

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: TEXAS SERVICE CENTER Date: **MAR 16 2010**
SRC 08 277 50203

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:
[REDACTED]

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, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 an alien of exceptional ability. The petitioner seeks employment as a social scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for classification as an alien of exceptional ability or a member of the professions holding an advanced degree (also pursuant to section 203(b)(2) of the Act), but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director erred in denying the petition without first issuing a request for evidence or notice of intent to deny and by allegedly noting the lack of "national or international acclaim," the statutory standard for a higher classification than the one sought. The petitioner submits new evidence.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides that if all of the required initial evidence is not submitted with the petition or does not demonstrate eligibility, the director may deny the petition for ineligibility. The regulation at 8 C.F.R. § 103.2(b)(8)(iii) permits the director to deny a petition where the initial required evidence is submitted but does not establish eligibility. Thus, the director did not err in denying the petition without first issuing a notice of intent to deny or request for evidence. We will consider the new evidence submitted on appeal below. Finally, we note at the outset that the director did not reference "national or international acclaim" but noted the lack of evidence of "national or international attention." Attention is considerably less than acclaim and, as will be discussed below, relates to the petitioner's ability to provide benefits that are national in scope.

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

(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.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Master of Arts degree from the Center for International Studies at The Ohio University and an earlier Master of Science in Irrigation Engineering from Utah State University.¹ The description for the petitioner's current job as a research associate for the Florida Agricultural and Mechanical University (Florida A&M University) indicates that the job requires a Master's degree (doctorate preferred) in education and/or a related field. Thus, the petitioner's occupation falls within the pertinent regulatory definition of a profession as defined at section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2). Therefore, the petitioner qualifies as a member of the professions holding an advanced degree.

While the petitioner qualifies as an advanced degree professional, it is worth noting that counsel's initial assertions regarding exceptional ability would not likely succeed. For example, the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B) requires evidence of at least ten years of full-time experience in the occupation. Much of the petitioner's experience was obtained while a student and has not been demonstrated to have been full-time. Moreover, the petitioner lists no experience as a research associate, his current occupation, or in any other position relating to education or HIV/AIDS, the two areas in which the petitioner proposes to benefit the national interest, prior to 2002. Similarly, a letter affirming that the petitioner has the "education and research experience to make significant contributions" to the field at some point in the future does not constitute the type of formal peer recognition for past achievements and significant contributions contemplated by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F).

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

¹ The petitioner also claims to have a Ph.D. in Mass Communications from The Ohio State University but that degree is not in the record.

The Service 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 Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown 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.

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. *Id.* at 219. 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. *Id.*

Counsel advances two unrelated areas with substantial intrinsic merit: AIDS research and improved education. The petitioner submits an unpublished manuscript on media coverage of HIV/AIDS and a proposal on eliminating AIDS in Swaziland apparently submitted unsolicited to the U.S. Agency for International Development (USAID) with no evidence of a response from USAID. The record lacks evidence that the petitioner continues to work in this area of research. Rather, the petitioner provides research on academic issues for Florida A&M University. Thus, while we do not contest that HIV/AIDS research has substantial intrinsic merit, the record is not persuasive that the petitioner will be pursuing such research. Nevertheless, we do not contest the substantial intrinsic merit of researching improvements to higher education.

Initially, counsel noted that HIV/AIDS exists in every U.S. state and, thus, prevention of the virus has benefits that are national in scope. We do not contest that the proposed benefits of reducing HIV/AIDS levels through mass media health promotions is national in scope. We reiterate, however, that the petitioner does not appear to be pursuing this research.

Counsel further asserted that the No Child Left Behind Act of 2001 demonstrates that improved education is national in scope. At issue, however, is not whether the problem is national in scope but whether the proposed benefits of the petitioner's work will be national in scope. On appeal, counsel

notes that [REDACTED] for Academic Affairs at Florida A&M University, affirms that the university conducted two rounds of interviews from two different pools of candidates from across the United States to fill the petitioner's position. Counsel does not explain how interviewing candidates from different states establishes that the benefits of the petitioner's work in this position will be national in scope.

In addressing this issue, *NYS DOT*, 22 I&N Dec. at 217, n.3, provides:

In reaching this conclusion, we note that the analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3. We disagree that the 2001 No Child Left Behind Act is a post-*NYS DOT* factor that changes the analysis quoted above. *NYS DOT* did not question the importance of education. Rather, it concluded that the impact of a single teacher would be negligible at the national level. Similarly, we find that the impact of one researcher working to improve educational opportunities at a single university provides benefits that would be too attenuated at the national level to warrant a waiver of the alien employment certification process in the national interest.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Initially, counsel asserted that the alien employment certification process would take 17 months, preventing the petitioner from continuing in his important work if that process was pursued. In support of that assertion, the petitioner submitted a chart reflecting that the preliminary preparation for the alien employment certification process would take 15 to 30 days, the recruitment would take 45 to 60 days, the post-recruitment process would take 15-30 days and the application and processing stage would take 45-60 days. The petitioner also submitted the processing dates for Forms I-140, which are the exactly the same for petitions filed under section 203(b)(2) of the Act regardless of whether they are supported by an approved alien employment certification or a request for a waiver of that certification. Thus, rather than the 17-month difference implied by counsel, the only difference between the two processes (assuming no preparation was required for the national interest waiver

request) would be the maximum six months it might take to secure an alien employment certification from the Department of Labor.

On appeal, counsel asserts that universities "almost never sponsor for Permanent Residency" researchers in the social sciences. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). Even if counsel's assertion is true, university policy not to utilize the alien employment certification process does not obligate U.S. Citizenship and Immigration Services (USCIS) to waive that congressionally mandated process in the national interest.

