

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: [Redacted] Office: NEBRASKA SERVICE CENTER Date:
SRC 07 800 26855

NOV 06 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

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).

Perry Rhew
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 to classify the beneficiary 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 beneficiary seeks employment as an environmental engineer with the Bioengineering Group, Inc. 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 beneficiary 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 argues that the director's decision has serious procedural flaws.

Part 1 of the Form I-140 petition identifies [REDACTED] Salem, Massachusetts, as the petitioner. Review of the petition form, however, indicates that the petitioner is the attorney who represents both the Bioengineering Group and the beneficiary. An applicant or petitioner must sign his or her application or petition. 8 C.F.R. § 103.2(a)(2). In this instance, Part 8 of the Form I-140, "Signature," includes the name, telephone number, and electronic mail address of the attorney, rather than the company. Thus, the attorney, and not his client, has taken responsibility for the content of the petition. This will not affect the adjudication of the appeal, because the record shows that the attorney who filed the petition also signed the Form I-290B Notice of Appeal. Thus, the appeal has been properly filed.

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 beneficiary 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.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not raise this issue. We will, therefore, review the matter on the merits rather than leave it at a finding that the petitioner did not properly apply for the waiver.

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 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.

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.

The petitioner filed the petition on July 31, 2007. The petitioner's initial submission included a 15-page brief, most of it contesting *Matter of New York State Dept. of Transportation*. The petitioner essentially repeats these arguments on appeal, and we shall address them in that context.

The petitioner asserted that the Bioengineering Group "is a distinguished leader in environmental engineering," and stated:

The work being done by [the beneficiary] . . . is essential to the protection of the city and port of New Orleans, the port that handles all river commerce flowing down the Mississippi River, and thus a significant component of the entire United States economy. Furthermore, the work that [the beneficiary] is doing in the New Orleans area will have applicability to other coastal areas that are subject to being ravaged by hurricanes.

The petitioner asserted that the beneficiary's "substantial contributions" justify the waiver.

Apart from documentation of the beneficiary's academic degrees, the remainder of the petitioner's initial submission consists entirely of witness letters.

Three of the witnesses know the beneficiary from his studies at the University of New Orleans (UNO). [REDACTED] now an associate professor at the University of Dubuque, stated:

Until 2004, I was an associate professor at the University of New Orleans (UNO) where [the beneficiary] was a Ph.D. student. . . .

During [the beneficiary's] graduate studies, I worked with him on research projects. . . .

[The beneficiary] combines an unusual background in biology, hydrology, computer simulation, and environmental engineering. His expertise is particularly valuable in the aftermath of Hurricane Katrina, as the issues of reconstruction require an interdisciplinary approach, for which he is well suited.

[The beneficiary] is one of the very few experts in the world with specific expertise in the Lake Pontchartrain Basin surrounding the New Orleans area. Combined with his

interdisciplinary background, [the beneficiary] can make an unmatched contribution to the national interest.

[REDACTED], now a postdoctoral fellow at Oak Ridge National Laboratory, stated:

I met [the beneficiary] at the University of New Orleans . . . while he was conducting his doctoral research. . . .

[The beneficiary] has expertise and extensive experience in the areas of water quality modeling, wetland science, hydrological and hydraulic engineering, watershed modeling, stormwater management, and stream restoration. . . . He is a key member of the team in charge [of] the NEPA assessment study for the Inner Harbor Navigation Canal (IHNC) in the City of New Orleans. He will also be involved in various capabilities during the design and construction phase of the affected levee systems in New Orleans. . . . [The beneficiary's] research experience has made him a critical member of a[n] engineering, design and research program dedicated to developing environmental engineering approaches that are highly relevant to national interests of the United States.

[REDACTED] stated that the beneficiary's "work has been accepted in leading peer-reviewed journals," but the petitioner's initial submission included no evidence to support this claim.

[REDACTED] now a water resources engineer at Woolpert, Inc., stated:

I have known [the beneficiary] since 2002 when we met at the University of New Orleans (UNO) while I was doing my masters in Civil Engineering.

