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: OCT 10 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 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 an alien of exceptional ability in business. The petitioner seeks employment as a bank executive at [redacted] (the name is an abbreviation of '[redacted]. The record provides different titles for the petitioner, including "senior vice president," '[redacted] divisional director" and "director of business development." 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 has not established that he qualifies for classification as an alien of exceptional ability, and that he 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 supporting evidence, including 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.

I. Exceptional Ability in Business

The first issue under consideration is whether the petitioner qualifies for classification as an alien of exceptional ability in business. The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on December 10, 2012.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; and
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility. 8 C.F.R. § 204.5(k)(3)(iii).

If a petitioner has submitted the requisite evidence, U.S. Citizenship and Immigration Services (USCIS) determines whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered" in the arts. 8 C.F.R. § 204.5(k)(2). *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. While involving a different immigrant classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter.

The petitioner initially claimed to have satisfied all six of the regulatory criteria. After the director issued a request for evidence (RFE) on June 17, 2013, in which the director found the petitioner's initial evidence insufficient, the petitioner did not pursue his claim to have satisfied two of the criteria, but continued to claim that he had satisfied the remaining four criteria, discussed below:

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

The director found that the petitioner met this criterion. The record, however, does not support this finding. We may identify additional grounds for denial beyond what the service center identified in the initial decision. The AAO conducts appellate review on a *de novo* basis. *See Siddiqui v. Holder*, 670 F.3d 736, 741 (7th Cir. 2012); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The introductory brief submitted with the petition stated:

> Applicant holds an Agricultural Engineering Degree ("Licenciatura") from the [redacted] A true and correct copy of the Applicant's Degree and Curriculum Vitae is attached and incorporated herein as Exhibit "B."
>
> Additionally, in 1994, the Applicant received a 2-year highly intense training certification in Banking Credit Analysis from Mexico's premier university, [redacted]

Exhibit B includes a copy of the petitioner's diploma in agricultural engineering, but that degree does not relate to the petitioner's area of claimed exceptional ability, banking. The petitioner's *curriculum vitae* mentions the 1994 training in banking credit analysis, but it is not an official academic record, and therefore it does not meet the requirements of the regulation to establish his claimed certificate in banking credit analysis. The brief did not cite, and the petitioner did not submit, any evidentiary exhibit relating to the "highly intense training certification" from [redacted] 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)).

In the June 2013 RFE, the director instructed the petitioner to explain the relevance of his academic degree and to submit any necessary translations of foreign-language documents. In response, the petitioner did not continue to claim that his "2-year highly intense training certification in Banking Credit Analysis" constituted an academic degree. Instead, the petitioner focused entirely on his agricultural engineering degree. The petitioner submitted a brief with the assertion that [redacted] has many clients in the agricultural sector, and that "Applicant's unusual agricultural training has been key in [redacted] success with this particular group." The petitioner submitted no evidence to support this claim, and the unsupported assertion cannot meet the petitioner's burden of proof. *Matter of Soffici*, 22 I&N Dec. 165.

When the director denied the petition on November 7, 2013, the director stated: "the evidence submitted meets this criterion." The petitioner, however, has not established that a degree in agricultural engineering relates to banking, which is the petitioner's claimed area of exceptional ability. We note the petitioner's assertion that some of [redacted] clients are in the agricultural sector, but by this logic, degrees in an unrealistically broad variety of disciplines would relate to

banking. It may be that the petitioner's degree put him in a good position to interact with agricultural clients (although the record does not support this claim), but it does not follow that his agricultural engineering degree therefore relates to banking.

We withdraw the director's finding that the petitioner has established a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

The director found that the petitioner satisfied this requirement by submitting letters from officials of [redacted] attesting to the petitioner's employment beginning in the 1980s. We will not disturb that finding.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

The introductory brief cited the petitioner's "degree in Engineering" and his "training certification in Banking Credit Analysis." These are the same credentials cited under the "academic record" criterion discussed above. In the RFE, the director stated that the petitioner's "degree and training certificates do not qualify as evidence under this criterion."

