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 24 2014 OFFICE: NEBRASKA SERVICE CENTER

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,

for 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 a member of the professions holding an advanced degree. The petitioner is a senior business analyst for he seeks to take over ownership of a restaurant now owned by 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 several statements 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 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, 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 August 29, 2013. In an introductory statement, the petitioner described his intended work in the United States:

> During my MBA [master of business administration] coursework [at the School of Business], I did a project at HQ [headquarters] of in 2007 analyzing why is losing its dominance in the pizza market. During this period I started wondering why we don't have an Indian food chain here in [the] US or anywhere in the world on the pattern of Chinese food chain[s] like (1200 stores) or (400 stores).

After [receiving] my MBA in 2008, I started researching about the Indian food restaurants here in [the] US (almost 3500), talking to the restaurant experts, my MBA friends and Professors at about viability of such an Indian food chain. This culminated in the formation of a company called in July 2009 incorporated in Michigan. We took over an existing restaurant called at MI. . . . We started our operations on 16th Oct, 2009. I was one of [the] Co-founders along with other co-founders all from the Indian food industry and am presently on H1B visa . . . with y as Senior Business Analyst. . . .

Summary of the achievements/timeline for

- Raised $418K from 32 investors . . . , the first such instance in Indian food industry in US, called 'community ownership.' . . .
- In 2010, we brought Indian food to 2 cafeterias at campus. . . . This also gave us [the] opportunity to become [a] vendor with the biggest food service provider in [the] US. . . .
- In 2011, we [entered a] partnership with to provide food at MI, being another large food service provider. Also in April 2011, we opened our first franchise in Columbus, OH. . . . We were not able to raise the fund[s] for our central location as my H1B visa status could not convince the local community . . . of my long term commitment. . . . We had to close down the Columbus venture in May 2011 and it impacted our Michigan operations badly.
- In 2012, we struggled to keep ourselves afloat. . . . Also we opened our 2nd location at campus in April 2012, the first time without [a] kitchen. We also served at various corporate cafeterias under in 2012.
- . . . [I]n 2013, we found our mission – to fight 'overweight prevalence or obesity' in [the] US. To emphasize our message, we changed our restaurant name to We believe Indian food can change the health profile of [the] US if we can attract the general population. . . . As of now the overweight prevalence in India is 16% as compared to 74% in the US and our food and the eating habits play a major role in [this] low rate.
- Also with [the] new message, we changed our business model from the 'Fine dining' one to 'Café' style. . . . [No other] Indian or ethnic food restaurants do the 'daily' menu or use social media as extensively as we do and this is going to take some time to catch [the] imagination of the populace.

The petitioner stated that Indian food uses healthier ingredients than "other Asian or Mediterranean cuisine," and that the company was "able to build a customer base at the campuses" but "failed at the

corporate cafeterias." The petitioner asserted that plans to expand its hours, work in "[p]artnership with to reach . . . more campuses as well as the high and middle schools," and, after securing "big name support," begin serving "Airports, Highways rest areas, shopping Malls where you would never find Indian Cuisine now."

The petitioner stated that, once he becomes a permanent resident of the United States, he "would be able to start negotiations for taking over the ownership" of The petitioner also stated that his H-1B nonimmigrant status "has been an impediment to the decision-making at every stage," and that "[t]he waiver of labor certification would expedite the whole process as [his] current H1B visa expires on 30th Nov[ember] 2013." These assertions explain the petitioner's personal motivation for seeking the waiver, but do not establish that the waiver will serve the national interest.