My job involves performing hydraulic and hydrologic modeling analysis for various streams in watersheds and propos[ing] preventive and corrective actions to rectify the issues related to stormwater management. At UNO, I was part of the same research group [as the beneficiary] and for that reason we have worked closely with each other on various projects. . . .

[The beneficiary's] technical expertise was quite evident when we were working together at UNO. He has since gained valuable experience in watershed management, stream restoration, wastewater treatment methods, coastal restoration and various innovative methods in managing stormwater. . . . He will be extensively involved in the National Environmental Policy Act assessment studies for the Inner Harbor Navigation Canal, development of disaster response methods and better lev[ee] systems in the City of New Orleans and the surrounding areas.

[REDACTED] of the Bioengineering Group, stated:

[The beneficiary's] expertise classifies him as a person performing valuable work to support a key national priority, namely the improved hurricane protection systems in coastal Louisiana. . . . [H]is presence on our staff was a key factor in allowing us to win and to perform our work to date among a competitive field of internationally top ranked engineering firms. [The beneficiary] has recently moved back to New Orleans where he continues to provide effective technical support through my firm under contract to the Army Corps of Engineers. I would like to offer detailed confirmation that [the beneficiary] is internationally recognized as an expert in the hydrology and hydraulics of the Greater New Orleans area, and in particular the Lake Pontchartrain Basin system which was involved with Katrina-related city flood effects. . . .

[The beneficiary] developed some of the baseline modeling of water quality fate and transport in the Lake Pontchartrain Basin, during normal weather as well as storm events. . . . He has been playing for the past six months a key role as Project Manager for the environmental compliance process for the improvements for hurricane protection measures on the Inner Harbor Navigation Canal in New Orleans and his continued contributions are crucial to the progress of this project which is identified as the number one priority element of the short term hurricane protection strategy for New Orleans.

While clearly considers the beneficiary to be highly qualified in his field, her letter contained no "detailed confirmation that [the beneficiary] is internationally recognized" as she claimed.

[REDACTED] of Engineering and Director of Gulf South Operations for the Bioengineering Group, stated:

I joined the Bioengineering Group in January 2006 at which time I became [the beneficiary's] immediate supervisor. . . .

We are continually challenged to hire and retain individuals of [the beneficiary's] character and abilities in the very competitive market of environmental consulting. . . . As you are aware there is a critical shortage of qualified engineering professionals at this time. Recruitment of talented researchers and engineers is difficult at best in today's competitive climate. [The beneficiary] in particular has conducted important research regarding the salinity levels in Lake Pontchartrain while a graduate student in environmental engineering at the University of New Orleans. This research is currently being used in the overall environmental evaluations we are currently performing regarding the closure of the Mississippi River Gulf Outlet (MRGO) and potential design of floodgate structures along the Gulf Intercoastal Water Way (GIWW) and Mississippi Gulf River Outlet. [The beneficiary] is a vital member of my product delivery team for this vitally important work.

The national interest waiver is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages. See

Matter of New York State Dept. of Transportation at 218. We will give the petitioner's assertions due consideration, but the claim of a worker shortage is an argument for obtaining a labor certification, not for waiving that requirement.

Interdisciplinary Coordinator for the Bioengineering Group, stated that the beneficiary:

Brings a variety of engineering skills developed in both a research capacity, dealing with air and water quality issues including emissions and particulate sampling and fate and transport models for pollutants in Lake Pontchartrain, and his varied practical experience. As scientist and environmental engineer at The Bioengineering Group he has been involved in a wide variety of projects where he integrated sound engineering practice through computer modeling with his extensive knowledge of chemistry and natural processes. His efforts have produced cost effective solutions to a variety of complex problems relating to stream and wetland restoration, water quality improvement and stormwater management.

To accomplish the necessary engineering analysis and design that restoration of the gulf coast demands requires the talents that [the beneficiary] has demonstrated on the many projects he has successfully completed as a Bioengineering Group employee. The organization considers him to be our most knowledgeable employee in the areas of computer modeling and simulation of essential processes such as sediment and pollution transport that relate directly to the restoration of the gulf coast. He is an integral member of our team of specialists assigned to this important work and his contribution is essential to its successful completion.