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the alien employment certification process. *NYS DOT*, 22 I&N Dec. at 223. Included among the "inconveniences" of that process are the length of time it takes to obtain an approved alien employment certification and the effort of the process.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted a letter from [REDACTED], a professor at Utah State University discussing the petitioner's course work and thesis on irrigation engineering. [REDACTED] Department Head in Agricultural and Biological Engineering at Mississippi State, confirms that the petitioner worked there in 2001 as a research assistant focusing on precision agriculture and agricultural engineering. This work appears to have no relevance to the petitioner's track record of success in education research or even HIV/AIDS research, the two areas the petitioner proposes to benefit in the future.

[REDACTED] an instructor at Wake Technical Community College, discusses the costs in lives and burden on the health care system of HIV/AIDS infections in the United States. Once again, we do not contest the intrinsic merit or national scope of reducing HIV/AIDS infections in the United States. [REDACTED] continues:

[The petitioner] has the education and research experience to make significant contributions in the field. Through his course work at Ohio State University, he has demonstrated interest in studying the role of the mass media in promoting awareness of HIV/AIDS in rural areas of the U.S. We need more skilled and experienced researchers working to prevent the spread of HIV/AIDS, especially in rural areas in the U.S. that have been long ignored.

[REDACTED] does not provide any examples of how the petitioner's past work in HIV/AIDS and the media has had an influence on the field as a whole. As stated above, the petitioner submits a single unpublished manuscript on the issue and a report that appears to have been submitted unsolicited to USAID. The record contains no evidence that the petitioner has published or presented his work on this subject or that USAID has expressed any interest in his proposal. Without evidence of publication, the petitioner has not even demonstrated national exposure to his work let alone an interest by others in the field as might be demonstrated by citations to that work. Thus, even if the petitioner had demonstrated that he would continue to work in this area in the future, he has not demonstrated a past track record of success with some degree of influence on the field as a whole.

On appeal, the petitioner for the first time submits letters addressing his work in education. Two of these letters are from administrators at Florida A&M University and the third is from another organization in Florida.

[REDACTED] of University Assessment at Florida A&M University and the petitioner's immediate supervisor, explains that state and federal mandates as well as regional accreditation entities have increasingly required institutions of higher learning to demonstrate more evidence-based effectiveness in providing quality education, requiring the implementation of assessment programs. Dr. Ohia further explains that these programs have been slow to implement because of the shortage of qualified personnel. The issue of whether similarly-trained workers are available in the United States, however, is an issue under the jurisdiction of the Department of Labor. *NYS DOT*, 22 I&N Dec. at 221. An employer's policy of typically refusing to demonstrate a shortage before the Department of Labor, as alleged by counsel, does not give USCIS jurisdiction it would otherwise not have. As stated above, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the alien employment certification process. *Id.* at 223.

[REDACTED] then discusses the petitioner's education and experience and asserts that he has "effectively used these credentials and skills to improve the performance of our office through his research on current assessment issues, the accomplishment of his duties, and continuous assessment trainings he

provides to faculty and staff members across the University." Education and experience are two criteria for aliens of exceptional ability, a classification that normally requires an alien employment certification approved by the Department of Labor. Section 203(b)(2) of the Act, 8 C.F.R. § 204.5(k)(3)(ii)(A), (B). We cannot conclude that evidence relating to these two criteria warrants a waiver of that requirement in the national interest. *NYS DOT*, 22 I&N Dec. at 218, 222.

further asserts that the petitioner's specific contributions include playing "a major role in the design, execution, and analysis of novel and complex studies of the effectiveness of institutions of education in providing lasting students learning outcomes." notes that the petitioner presented his work relating to education at two international conferences, one of which postdates the filing of the petition. The 2008 conference predated the filing the petition by only a few months. While this conference may have provided exposure for the petitioner's work, the record does not document his influence. For example, the record contains no evidence of any citations to his presentation or letters from assessment offices at other universities confirming their reliance on the petitioner's work. Finally, notes the petitioner's benefit to the university, which does not demonstrate his influence on the field as a whole.

discusses the petitioner's influence at Florida A&M University where he is employed. Once again, at issue is the petitioner's influence beyond the institution where he is employed.

at the Association for Institutional Research (AIR), discusses the importance of the petitioner's area of research, which we do not contest. then discusses the petitioner's 2008 presentation demonstrating the significance of exploring students' performance through different perspectives using performance data from different national and locally developed instruments including direct and indirect methods. concludes that this work is "a singularly original perception that will forge further debate, policy formation, and positive educational benefits, and it was on this basis that his proposed study was accepted for presentation at the conference." then notes the positive reviews of the study during the peer-review process. It can be expected that any study accepted for presentation at a peer-reviewed conference necessarily received positive reviews. We are not persuaded that every conference presentation constitutes presumptive evidence of an influence on the field as a whole. Rather, it is the petitioner's burden to demonstrate the influence of his individual presentation. concludes:

Practically, [the petitioner's] work identifies clear and inspirational ways in which universities and colleges can provide lasting learning outcomes to their graduate[s], thereby improving their lives, ability for lifelong learning, and to cope with society; at last enabling institutions of higher education to provide tangible evidence of this accomplishment in response to the ever increasing public demand of such evidence.

does not, however, provide examples of how the petitioner's work is already influencing education assessments at the national level.

The opinions of experts in the field are not without weight and have been considered above. 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 we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also 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)).

The letters considered above primarily contain vague claims of contributions without providing specific examples of how those contributions have influenced the field. All of the letters are from colleagues in Florida. Such letters, while important in explaining the details of the beneficiary's work, cannot demonstrate his influence in the field beyond Florida where he currently works. Finally, the record does not contain corroborating evidence that might support claims that the petitioner has influenced either the field of education or AIDS research as a whole.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment 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 denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.