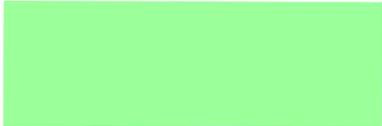




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OCT 25 2013

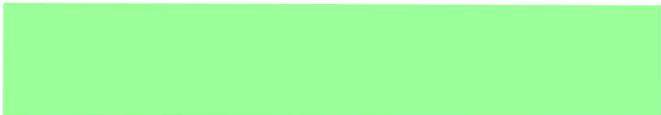
OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider, which the director dismissed. The petitioner then appealed the decision to the AAO, which dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner filed the Form I-140 petition on March 19, 2012, seeking 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 seeks employment as a special education teacher for [REDACTED] in Maryland. She has taught at [REDACTED] Maryland, since 2005. 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 denied the petition on November 7, 2012, having 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.

The AAO dismissed the petitioner's appeal on March 8, 2013. In that decision, the AAO noted the approval of a previous petition, with an approved labor certification, that [REDACTED] had filed. That petition, which classified the alien as a member of the professions under section 203(b)(3) of the Act, has a priority date of September 29, 2008. The dismissal of the appeal and had no effect on the approval of that earlier petition.

On motion, counsel asserts that the AAO did not give sufficient consideration to federal initiatives intended to improve public education in the United States, particularly the No Child Left Behind Act (NCLBA), Pub.L. 107-110, 115 Stat. 1425 (Jan. 8, 2002).

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.

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, P.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 Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm’r 1998) (NYS DOT), 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.

In dismissing the petitioner’s appeal, the AAO did not dispute the intrinsic merit of the petitioner’s occupation, but found that the petitioner had not shown (1) that her work would provide a benefit that is national in scope, and (2) that she will serve the national interest to a substantially greater degree

than would an available United States worker having the same minimum qualifications. On motion, counsel cites four passages from the AAO's appellate decision.

The first disputed element of the AAO's appellate decision concerns the Department of Labor's debarment of the petitioner's employer, [REDACTED]. In its decision, the AAO noted that the petitioner had raised the issue of [REDACTED]'s debarment under section 212(n)(2)(C)(i) of the Act, which prohibits the approval of any employment-based immigrant or nonimmigrant petitions filed by [REDACTED] between March 16, 2012 and March 15, 2014. The AAO stated that, whatever her employer's circumstances, "the petitioner still must demonstrate that the alien will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT*, 22 I&N Dec. at 218 n.5."

On motion, counsel states: "the petitioner's National Interest Waiver is premised on our good faith arguments of her eligibility and . . . our mention of [REDACTED] debarment was not invoked as an argument of her eligibility but merely as a point of equity."

Counsel states that the AAO appears to have held the petitioner to a standard "that is not clearly defined and quite synonymous to the threshold in an 'EB-1 Extraordinary Ability' petitions [*sic*]." Section 203(b)(1)(A)(i) of the Act refers to individuals of "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim." The regulation at 8 C.F.R. § 204.5(h)(3)(ii) indicates that a petitioner can establish extraordinary ability by meeting at least three of ten specified evidentiary criteria, including "nationally or internationally recognized prizes or awards for excellence in the field of endeavor" and "evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." Counsel does not explain how the AAO held the petitioner to an "extraordinary ability" standard.

Counsel states:

With NCLBA in place, petitioner has legitimately beseeched the USCIS to put in consideration pertinent provisions of the Act in the adjudication process instead of completely ignoring same and zeroing solely on NYSDOT. As explicitly admitted in NYSDOT, "neither the statute nor USCIS regulations define the term "national interest".["]" Additionally, Congress did not provide a special definition of "in the national interest."

Whereas, NCLBA provided a definite definition of "in the national interest" as elaborated in the petitioner's Case File, the NYSDOT has not even gone closer to this. In fact, nowhere in the USCIS' decision could be found its proposed definition of what is "in the national interest" in the field of education. In other words, from the starting point alone, USCIS' analysis of the petitioner's NIW petition as a "Highly Qualified Teacher" was lacking the necessary foundation.

It is worth noting that the petitioner through NCLBA has posited a definition of what is "in the national interest" unlike the NYDOT [*sic*] applied by USCIS.

Having asserted that *NYSDOT* lacks a “definition of what is ‘in the national interest,’” counsel does not identify any section of the NCLBA that contains such a definition. The text of the NCLBA contains no such definition.

The NCLBA prescribes certain measures intended to improve public education, but it does not state or imply that one of those measures involves granting national interest waivers to public school teachers. The NCLBA did not create any new immigration provisions or modify any existing ones. The statute contains several references to “immigrant children and youth” (in the context of their particular needs), but no references to immigrant teachers.

The second point that counsel disputes on motion concerns the following quoted passage from the AAO’s appellate decision:

Counsel claimed that the labor certification process poses a “dilemma” for the petitioner because she possesses qualifications above the bare minimum required for the job she seeks, and therefore “the United States Department of Labor would . . . most likely recommend denial of the application” for labor certification. The Department of Labor, however, has already approved a labor certification for the petitioner, and therefore counsel’s speculation contradicts documented facts.