With respect to the assertion that the Bioengineering Group requires the beneficiary's continuing work on current projects, we note that the beneficiary already holds H-1B nonimmigrant status that permits him to work for the Bioengineering Group through September 30, 2012. The denial of the national interest waiver does not affect or shorten his nonimmigrant status.

[REDACTED] of the Center for Landscape Interpretation and a consultant for the Bioengineering Group, stated:

I first met [the beneficiary] in August 2006 at a three-day Bioengineering Group corporate retreat in Salem, Massachusetts. . . . Upon his arrival [in Louisiana], we developed an even closer collaborative relationship. . . .

[The beneficiary] has had a rich diversity of first-hand project experience in several states in the U.S. where he has been devising data collection, assessment and monitoring systems, computer simulation modeling, and imaginative engineering solutions. . . . In terms of his recent work with the Corps of Engineers, he and his co-workers, understandably, are under intense pressure to complete urgently needed and quite

extensive hurricane protection and rebuilding projects quickly, effectively, and on budget. . . . By drawing upon his many talents, skills, knowledge, and experience, his engagement with this challenge will enable him to make an important contribution to national security. . . . His continuing research and teaching interests coupled with the scope and breadth of his project activities should continue to prepare him for future leadership positions in both public and private sectors.

On October 23, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit further evidence to establish "a past record of specific prior achievement that justifies projections of future benefit to the national interest." The director specifically requested copies of published articles showing independent citation of the beneficiary's work. In response, the petitioner asserted: "The Department of Labor (DOL) regulations found at 20 C.F.R. § 656.17(h) prohibit the inclusion of job requirements beyond those normally found in the DOL's *O*Net*." The petitioner argued that "the employer's requirements for this job . . . all combine to preclude eligibility for an individual labor certification" because those requirements exceed the minimum requirements found in the O*Net database. Specifically, the petitioner asserts that the "employer has a need for an employee with a Ph.D," among other qualifications. The record shows that the employer hired the beneficiary seven months before he received his Ph.D. degree. Clearly the job did not require a Ph.D. when the company hired the beneficiary; the employer may strongly prefer a Ph.D., but they cannot permissibly expand the "minimum requirements" to match the beneficiary's current level of education, training and experience. The employer's inability to tailor the labor certification to match the beneficiary's qualifications does not imply that the employer cannot obtain a labor certification within the confines of regulatory requirements – particularly in the face of "a critical shortage of qualified engineering professionals" that would narrow the field of potential job applicants.

More significantly, the petitioner's arguments, above, revolve not around the beneficiary, but around the employer's stated needs and preferences. In this respect, the request for the waiver is tied not specifically to the beneficiary, but to the position that the beneficiary hopes to fill, as though any alien who qualifies for that position also necessarily qualifies for a national interest waiver. We reject this reasoning.

The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Matter of New York State Dept. of Transportation* at 218, n.5. Even then, the petitioner has not shown that a labor certification cannot be obtained for the beneficiary; the petitioner has shown only that the regulations prohibit the employer from tailoring a labor certification application to match a given alien's qualifications.

The petitioner submitted a database printout to show one citation each for four of the beneficiary's published articles. The petitioner also submitted copies of a book chapter that cited two of the beneficiary's articles, and an article that cited another of the beneficiary's works. It is not clear whether these three citations overlap with the five citations documented on the database printout,

because the printout simply counted the citations without identifying where they appeared. All but one of the beneficiary's cited articles relate to dry abrasive blasting; the petitioner has not explained how this relates to the beneficiary's intended work for the Bioengineering Group. The listing and timing of the beneficiary's publications indicate that the beneficiary's doctoral research focused on blasting abrasives, but his *curriculum vitae* does not suggest that the beneficiary has continued to specialize in that area.

