 203(b)(2)(A) of the Act that exceptional ability is not sufficient grounds for a waiver of that requirement. Thus, it is a basic fact that being a school teacher, even an exceptional one, is not a sufficient basis for the national interest waiver.

The petitioner contends that "a certain percentage" of her students might go on to "create scientific breakthroughs that will benefit this great country or humanity." Such impact would be indirect, crediting the petitioner with the achievements of other, and the petitioner has not shown that any of her former students have produced such results so far. Speculation that a now-unidentifiable student may go on to a productive career in the sciences is an insufficient basis for approving the waiver.

A school teacher can exert broader influence on the field through activities beyond routine classroom teaching, for instance through development of textbooks or curricula that then see widespread use. The petitioner in this proceeding has not shown that she has had an influence in this way. Her stated intention, in response to the request for evidence, to engage in wider activities deviates from her initial claims, and the petitioner has documented no past record to justify expectations of future success in such ventures.

The petitioner makes general assertions about the importance of education, which apply to all qualified teachers. There is no collective waiver for teachers, and therefore the petitioner's membership in that profession does not qualify her for the waiver. The petitioner states: "Giving Instructional Teachers a fair chance to obtain lawful permanent residence . . . will eventually have a prospective effect to the US nation as a whole." The petitioner, here, speaks to the collective rather

than individual impact of such teachers. Furthermore, even if the petitioner had established that the existence of the job offer requirement deprives foreign teachers of "a fair chance to obtain lawful permanent residence" (which she has not done), the job offer requirement is a statutory provision that we have no discretion to modify or disregard. As shown by the existence of section 203(b)(2)(B)(ii) of the Act, Congress has the authority to designate blanket waivers for given occupations. Congress has not delegated that authority to USCIS. *See NYSDOT*, 22 I&N Dec. at 217.

The petitioner questions the applicability of the *NYSDOT* precedent decision, which concerned a bridge engineer. The petitioner contrasts engineers and teachers in various ways. The *NYSDOT* national interest test, however, was designed to be broadly applicable over the range of occupations covered by section 203(b)(2) of the Act, including both engineers and teachers and many others.

The petitioner states that her evidence "shows that there is [a] shortage of workers [in her] field." Authority to determine the availability of qualified U.S. workers rests with the Department of Labor, through the labor certification process. *See NYSDOT*, 22 I&N Dec. at 218, 222. The petitioner has essentially claimed that the labor certification process will prevent her continued employment in the United States, but she has not explained why this is so, or why it would serve the national interest to override an existing, legally mandated procedure that already takes worker shortages into account.

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 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.

We 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.