The petitioner's initial submission included several untranslated certificates from [redacted] In response to the RFE, the petitioner submitted translations of the [redacted] certificates and maintained that they are evidence of "Certification to Practice the Applicant's Occupation." The cited the certificates as evidence that "Applicant received a 2-year highly intense training certifications [*sic*]." The reference to "2-year highly intense training" echoes the earlier claim regarding the petitioner's academic degrees, but the certificates in exhibit B are not from the [redacted] The certificates acknowledge the petitioner's "participation" in the following courses:

Advanced Credit	October 3, 1986
Time Deposit and the Stock Market	February 9-13, 1987 (40 hours)
Development Funds	May 8-9, 1987
Labor Relations	March 16-17, 1990

[1] The petitioner initially claimed that these certificates satisfied the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), which calls for evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. The director found the certificates to be insufficient evidence in that regard, and the petitioner did not repeat the claim in subsequent submissions.

The translation of another certificate stated that the petitioner "presented the best status presentation during the [redacted] on March [redacted]

The certificates document the petitioner's completion of short-term, in-house training in increments of one to five days over a span of three and a half years. The petitioner did not explain how they document a "2-year" course of "highly intense training," or establish that these training certificates amount to licensure or certification for his occupation.

In the denial notice, the director stated:

> The degree certificate and training diplomas do not appear to certify the beneficiary in any manner. Specifically the training certificates simply note the beneficiary's attendance at classes. Furthermore, the petitioner failed to provide documentary evidence to establish that the occupation requires the license or certification possessed by the beneficiary.

The petitioner's appellate brief contains this response:

> Although the agency found Applicant's Agricultural Engineering Degree combined with Applicant's 30 years of experience met the criterion of advanced degree for the particular occupation sought in this matter, however it found that the same degree certificate combined with the training did not appear to certify the beneficiary "in any manner."

The above assertion rests on a false premise; because the director made no finding that the petitioner's degree and experience, together, constitute the equivalent of an advanced degree. Even if the director had made such a finding, there is no requirement that the equivalent of an advanced degree is also the equivalent of certification for a particular occupation.

The brief continues:

> 8 C.F.R. Section 204.5(k)(3)(iii) provides: "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility."
>
> Pursuant with the aforesaid statute Applicant submitted the training certificates as comparable evidence to establish eligibility. The certificates are reasonably comparable as they relate to intense training provided by [redacted] to its high ranking executives.

The petitioner has not established that the submitted certificates represent "intense training" limited to "high ranking executives," or that he himself was a "high ranking executive" when he took the training between 1986 and 1990. *See Matter of Soffici*, 22 I&N Dec. at 165. The petitioner has not

established that in-house training provided to existing employees is comparable to licensure by a licensing board or certification by a certifying authority.

The petitioner has not established that he holds a license to practice the profession or certification for a particular profession or occupation.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

The petitioner's initial submission included an August 29, 2012 letter from director and associate general counsel for indicating that the petitioner "will receive an annual base salary of $230,000."

The introductory brief stated:

> Applicant is currently earning a salary of $388,000 . . . which is more than twice the National Average for Chief Executive Officers according to O*NET, which designates a Chief Executive Officer's annual salary [as] $166,910. Additionally, a Chief Executive in California who is making $187,200 is in the top 10% of Chief Executive's income earners for the 2011 fiscal year. Finally, according to the Foreign Labor Certification Data Center Online Wage Library, a chief Executive in the Greater area can expect to make a mean wage of $215,176.