The remainder of the petitioner's response to the RFE consisted of witness letters. [REDACTED]

[REDACTED] stated:

[The beneficiary] was a critical member of my experimental research team dedicated to developing data and approaches that are highly relevant to the national interests namely human safety and environmental interests of the United States: i) developing water quality data for London Avenue Canal that discharges into the south shore of Lake Pontchartrain; and ii) development of predictive models to address water quality issues.

. . .

I served as the advisor for [the beneficiary's] MS thesis work titled "Water Quality Model of a Storm Water Channel." . . . [The beneficiary's] work was a great step towards analyzing and quantifying the hydrodynamics, and water quality impacts of various storm events in the Canal and Lake Pontchartrain. . . . The results of his study served as an important input in formulating regulations pertaining to swimming and fishing in Lake Pontchartrain. [The beneficiary's] research provided data and model formulations that are required to address water quality issues, biodiversity, critical habitats, and coastal restoration strategies. His work was used and is being used as a reference by other Graduate students who are specializing in the field of water quality and hydrodynamic modeling.

I am aware [that the beneficiary] has spent the past three years, working with Bioengineering Group Inc. . . . [The beneficiary] has been working on projects including sustainable design of sites across the nation, water quality analysis and modeling of watersheds in the New England area, TMDL analysis of impaired water bodies in the Northeast, fluvial geomorphological analysis, hydrological and hydraulic (H & H), and sediment transport modeling pertaining to restoration of streams and shorelines in multiple states. . . . I would enthusiastically rank him as one of the significant contributors to the field of environmental engineering.

[REDACTED] the beneficiary's dissertation advisor at UNO, stated that the beneficiary's "most significant contribution was the evaluation of the performance of six different abrasives in blasting rusted and painted steel panels used in maritime industry. Emissions data generated by him fills a critical gap in the performance characterization literature for industrial processes, a cause of major pulmonary diseases." Prof. Kura said almost nothing about the beneficiary's present work, except for

the general assertion that the beneficiary "has been working on environmental impact assessment of proposed hurricane protection activities in the Louisiana Gulf Coast."

[REDACTED] of the Louisiana State University Health Sciences Center, Section of Cardiology, stated:

The human health effects of particulate air pollution have been reported in great detail, whereas the effects of particulate emission from industrial sources have not been documented so extensively. [The beneficiary], as part of his doctoral research, evaluated the particulate emissions (in various size fractions) from dry abrasive blasting . . . [which] is apparently one of the widely used industrial processes contributing to air pollution. . . .

Towards [the] end of 2005, [REDACTED] academic advisor of [the beneficiary's] research efforts, approached me with the idea of establishing a Particulate Matter Research Center at University of New Orleans, LA in collaboration with the LSU Health Sciences Center . . . [with me] as co-investigator. . .

Thus in conclusion, I feel that [the beneficiary] has been an integral part of a research team continuously involved in investigating and providing answers to complicated questions facing the pulmonary and cardiac health sector.

The record does not show that the beneficiary has continued to pursue the particulate pollution research that he conducted during his doctoral studies. Indeed, when the petitioner first filed the petition, the focus was entirely on the importance of protecting New Orleans from severe storms.

In her second letter, [REDACTED] echoed the petitioner's argument that the Bioengineering Group's hiring standards are so high "that it would be impossible for us to impose our actual hiring standards as part of the foreign labor certification process." [REDACTED] also called the beneficiary "an unusually gifted professional with skills far beyond those normally found in others with similar degrees." She did not describe the beneficiary's specific contributions in any detail.

[REDACTED] of Interdisciplinary Design at the Bioengineering Group, stated:

[The beneficiary] is an expert at developing sustainable strategies for water quality enhancement, natural systems design, and sound watershed management. Additionally, he has creatively implemented low cost/low maintenance stormwater management strategies that harness natural processes, relying on self-repair and adaptation, rather than external maintenance procedures. These make him a very critical and essential resource to Bioengineering Group's sustainable design team.