In a separate statement, the petitioner contended that his MBA degree should be considered a degree in a STEM (science, technology, engineering, and mathematics) field. The petitioner submitted a copy of "[t]he present STEM list" maintained by Immigration and Customs Enforcement. He acknowledged that the list "does include 'Management Science' . . . and 'Management Science and Quantitative Methods, other' . . . but not MBA," and asserted: "I do believe that the whole purpose of this STEM list is to encourage the immigrant talent pool to stay in USA and create new businesses and the jobs which can help foster the economic growth overall." The STEM list, a list of qualifying STEM degree programs, relates specifically to a 17-month extension of optional practical training for F-1 nonimmigrant students. *See* 8 C.F.R. § 214.2(f)(10)(ii)(C) and 73 Fed. Reg. 18944 (April 8, 2008). The petitioner has not shown that the list of STEM degree programs has any bearing on the present proceeding. There exists no relevant provision in statute, regulation, or case law that gives STEM degree holders a special advantage with respect to the national interest waiver, and the petitioner has acknowledged that MBA degrees do not appear on the STEM degree program list.

The business plan for proposed that "Indian food can play a major role in changing the health profile of [the] US," but the petitioner did not show that his company has, so far, had a significant effect in this area. The business plan suggested that the company could grow if it receives "support from a big name foundation or wider publicity," but the record does not show that the company had received such support. The petitioner submitted copies of two articles in local media about his business. An undated review of appeared at ran an article entitled " on May 24, 2011. As the petitioner acknowledged, the Columbus restaurant later failed.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, to establish eligibility for the national interest waiver, it cannot suffice for the petitioner to set forth plans for what he hopes to accomplish in the future. He must establish that he had already influenced the field as a whole at the time he filed the petition. In his initial submission, the petitioner neither claimed nor demonstrated

this prior influence or impact. Rather, he acknowledged that his restaurant had so far established only a local foothold in the area.

The petitioner provided the following figures for

Year	Restaurant sales	Campus sales	Payroll
2009	$114,916	n/a	$57,090
2010	$486,518	$48,000	$94,852
2011	$391,682	$55,000	$102,044
2012	$256,178	$38,000	$81,690

Copies of state tax returns show "Gross sales" figures matching the claimed "Restaurant sales" numbers; they do not corroborate the separate "Campus sales" figures. The petitioner did not explain why the "Restaurant sales" figures are more exact than the rounded "Campus sales" figures. Also, the petitioner did not provide numbers for other businesses that would have allowed a comparison.

Because the petitioner had not established eligibility for the benefit sought, the director issued a request for evidence on September 19, 2013. In response, the petitioner provided another history of his business, and provided various facts about his restaurant, such as the emphasis on healthier ingredients, a range of beverage choices to reduce the consumption of carbonated drinks, and the use of biodegradable packaging. As with the initial submission, the petitioner's assertions about benefit to the United States rest on assumptions or predictions about the future, rather than evidence to show the effect that his business has already had. For example, the petitioner claimed that "Indian food . . . can stop this menace of . . . obesity in the next 20 years in the US," and asserted that his blog "may get attention in due course and trigger a statewide or national debate." The petitioner stated that he had submitted an article "to various newspapers or online journal[s]" such as but he submitted no evidence that any of these publications had accepted or published the article. The petitioner also stated that he had submitted an article "to various Indian newspapers published in the US," and claimed: "Once it gets published it is going to cause huge ripples all around." The petitioner's personal expectation of future success is not evidence that, at the time of filing, he already met the *NYSDOT* guidelines for the national interest waiver. The petitioner's use of social media such as Twitter and Facebook provide opportunities for wider impact, but his presence on those sites is not, itself, evidence that he has already had that impact.

The petitioner stated: "I would be OK with 2 years' conditional green card for the Entrepreneurs as I am very confident that would be ready to come [to] the national stage in 2016." The petitioner filed a petition for classification under section 203(b)(2) of the Act. An entrepreneur can qualify for benefits under that classification, but the classification does not provide for conditional residence for entrepreneurs. Section 203(b)(5) of the Act provides for a separate immigrant classification (known as EB-5) specifically for entrepreneurs. The EB-5 classification, which does provide for conditional residence, has a different petition form (Form I-526, Immigrant Petition by Alien Entrepreneur) and different governing regulations at 8 C.F.R. § 204.6. To qualify for that

classification, current regulations require an alien to invest at least $500,000 or $1,000,000 of his own funds (depending on the geographic area of the business) in the commercial enterprise. *See* 8 C.F.R. § 204.6(f). The petitioner does not claim to have made such an investment. Rather, his business plan makes it clear that he seeks outside capital to fund the venture.