The petitioner submitted printouts from the web sites of O*NET, and the Foreign Labor Certification Data Center to support the above claims regarding executive compensation. The O*NET printout shows a national median wage of $166,910 per year. printout shows the following percentile figures for chief executives in California:

10%	25%	Median	75%	90%
$100,000	$135,000	$187,200+	$187,200+	$187,200+

The top three figures are all the same, with "+" signs indicating that the true amounts are higher than the amounts shown. This would have to be the case, because the 90th percentile figure could not also be the median (which is, by definition, the 50th percentile). Therefore, the true figures are all higher than $187,200, and the true 90th percentile figure is likely well above that amount. The submitted figure, therefore, refutes rather than supports the petitioner's claim that "a Chief Executive in California who is making $187,200 is in the top 10% of Chief Executive's income earners for the 2011 fiscal year."

The documents show figures for "chief executives" without distinguishing between different fields of business. The record, therefore, does not show whether there is a significant difference in pay between bank executives and executives of other businesses. Also, the cited figures are salary amounts, rather than total compensation, and thus do not take into account supplemental income

such as bonuses and stock options. The introductory brief stated that the petitioner earns "a salary of $388,000," but the record does not support the claim that this amount reflects the petitioner's base salary. Comparison of the petitioner's total compensation to statistics that only reflect base salaries produces a skewed outcome.

The petitioner's initial submission included an analysis by vocational expert [redacted] who stated that the petitioner "is compensated in U.S. dollars at approximately $388,000 per year which places [him] in the top 2% of U.S. earners." To meet the plain language of the regulation, the basis for comparison is not all "U.S. earners," but workers in the petitioner's own occupation, *i.e.*, bank executives.

Ms. [redacted] cited 2012 survey data to show that the petitioner's annual income is well above the 90th percentile of the annual earnings of a "Bank Teller," "Banking Customer Service Representative," "Banking Assistant Branch Manager (Major Branch)," "Banking Loan Officer Consumer," and "Banking Branch Manager (Major Branch)." The petitioner claims none of those job titles. Rather, the petitioner is an executive above the individual branch level. On Part 6, line 3 of Form I-140, the petitioner claimed to "supervise 10 branches and [the projected] opening of 5 more in 2013/14." The submitted data shows that the petitioner earns considerably more than his subordinates, but this does not show that his earnings indicate exceptional ability as a bank executive.

A copy of the petitioner and his spouse's 2011 joint federal income tax return shows $388,281 in "wages, salaries, tips, etc.," but does not break down the constituent elements. The joint return listed both the petitioner and his spouse as employed.

In the RFE, the director observed that the joint income tax return reflects the petitioner's earnings and those of his spouse, and therefore the petitioner could not claim the entire amount as evidence of his own compensation. The director requested copies of tax documentation to establish the source and amount of the petitioner's compensation.

In response, the petitioner's brief acknowledged the director's concerns, but repeated the claim that "Applicant is currently earning a salary of $388,000 USD," even though the only source for that figure is a joint tax return that combined the petitioner's income with that of his spouse. The petitioner did not submit any documentation from his employer to establish that the claimed amount is his salary, not including bonuses or other additions to base pay. Ms. [redacted] had indicated that the petitioner "will receive an annual base salary of $230,000," indicating either that the $388,000 figure includes income above base salary. The petitioner submitted California and Arizona state income tax documents for 2012, but these, like the federal tax return submitted previously, reflect undifferentiated joint income.

The petitioner submitted copies of his Mexican tax returns for 2011 and 2012. A summary translation stated that his "Total income from wages, salaries and similar concepts" was $5,461,853 MXN in 2011 and $6,125,053 MXN in 2012. Translated copies of monthly pay stubs from early

2013 show varying six-figure sums in pesos, along with a "Special" payment of $2,398,110 MXN. The petitioner submitted no evidence to establish the significance of these sums.

The director, in denying the petition, stated:

> The petitioner has failed to submit any documentary evidence to demonstrate how the beneficiary's services which lead to salary, or other remuneration were based on the beneficiary's exceptional ability. Without this evidence it may be assumed that all bank executives at the beneficiary's employer receive pay identical to the beneficiary.