As a recent example of [the beneficiary's] contribution to the field, BioGroup designed and is overseeing construction of a LEED[®] (Leadership in Energy and Environment)

certified Department of Public Works (DPW) facility in the Town of Lexington, MA. [The beneficiary] was the Chief Engineer who worked on the hydrological and sustainable stormwater management aspects of the project. . . .

The significance of the project included: obtaining Lexington's first municipal green (LEED[®] Certified) building; minimizing water quality impacts to the already contaminated North Lexington Brook; and providing the town with a sustainably designed facility. . . . [The beneficiary] was involved in incorporating sustainable storm water management and water quality treatment into the site design. As project engineer, he employed a range of stormwater management measures to reduce the impervious areas (parking lots and buildings), distribute the runoff from the paved area, and meet the Conservation Commission's mandate for stormwater quality, utilizing bioretention basins, emergent wetlands, porous pavement, water quality treatment units, a vegetated roof and roofwater harvesting system, and subsurface infiltration systems.

also discussed a project in Cambridge, Massachusetts, but he never mentioned any projects in Louisiana.

"a designer and construction manager for civil engineering, environmental remediation and wetland restoration projects," stated:

I became aware of [the beneficiary] in May, 2007 while reviewing designs for civil engineering projects including the Department of Public Works facility for the Town of Lexington (Massachusetts) and the Massachusetts Department of Youth Services facility in Roslindale, Massachusetts. [The beneficiary] was instrumental in design development and achievement of performance requirements for both these projects. Specifically, [the beneficiary] prepared the hydrological models, evaluated the pollutant loadings and selected and sized the stormwater control features. I was particularly impressed by the quality of his work, in that [the beneficiary] advanced clear vision for the whole project design through all the control features and achieved a very high level of performance for the site development. [The beneficiary] was the technical leader on these projects, leading other staff in the design preparation and development.

[REDACTED] of Redpoint Incorporated stated:

I am familiar with [the beneficiary's] research, modeling and design work having been involved in construction of projects based upon his work. . . .

[REDACTED] was hired to run field operations and construction oversight for two projects designed by Bioengineering Group Inc in 2006. The remedial designs for these sites were based on [the beneficiary's] hydrological and hydraulic modeling results. The two sites are the USEPA Superfund Site, Richardson Hill Road Landfill, Herrick

Hollow Creek Restoration, Sidney, NY and Mill Creek Restoration Supplemental Environmental Plan 2: Elmwood Place Landfill Site, Cincinnati, OH.

At the Herrick Hollow site [the beneficiary] performed detailed hydrological (HEC HMS) and hydraulic (HEC RAS) modeling to assess existing conditions in the creek channel, stream banks and riparian areas. . . . [The beneficiary's] analysis and design took a more holistic approach than previously failed designs by three other Consulting firms. . . . [The beneficiary] was aware of the dynamic nature of the ecosystem and created a design capable of adapting to these changes ensuring the success of the project. This is something rare that I do not find in designs from other engineers that I work with on a daily basis.

For the Mill Creek Restoration, [the beneficiary] again performed hydrological and hydraulic calculations required for the location and design of two J-hook vanes as part of the restoration of Mill Creek adjacent to the Elmwood Place landfill. . . . [The beneficiary] provided a simple solution to a very complex problem. While on site, there were very few questions regarding how the J-hooks were to be built. This resulted in minimal change orders and finishing the construction within schedule – two primary hassles that Construction Contractors like myself face every day.

I strongly believe that [the beneficiary] is an extraordinary researcher and that he has unique abilities that are not normally encountered in this field. . . .

I feel that [the beneficiary] is one of the most pragmatic engineers in the field of environmental modeling. . . . [The beneficiary's] work is an example which should be followed by other consulting firms and engineers.

The witness letters contain little, if any, discussion of the beneficiary's work in Louisiana, even though the petitioner's initial submission focused almost exclusively on that work. The petitioner has, thus, significantly shifted the focus of the waiver application, from the importance of protecting New Orleans from severe weather to the general proposition that the beneficiary is a superior engineer.