The petitioner stated that his restaurant compares favorably to other Indian restaurants in the United States in terms of price, variety, and other factors, but this information does not establish impact or influence on the field as a whole.

The petitioner submitted information regarding obesity in the United States, but he did not establish that his restaurant has had a discernible effect on obesity rates. The petitioner submits evidence about the health benefits of common Indian food staples, such as curry and lentils, but the fact that serves those foods does not establish that the petitioner's restaurant has affected, or will affect, national obesity statistics.

The director denied the petition on January 17, 2014, stating that the petitioner had established the intrinsic merit of his occupation, but not its national scope or the petitioner's influence on the field as a whole. The director stated: "the petitioner has failed to provide any probative evidence that he has the financial capital or the business experience . . . to establish the first Indian food chain in the world." The director added that, even if the petitioner were to grow his business to a national level, he would still need to "demonstrate that he will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications."

On appeal, the petitioner has submitted three statements. In the first statement, dated March 15, 2014, the petitioner states that the director did not consider the petitioner's "first and foremost goal," which is "to raise awareness about BMI (Body Mass Index)." The petitioner states that, in his restaurant, he has posted information about how to calculate one's BMI, as well as calorie charts for the foods served at the restaurant. After making various other assertions about a healthy diet and the need to reach younger customers whose palates are more flexible, the petitioner states: "whatever we have done or [are] trying to do is unique and revolutionary. During my research in the US and beyond, I did not find any restaurant or food chain with such [a] clear cut agenda." The petitioner does not claim to have achieved his stated goals. Rather, he asserts: "We need to sustain our momentum for the next 2 years to see the real impact." As stated previously, the petitioner must establish eligibility at the time of filing. 8 C.F.R. § 103.2(a)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 49. The petitioner must have established some degree of influence on the field. *NYSDOT*, 22 I&N Dec. at 219, n.6. The petitioner cannot qualify for immediate immigration benefits based on speculation that he will realize his goals several years in the future.

The petitioner asserts that his company "served Indian cuisine to almost 100K people since 2009," and he speculates that his customers, in turn, have reached "more than one million people" through social media. Elsewhere in the appellate statement, the petitioner claims that his work "has already impacted the health profile of . . . millions" of people. The petitioner submits no evidence to support these claims. *See Matter of Soffici*, 22 I&N Dec. at 165. The petitioner states that web site

has "more than 500 unique visitors . . . every month," but he does not show that this figure demonstrates that his restaurant has attracted attention beyond the local level.

The petitioner states: "I believe if I can raise money just after one year of my MBA in 2008 with no experience in [the] Food industry, I can do it again now with 4 years of hands-on experience and with [a] perfect business model at for an Indian food chain." The petitioner asserts that the "Michigan Governor signed a 'Crowd Funding bill' recently and Michigan may become the first state with . . . local stock exchanges where the small investors can invest in the local businesses. . . . This would be a broader version of 'community ownership' [akin to] what I did for our venture." Here again, the petitioner relies on speculation about the future rather than evidence about known, past events. Even if the petitioner's business model is "perfect" as he claims, he has not shown that it has achieved the results that he expects it to attain.

The petitioner lists various ways that depend on his continued involvement, and the petitioner claims that, on page 3, paragraph 2 of the denial notice, the director stated that the "labor certification process would not impact [the petitioner's] continued services." This is not what the director said. Rather, the director stated that one of the issues in this proceeding "is whether the national interest would be adversely affected if a labor certification were required to facilitate the petitioner's continued services." The assertion that his employer requires his continued presence does not show that this presence serves the national interest.

The petitioner asserts: "My employer started the labor certification process for EB 2 visa for me." The petitioner claims that no U.S. worker applied for his position in response to a job posting listed in November and December of 2013. The claim that the petitioner's employer has begun pursuing labor certification does not establish that he qualifies for a waiver of the job offer/labor certification requirement.