Counsel offers no direct rebuttal to the above passage. Instead, counsel states that the AAO “provided no contradictory evidence to the following ‘Good Faith Arguments’ of the petitioner.”

A motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior appellate decision. The moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *In re O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006).

The next eight pages of the brief comprise language directly copied from the earlier appellate brief. In the copied language, counsel cites a 2010 Department of Education report, *ESEA Blueprint for Reform*. Counsel states:

The U.S. Department of Education’s finding that meeting the NCLB Act’s requirements for the “highly qualified” standard “does not predict or ensure that a teacher will be successful at increasing student learning” because while the NCLB requirements set minimum standards for entry into teaching of core academic subjects, they have not driven strong improvements in what matters most: the effectiveness of teachers in raising student achievement which demonstrates that teacher effectiveness contributes more to improving student academic outcomes than any other school characteristic.

The finding that “the NCLB requirements . . . have not driven strong improvements in . . . the effectiveness of teachers in raising student achievement” appears to undermine the claim that the NCLBA has set the standard for the national interest with respect to education.

Other portions of the quoted language refer to attrition among special education teachers. If this attrition causes a shortage that makes it difficult to recruit qualified workers, then it is precisely the situation that labor certification exists to address. See *NYSDOT* at 218 and 222. As noted previously, and as counsel acknowledges on motion, the petitioner has already obtained an approved labor certification, and an approved petition, based on her employer's inability to recruit qualified United States workers.

Most of the quoted language, repeated on motion, concerns general assertions rather than the specific merits of the present petitioner. There is, however, a brief discussion of the petitioner herself:

[The petitioner] is one of the 59% [of] special educators in the nation with equivalent Master's degree.

[The petitioner] is one of the 92% [of] special educators with full certification.

Counsel acknowledges that most special education teachers have master's degrees, and almost all of them have "full certification." Therefore, it is not evident that the petitioner's possession of these commonly-held credentials sets her apart from others in her field.

Counsel also repeats the assertion that the petitioner "is an international teacher recruited from the Philippines on the basis of her credentials and has proved her worth and remains to be needed by [redacted] [sic] as shown by testimonials from her superiors." Counsel also asserts that, while more highly trained teachers have a greater tendency to leave special education, the petitioner does not intend to do so.

The record does not document the recruitment process that brought the petitioner to [redacted]. The unsupported assertions of counsel do not constitute evidence. See *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).

Much of the copied language repeats the basic assertion that the NCLBA and other elements of federal education policy have, in effect, created a blanket waiver for "Highly Qualified Teachers," as the NCLBA defines that term. Counsel does not cite any relevant precedent decision or other authority to support this assertion.

Counsel does not explain why [redacted]'s continued need for the petitioner's services, and the petitioner's intention to provide those services, should be grounds for approving the national interest waiver. Counsel cites no statute, regulation, or case law to show that the likelihood of continued employment warrants a waiver of the job offer employment. The employer's letters demonstrate a standing job offer from [redacted] which has already led to an approved petition.

The third point that counsel identifies as grounds for the motion concerns the approval of a petition for another teacher. The petitioner did not show that the facts of the two petitions were sufficiently similar

to warrant a similar outcome. Counsel states: "Petitioner most respectfully submits to USCIS on this matter and no rebuttal will be represented further."

In the fourth and final contested passage from the dismissal notice, the AAO stated: "The assertion that the NCLBA is tantamount to a retraction or modification of *NYSDOT* is not persuasive; the NCLBA did not amend section 203(b)(2) of the Act." On motion, counsel states:

it is not the petitioner's claim that NCLBA is tantamount to a retraction or modification of NYSDOT. However, it is our position that the pertinent needs of NCLBA as submitted in her Case File be considered more particularly in defining what is "in the national interest" instead of departing from oblivion.

USCIS' rejection of NCLBA in the adjudication process would be untenable, as compared to when the Service explains that despite consideration of pertinent points of NCLBA, the petitioner still did not meet the threshold.

Here, USCIS, without any qualms, just easily dismissed NCLBA for being not an immigration law by nature. The Service position would be more acceptable in the absence of NCLBA especially since there is no standing definition provided to what is "in the national interest" in NYSDOT.

Although not an immigration [statute] per se, NCLBA's implementation resulted [in] hiring of foreign teachers which were given immigration benefits by USCIS through the H-1B Program or J-1 Program, among others. For this reason, it would be a prudent exercise of the Attorney General's discretion for USCIS to also squarely adjudicate these foreign teachers' NIW Petitions on the merits based on the same NCLBA law that accorded them those temporary worker status.

The statutory provisions relating to H-1B and J-1 nonimmigrant workers existed prior to the NCLBA, and the NCLBA did not amend those provisions. Furthermore, prior nonimmigrant status is not a basis for granting the national interest waiver.

The petitioner, on motion, has not established that the AAO's decision was based on an incorrect application of law or USCIS policy, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the AAO will dismiss the motion. 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 motion is dismissed.