The appellate brief states:

> Applicant is currently earning a salary of $510,763 USD which is more than twice the National Average for Chief Executive Officers. Applicant's salary is also almost twice as much as an average Chief Executive in a comparable position in his local area, and is in the top 2% of income earners in the United States. . . .
>
> The evidence shows that Applicant earns more than $500,000 dollars, common sense dictates that this is likely not a salary commonly earned by most executives at [redacted] or at any other industry. . . .
>
> Applicant's subordinates are high ranking executives and they earn a high salary which ranges from the lowest at approximately $95,000 to the highest at about $270,000. However, none of them earn an amount nearly as high as the salary that Applicant earns, and as such is evidence submitted to further demonstrate that not all executives at [redacted] earn the same salary.

The petitioner's monthly pay receipts from 2013, resubmitted on appeal, show varying amounts, but with a recurring base figure of $268,518.52 MXN per month. The petitioner documents a currency exchange rate of 13.2492 pesos to the dollar as of February 28, 2014. Using this exchange rate, the pay receipts show a monthly base salary of $20,286.69 USD (rounded to the nearest cent) before deductions, which extrapolates to a rounded figure of $243,440.27 USD per year. This figure is closer to Ms. [redacted] reference to "an annual base salary of $230,000" than to the claim, on appeal, of more than twice that amount. Additions to this amount appear to be bonuses and other one-time payments, although the petitioner has not provided complete translations of the pay receipts. The petitioner had previously asserted: "according to the Foreign Labor Certification Data Center Online Wage Library, a chief Executive in the Greater [redacted] area can expect to make a mean wage of $215,176." The petitioner's 2013 base salary figure exceeds that amount, but only by approximately 13 percent.

Evidence that the petitioner earns more than his subordinates is of little consequence in this proceeding because that is a typical arrangement. The petitioner does not establish that his

compensation exceeds, or even equals, those of other [redacted] executives of comparable rank to himself.

The petitioner has provided incomplete evidence relating to his compensation. The figures provided for comparison have not been suitable for the purpose, because the petitioner compared his entire annual compensation (and that of his spouse) to the base wages of other executives, without accounting for variations between industries. When the director requested specific documentation, such as IRS documentation, the petitioner responded by submitting materials from other sources that did not address the director's concerns.

For the above reasons, the petitioner has not established that he has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

Because the petitioner has not met at least three of the regulatory criteria for exceptional ability, we need not proceed to a final merits determination as described in *Kazarian*. The petitioner has not established a *prima facie* claim of exceptional ability in business.

II. National Interest Waiver

The second and final 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. The petitioner cannot qualify for the waiver without first showing eligibility for the underlying immigrant classification, but the director addressed the merits of the waiver application and we will do the same here.

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), Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now 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 petitioner's introductory brief established the intrinsic merit and national scope of the banking industry, which are not in dispute in this proceeding. At issue is whether the petitioner has satisfied the third prong of the *NYSDOT* national interest by establishing his impact and influence on his field.

An introductory brief submitted with the petition claimed that the petitioner is "a high level executive of through their subsidiary, (hereinafter " The petitioner did not show that his executive position with makes him "a high level executive of " rather than a high level executive of a subsidiary.

The introductory brief included further claims about the petitioner's role at

> In occupying and discharging his duties as Senior Vice President, the Applicant exerts significant influence over the strategy, direction, and implementation of operations and management in the United States as well as its business development activities in the of Mexico. . . .
>
> The Applicant oversees loans to individuals and companies in excess of $5,000,000 and regularly approved an average of $26,000,000 weekly or $1.352 billion dollars annually. . . .
>
> [T]he Applicant is in charge of business development activities that have significantly increased bank revenue. The Applicant develops new branches and product lines. In the last 4 years, the Applicant has developed for 10 new branches in California and Texas, which has seen an increase in staff of 80 staff members and 10 branch members. . . .
>
> has plans to open up at minimum 5 more branches in the Region of the US in 2013-2014 alone. . . .