The director denied the petition on March 6, 2009. The director found that the beneficiary's occupation has substantial intrinsic merit and is national in scope, but that the petitioner had not shown that the beneficiary "has exhibited a substantial degree [of] influence on his field of endeavor." The director noted the minimal citation of the beneficiary's published work.

On appeal, the petitioner makes no reference to the specific facts of this proceeding apart from three introductory sentences near the beginning of the brief. Instead, the bulk of the appellate brief is devoted entirely to criticism of the format of the RFE, and to an attack on *Matter of New York State Dept. of Transportation*.

The petitioner protests: "The Director issued a template Request for Evidence, used more than ten times by the CIS each year that did not bear an OMB approval number. . . . [T]he use of 'broad brush' RFEs clearly violates CIS policy as well as the explicit terms of the *Paperwork Reduction Act*" (the petitioner's emphasis). Because no precise evidentiary guidelines exist for the national interest waiver, it would be difficult for the director to request specific documents (rather than broad types of evidence) in the RFE. Even then, the petitioner's objection to the content of the RFE does not demonstrate that the director should have approved the petition. At best, the issuance of a severely deficient RFE would warrant a remand for a new decision. We do not find the RFE to be so deficient that a remand would be in order. The petitioner's objections regarding the Office of Management and Budget are administrative in nature and fall outside the scope of this proceeding, and therefore we will not explore the question of whether the RFE does, in fact, fall within the scope of the Paperwork Reduction Act.

The petitioner argues: "The Petitioner has put forward a *prima facie* case of eligibility and has submitted competent, admissible, and persuasive initial evidence," thereby meeting the burden of proof. This is a circular argument; the petitioner asserts that the beneficiary is eligible for the waiver, and then uses that assertion to prove that the beneficiary is eligible for the waiver. The petitioner cannot prove his case simply by presuming the point that he seeks to make. As such, this argument does not prove that the initial submission was, in fact, sufficient. The sufficiency of the petitioner's evidence is very much at issue in this matter; the petitioner cannot avoid this issue simply by declaring that the evidence obviously shows that the beneficiary qualifies for the waiver.

Complicating the issue is that the petitioner's response to the RFE relies on factors that are almost entirely different from the grounds previously set forth in the initial submission. This very significant shift means that the petitioner has not laid out a consistent, coherent national interest claim.

The petitioner devotes much of the appellate brief to allegations that *Matter of New York State Dept. of Transportation* misconstrued Congressional intent. Rather than dissect these arguments in detail, we will observe that Congress is presumed to be aware of existing administrative and judicial interpretations of statute. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

In this instance, Congress's awareness of *Matter of New York State Dept. of Transportation* is a matter not of presumption, but of demonstrable fact. In 1999, Congress amended section 203(b)(2) of the Act in direct response to the 1998 precedent decision. Congress, at that time, could have taken any number of actions to limit, modify, or completely reverse the precedent decision. Instead, Congress let the decision stand, apart from a limited exception for certain physicians, as described in section 203(b)(2)(B)(ii) of the Act. Because Congress has made no further statutory changes in the decade since *Matter of New York State Dept. of Transportation*, we can presume that Congress has no further objection to the precedent decision.

Furthermore, 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act. Therefore, the petitioner cannot realistically argue that the director erred by following *Matter of New York State Dept. of Transportation*; the regulations

required the director to follow it. The petitioner's disagreement with *Matter of New York State Dept. of Transportation* does not affect its standing as binding precedent.

The petitioner has established that the beneficiary is a skilled environmental engineer, valued by his employer and colleagues. Simply being good at what he does, however, is not a sufficient basis for the special benefit of a national interest waiver. As we have already noted, the statutory language clearly indicates that exceptional ability does not result in automatic exemption from the job offer requirement. The petitioner has argued that the beneficiary should not have to offer any benefit to the United States in order to qualify for the waiver, and has emphasized the difficulty that the employer would encounter in trying to phrase an application for labor certification in such a way that no one but the beneficiary qualifies for the position. Waiving the job offer requirement in such an instance would clearly be in the employer's interest, but it does not follow that it is equally in the national interest.

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.