

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B5

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

LIN 07 227 53189

AUG 25 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a mathematics teacher at Bloomington High School, Colton, California. 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 she qualifies for classification as a member of the professions holding an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

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

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer --

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner filed the petition on August 6, 2007. The first issue concerns the petitioner's eligibility for classification as a member of the professions holding an advanced degree. The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(2) defines "profession" as "*Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." School teachers are listed in section 101(a)(32) of the Act, and therefore the petitioner qualifies as a member of the professions.

8 C.F.R. § 204.5(k)(3)(i) requires that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner holds United States advanced degrees – specifically, a master’s degree in Education from Drury College, Springfield, Missouri, and a doctorate in Education from Brigham Young University, Provo, Utah. At issue is the director’s finding that “[a]lthough the petitioner holds an advanced degree, the position does not appear to require one.”

The director, in reaching the above conclusion, apparently relied on this passage from 8 C.F.R. § 204.5(k)(4)(i): “The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent.” That requirement, however, only applies to petitions that include an individual labor certification, Schedule A application or Pilot Program application – all documents relating to the job offer requirement. Because the petitioner seeks a waiver of the job offer requirement, she is not required to submit any of the forms named above. Petitions with waiver requests fall under 8 C.F.R. § 204.5(k)(4)(ii). The petitioner need only establish that the occupation meets the regulatory definition of a profession, and that she holds an advanced degree or its defined equivalent. The petitioner has met both of these requirements. We therefore withdraw the director’s finding that the petitioner does not qualify as a member of the professions holding an advanced degree.

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.

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), published at 56 Fed. Reg. 60897, 60900 (November 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.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. 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.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used 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.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In a letter accompanying the initial filing of the petition, the petitioner noted “an increasing demand for Math teachers in the United States,” and claimed “computer research based teaching skills and international experience in math teaching which many US citizens do not possess.”

Principal of Bloomington High School, also cited the “national shortage of math teachers” and asserted that the petitioner is “a top-flight math teacher.” With regard to the petitioner’s duties and activities, [REDACTED] stated that the beneficiary’s “assignments at Bloomington High School include three geometry classes and two Algebra 2 classes.” Other Bloomington teachers and administrators attested to the petitioner’s credentials and skill as a teacher.

[REDACTED] Director of Teacher Education at Drury University, described the petitioner as “a dedicated secondary level mathematics teacher (an area of teaching shortage).”

[REDACTED] of Brigham Young University’s Department of Teacher Education stated that the petitioner “is a qualified, knowledgeable, skilled and experienced secondary education

mathematics teacher who successfully guides students to learn and apply mathematics to their lives.” [REDACTED] stated that the petitioner “has unique mathematical knowledge and skills and teaching experiences that most aliens, and even US citizens, do not possess.”

None of the initial witnesses indicated that the petitioner’s work as a teacher is national in scope, or has any direct impact outside of Bloomington High School. Instead, the witnesses focused on the overall merits of math instruction, assertions of a shortage of math teachers, and the petitioner’s performance at Bloomington. The work of a classroom teacher is generally local rather than national in scope. *Cf. Matter of New York State Dept. of Transportation* at 217, n.3. We are not indifferent to witnesses’ assertions about a shortage of qualified teachers, but the labor certification process exists as a means to address such shortages. *Id.* at 218.

On November 6, 2008, the director advised the petitioner of the guidelines found in *Matter of New York State Dept. of Transportation* and instructed the petitioner to establish that the petitioner’s work is national in scope, and will serve the national interest to a substantially greater extent than other qualified high school math teachers.

In response to the director’s notice, as evidence that the petitioner’s work is national in scope, the petitioner submitted a copy of a 1992 research paper she wrote as a graduate student. Counsel asserted that the method the petitioner outlined in that paper “is currently being successfully used at [Bloomington and] . . . is being referred to and distributed in other high schools and can be used in any state of the United States.” The purpose of the research paper, according to page 2 of the paper itself, was “to examine and collect information from published research on cooperative learning in order to use for my teaching mathematics to the elementary school children in India.” A survey of published research is not the same thing as the development of an influential new teaching method. The record contains no evidence that the petitioner’s research paper was ever published, let alone that it has influenced other teachers.

Counsel also asserted that the petitioner prepared instructional guides in Geometry and Algebra 1, which are “being implemented in other high school settings. . . . [T]hese instructional guides are sufficient to become a model in other jurisdictions of any state [and] therefore will be implemented as national level teaching guides.” The petitioner submitted no evidence that the petitioner’s guides “will be implemented as national level teaching guides,” or that the petitioner has developed original teaching methods that other schools have adopted. The observation that other schools could, in theory, adopt the petitioner’s teaching guides is not evidence that national implementation “will” happen. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaighbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not shown how her instructional guides are fundamentally different from the lesson plans or curricula that all teachers must formulate as part of their basic duties as teachers.

The director denied the petition on January 15, 2009. The director acknowledged the intrinsic merit of education, but stated that the petitioner’s work lacks national scope because “[t]he record is devoid of

any evidence to establish that the scope of her work goes beyond the students at Banning [*sic*] High School.” The director found no evidence that the petitioner’s work has had any influence beyond her own classroom.

On appeal, counsel repeats the claim that the petitioner’s graduate research paper outlined a “teaching technique [that] is being referred to and distributed in several high schools and can be used in any of the United States,” and that the petitioner’s instructional guides “are being implemented in other high school settings.” As before, counsel has provided no evidence at all to support these claims. Counsel has not even identified the other schools that purportedly use the petitioner’s techniques. Instead of providing any evidence of any kind to support these claims, counsel has simply repeated those claims under the heading “Statement of Facts.” Arbitrarily labeling an unsupported claim as a “fact” does not and can never give that claim the weight of accepted fact.

Counsel notes that USCIS has previously held that “a single individual can have a national impact on education in various ways, for instance by publishing influential research, by formulating techniques that other jurisdictions adopt as a model, or by serving as a top official of a national association or organization.” The petitioner, however, has not shown that she has done any of these things, nor are any of them typical job requirements for a high school math teacher that can be considered a routine part of the occupation. The evidence of record consistently limits the scope of the petitioner’s work to the school where she works.

Even if the petitioner had actually established the national scope of her work, which she has not done, intrinsic merit and national scope do not, by themselves, establish eligibility for the national interest waiver. The petitioner must also establish a record of achievements and influence that would justify projections of future benefit to the United States. The petitioner has not done this; she has established only that she is a valued employee of a local high school. Vague and subjective praise for her mathematical or pedagogical talents cannot suffice in this regard.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.