> Since the Applicant is in charge of Business Development for [redacted] it was the Applicant who proposed to the Bank that they begin investing in U.S. branches. . . .
>
> In fact, without the Applicant in the U.S., the Bank would not continue on such an aggressive path of growth in the U.S. since there are no other candidates who qualify for this position.

The petitioner submitted no documentary evidence to establish (1) the existence of the new branches, (2) his personal involvement in their creation, or (3) that [redacted] future expansion into the [redacted] United States is contingent on his future employment with the company. The petitioner's claim to be responsible for creating 90 new jobs, therefore, is without support. *See Matter of Soffici*, 22 I&N Dec. at 165. [redacted] letter, with the assertion that the petitioner "has a clear track record of expanding [redacted] business in the United States, which has created new jobs," does not suffice in this regard. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

The brief includes this passage on the subject of job creation:

> Congress has also recognized the need to give National Interest Waivers to job creators through the introduction of H.R. 6210, which states that the Secretary of Homeland Security shall grant a National Interest Waiver to job creators who over the course of the last 4 years have created at least 5 full time positions [for] U.S. Citizens and nationals or Legal Permanent Residents. The Applicant has created over the last 3 years 90 full time positions in the United States.

The bill in question, called the American Investment and Job Creation Act of 2012, was still pending when the petitioner filed the petition; it never reached the floor of the House of Representatives for a vote. Because Congress never passed the bill, it does not support the claim that "Congress has . . . recognized the need to give National Interest Waivers to job creators." The provisions of the American Investment and Job Creation Act of 2012 are not binding on USCIS or any other government entity. Even if it had passed, its provisions applied to "entrepreneurs" who created jobs through "a new commercial enterprise." The petitioner has not established that these provisions would have applied to executives at long-established corporations.

Under the heading "Benefit to A Substantial Greater Degree," the introductory brief stated:

> Applicant has played a vital role leading the overall direction of , with managing, directing, and overseeing the International Banking Division, which handles the promotion and maintenance of all corporate banking relationships in the region of Mexico, and the region of the United States (Texas to California). Through 30 years' experience at he has developed numerous relationships with small to large businesses, both in Mexico and the United States. These strong relationships have promoted international banking products and services to multi-national companies on both sides of the border.
>
> Applicant's role at has been instrumental in facilitating loans to Mexican nationals who in turn have opened up businesses in the United States. There continues to be a need for banking representatives who, such as the Applicant, are familiar with finances on both sides of the border.
>
> Through the Applicant is involved in all of these aspects of supporting small and medium sized businesses, including granting access to capital, boosting small business investing, promoting minority owned businesses (usually Mexican owned businesses), as well as assisting Mexican companies to enter the U.S. to establish branches and subsidiaries to facilitate US exports to Mexico.

The brief included no explanation as to how the above claims showed that the petitioner has produced "substantial[ly] greater" benefits to the United States than other banking executives.

Organizational charts and Ms. letter show that the petitioner, as a high-ranking executive of , exercises significant control over many of the bank's activities. To qualify for the waiver, however, the petitioner must do more than establish that he has a major role at a large corporation.

In the June 2013 RFE, the director instructed the petitioner to "submit documentary evidence to establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest." The brief submitted in response to the RFE repeated the claim that the petitioner "has created . . . 90 full time positions" through his "creation of 10 bank branches." The only evidence that the petitioner submitted to support this claim was a list of branch locations in the United States. This list does not establish that the petitioner created 90 jobs that otherwise would not exist.