The petitioner states: "I am asking for [a] 2 year conditional green card . . . with respect to our venture " As stated above, the petitioner has petitioned for a classification that does not provide for conditional residency.

In his second appellate statement, dated May 3, 2014, the petitioner stated: "I would like to share various developments with respect to our venture since my letter dated 15th March 2014." Developments after the filing date cannot establish that the petitioner was eligible at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 49.

The three reported new developments, even if timely, would not have established eligibility for the national interest waiver. The petitioner describes the new developments as follows:

1. Please see the attached document 'Time for disruptive eating' which we posted on our blog . . . on 25th April 2014 and which we are sharing with the newspapers [and] radio shows like State side at Michigan radio and show at NPR. The 'disruptive' eating addresses 2 most glaring issues of our generation – the 'Social Inequality' and the 'climate change.' This document sums up my

mission to bring Indian cuisine to the center stage of the US food industry. This can make a huge impact on the US health profile. . . .

2. We have been approved by www. .com to raise the fund[s] for our future plans under Michigan 'Crowdfunding' bill enacted recently. . . . We would be the first restaurant in Michigan to go this route. . . .
3. My employer did initiate 'labor certification' process with the postings at the local Newspaper . . . and the Michigan state job portal. . . . This time also, despite 50 views, there is not yet a single application for this job yet. . . . My employer would file for 'labor certification' this month after the 1-month period of newspaper posting ending on 20th May.

The petitioner submits a printout of the blog post, but no evidence to show what action, if any, the identified media outlets took regarding the post. Widespread media attention can result in significant impact on the field, but the petitioner cannot establish that impact simply by seeking media attention.

The petitioner submits a copy of an electronic mail message showing that his "Profile for has been approved." The message establishes that the restaurant is eligible to use to raise funds, but, as above, this evidence establishes only the existence of a plan, not its successful fulfillment or realization.

The petitioner submits copies of job postings, laying the groundwork for a future application for labor certification. These materials do not demonstrate or imply that it would serve the national interest to waive the job offer requirement in this case.

The petitioner states that the restaurant's "website traffic . . . is growing every month." The evidence submitted does not support this claim. Printouts from the *Google Analytics* web site show 955 sessions with 697 users between April 2 and May 3, 2014, a decline from the previous month's figures of 1,054 sessions and 730 users. The percentage of new visitors dropped from 38.6% in March 2014 to 36.3% in April.

The petitioner's third and most recent supplement to the appeal, dated June 23, 2014, again reports new developments that occurred after the filing date. The petitioner showed that had filed an application for labor certification on June 22, 2014. If approved, this labor certification could form the basis for a new petition filed by but it has no bearing on the petition under review in this proceeding.

The petitioner states: "We have been approved by startsomegood.com, a Crowdfunding website for the social projects, and launched our project to raise the fund to complete the business model of ' A June 22, 2014 printout from the website shows "$0 pledged of $10,000 tipping point goal." A crowdfunded project could have national impact, once the funds have been raised and the funded project is initiated, but the act of seeking such funding is not, itself, evidence of eligibility for the waiver. The petitioner does not explain what happened to the earlier crowdfunding arrangement with

The petitioner states: "I am ready to propose [redacted] as a project to [EB-5] investors from the Indian sub-continent or the Middle-East countries once I take . . . ownership of [redacted] . . . It would generate the much needed employment as well as improve the health profile of Michigan." The petitioner, here, speculates about the possible benefits arising from actions that he has not yet taken, presuming conditions that do not yet exist. The petitioner has not established that his past performance in creating jobs, attracting investment, and altering unhealthy lifestyles justifies the assertion that he will have a major impact in these areas at some point in the future.

The petitioner offers several predictions regarding the economic, social, and health impact that his work might have in the future. The petitioner has not, however, established that his past work has already had a degree of impact that would lend confidence and credibility to those predictions. Unrealized goals, however praiseworthy in themselves, cannot suffice to establish eligibility for a waiver of the statutory job offer requirement.

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").

As is clear from the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

We will dismiss the appeal for the above stated reasons. 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.