In his own statement, the petitioner claimed various achievements. He stated, for example:

> I have been solely responsible for developing bank policy for Mexico specifically to combat narco-money laundering in Mexico. I have implemented many policies that have become an important part of nationwide bank policies which have been proposed as regulations for Mexico. Some of the

> recommendations of Policies and Procedures have been adopted and have become law in Mexico.
>
> Similarly, using my experience in combating drug trafficking and money laundering, I have proposed many policies and procedures through my work with Many of my policies have in fact been adopted by A true and correct printout of [*sic*]
>
> To the best of my knowledge and belief I understand that in order to avoid government scrutiny, many other banks in the United States have adopted internal banking policies similar to
>
> I have become a well-known and trusted advisor to specifically for my knowledge of the money laundering counter tactics. . . .
>
> [P]olicies that I have personally developed have been adopted by the entire bank and affect banking policies and procedures not only in Mexico, but throughout the entire United States. Many of the policies have successfully lead [*sic*] to the elimination of money laundry schemes, not only by Mexican drug cartels, but also black market operators throughout the United States.

The second paragraph ends mid-sentence, as quoted above. The record contains no documentation from to establish adoption of the petitioner's policies, and no evidence to support the claim that the Mexican government has adopted the petitioner's policies. The petitioner also claimed, again without support, that he has been "responsible for initiating and approving over $5 billion in annual loans," and "for creating hundreds of white collar jobs through [t]he opening of branches throughout the United States." Without evidentiary support, these claims have no weight. *See Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner explained why he sought a waiver of the job offer requirement:

> Due to internal bank policy, is unable to sponsor my residency in the United States because according to bank policy, I would have to resign from Mexico, where I have spent my entire career and waive my seniority. It is for this reason that had previously sponsored my petition as an Alien Worker . . . but had to withdraw when the Bank made me aware of the internal bank policy preventing me from being able to move forward with my petition and adjustment to permanent residency.

The petitioner has not documented the claimed "internal bank policy" or demonstrated how its implementation by the bank would make him eligible for a waiver of a job offer in the national interest of the United States.

The petitioner submitted translated letters and certificates from officials, attesting to various activities within the company. The earliest, dated August 1990 and signed by three officials, stated:

> We are grateful in addressing you on this occasion to express the appreciation that commercial banking provides you for your outstanding performance and high professionalism for your management in the year 89/90.
>
> The challenges we face require executives who have these characteristics and are role models, so we encourage you to continue this level of commitment.

In a letter dated February 2004, central divisional director of congratulated the petitioner and his team for "achieving victory in the 2003 Tournament and occupying a privileged place in our Institution, being winner in the final stage of ." The record contains no further information about the tournament.

Other translated certificates stated that the petitioner's "outstanding performance" led to the petitioner's selection "for the " in 2003 and 2004. Without further information, the petitioner has not shown that these certificates amount to more than favorable performance evaluations.

The petitioner also submitted additional letters. executive vice president of stated:

> Over the past three years [the petitioner] has been a key player in developing the High Affluent market for clients to invest in the US. Thanks to his ability to promote and knowledge of the client's investment needs and trends of today's financial markets, in 2012 the Persona[l] Banking area sustained a 300% growth vs. 2011.

chief credit officer of stated that the petitioner's work on the bank's "Board of Directors . . . has been critical in promoting the approval of high quality and high profitable transactions that have helped the Bank to keep the best loan quality."

, chief executive officer of "a Mexican company dedicated to the film industry in California," stated that his company has been the petitioner's client since 2009. He stated: "I attribute the growth of our business to my relationship with [the petitioner] directly and Without their support, we would not have been able to expand our business options in the U.S. market."

The letters quoted above establish that the petitioner has had a productive relationship with his clients and colleagues, but they do not establish that the petitioner has influenced his field as a whole or that it is in the national interest to waive the job offer requirement that normally applies to the immigrant classification that the petitioner seeks.

In denying the petition, the director stated that the petitioner had not substantiated the key claims upon which the waiver application rests. On appeal, the petitioner does not address this conclusion. Instead, the petitioner submits an appellate brief to assert that *NYSDOT*, and USCIS's national interest waiver policy in general, are inconsistent with Congressional intent.

Under the heading "the decision in NYSDOT misconstrued Congress' intent and as such is being used by USCIS as a loophole to avoid making national interest waiver decisions," the appellate brief includes the following assertions:

> The Congressional intent clearly stated in the legislative history of IMMACT 90 was to ease the immigration barriers for professionals and highly skilled workers. . . .
>
> When enacting INA § 203(b)(2)(B), the national interest waiver, Congress did not define the phrase "national interest.". . .
>
> Congress intended to give the immigration agency a broad and flexible alternative to the labor certification procedure in order to allow greater numbers of talented aliens to reside permanently in the United States and contribute to our country.
>
> In essence, Congress' message to the immigration agency was to allow deserving applicants to forgo the "minimum-job-qualifications" rule contained in the DOL [Department of Labor] labor certification regulations. . . . Unfortunately, however, the INS in *NYSDOT* missed the cue from Congress and has become mired in the labor certification process.

The petitioner cites no evidence, such as documentation from the legislative history, to support this reading of Congressional intent. The claim rests on the assertion that, because the structure of the statute permits "advanced degree holders with no prior experience to qualify for the national interest waiver," Congress must therefore have specifically intended to exempt waiver applicants from the experience requirements inherent in the labor certification process. The brief cites the absence of a statutory definition of "national interest" as affirmative support for this contention.

The petitioner does not explain the relevance of the above assertions to his case. The petitioner is not an "advanced degree holder with no prior experience." He holds only a bachelor's degree, and claims decades of experience in banking.

As a gauge of Congressional intent, the brief cites H.R. 6210 (the aforementioned American Investment and Job Creation Act of 2012). The brief then quotes the *Congressional Record* in regard to a different bill, the Red Tape Reduction and Small Business Job Creation Act, H.R. 4078. Like H.R. 6210, that bill never became law.

USCIS is bound not by Congressional intent directly, but by the laws that Congress has passed. If a given piece of legislation fails to pass, then the intent behind the legislation is irrelevant, because the legislation has no force as law.

The petitioner claims exceptional ability in business, and the statutory language of section 203(b)(2)(A) of the Act subjects aliens of exceptional ability in business to the job offer requirement. That requirement, rather than the waiver, is the default position. There is no presumption of eligibility for the waiver; the petitioner must establish such eligibility. Furthermore, while the brief protests *NYSDOT*'s legitimacy, it is a published precedent decision, binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). *NYSDOT* has withstood legal challenge,[2] and the petitioner identifies no contrary ruling. Therefore, the director did not err by adhering to *NYSDOT*'s guidelines.

The appellate brief contains the assertion that "[l]abor certification . . . is not merely inconvenient, but has become virtually impossible to attain or so slow to process as to be nearly impossible. . . . The DOL in many cases currently takes two or more years to complete this process." The petitioner does not cite any source or submit any evidence to support this claim. As of June 26, 2014, the Department of Labor's web site shows that the Atlanta National Processing Center is processing permanent labor certifications (not under audit) filed in, or after, December

In the denial notice, the director acknowledged the petitioner's claim to have "created over ninety jobs in the last three years," but found that the petitioner had not submitted any evidence to support this claim. The petitioner, on appeal, repeats the job creation claim but does not address the director's key finding that the petitioner failed to submit evidence to support that claim.

The petitioner has failed to support critical claims at various stages of the proceeding, and the appeal relies heavily on a reading of Congressional intent based on legislation that did not pass. The petitioner has not established that the director's decision was in error, and the evidence submitted does not meet the *NYSDOT* threshold to establish eligibility for the national interest 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 his 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.").

On the basis of the evidence submitted, the petitioner has not established exceptional ability in business. The petitioner also has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

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[2] *See Talwar v. U.S. I.N.S.*, 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001).

[3] Source: https://icert.doleta.gov/ (printout added to record June 26, 2014).

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.