



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: **APR 07 2014** OFFICE: TEXAS SERVICE CENTER [REDACTED]

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:

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 matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a special education resource teacher for [REDACTED] in Maryland. The petitioner began teaching at [REDACTED] Maryland, in 2006. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and background evidence.

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

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

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

(B) Waiver of Job Offer –

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

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term “national interest.” Additionally, Congress did not provide a specific definition of “in the national interest.” The Committee on the Judiciary merely noted in its report to the Senate that the committee had “focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . .” S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT 90), Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dep’t of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm’r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien’s past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner’s assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term “prospective” is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

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

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on February 17, 2012. In an accompanying statement, counsel stated that the petitioner’s “petition for waiver of the labor certification is premised on her Master’s of Education Degree Major in Special Education: Mild to Moderate Disabilities, more than twenty (20) years of dedicated and progressive teaching experience . . . and the commendations and recognitions received by her.”

Academic degrees, experience, and recognition for achievements and contributions are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. Particularly significant forms of recognition can indicate broader impact and influence, but the burden is on the petitioner to establish as much. *See* section 291 of the Act, 8 U.S.C. § 1361.

Counsel's list of the beneficiary's "awards and recognitions" described five certificates in the record. Two of the certificates are from [REDACTED]. One acknowledged the petitioner's work as a presenter at a [REDACTED] team retreat in 2007; the other is a certificate of appreciation recognizing unspecified "valuable contributions to the Special Education Department." Two of the certificates are from the [REDACTED]. An "Outstanding Service certificate" recognized the petitioner's "invaluable contribution in giving academic help to the students of [REDACTED]" while a "Certificate of Excellence" commended the petitioner "for sharing her expertise in Response to Intervention."

The fifth certificate is a "Certificate of Membership [in] the [REDACTED] Society," issued to the petitioner "[i]n recognition of [her] outstanding academic achievement" while a graduate student at [REDACTED]. The evidence indicates that membership in the society rests on academic achievement as a student rather than on accomplishments as an educator. The petitioner has not shown that any of the submitted certificates establish the petitioner's significant impact or influence on education beyond [REDACTED].

A teacher's influence on her own classroom is local, and does not establish that the benefit from her work will be national in scope. *See NYS DOT*, 22 I&N Dec. 217 n.3.

Counsel stated:

In less than a year of employment [in] November 2006 [on] the teaching force of [REDACTED], [the beneficiary] already made a name in Area 2 Special Education Department as a Special Education Teacher, as a Special Education School Coordinator, as a Maryland Online School System Administrator, and as a school-based Medicaid Coordinator at [REDACTED] Elementary School, a hard to staff school because it is a TITLE I school.

Counsel stated that the school "did not meet the Adequate Yearly Progress for consecutive years," but met that target "[t]he moment" the petitioner began teaching there. Even if the petitioner had shown that she was largely responsible for this school-wide improvement, this effect is essentially local with no demonstrated wider significance.

Counsel added that the petitioner "co-authored a published book in 2004 . . . which was used in many private schools in the Philippines." The petitioner submitted a copy of the book (a Filipino-

language reading workbook), but the record does not establish that the book's impact on education in the Philippines. Furthermore, there is no evidence that the petitioner has written any books since entering the United States in 2005, or that she will do so in the foreseeable future. Therefore, the petitioner's involvement in the creation of a school book in the Philippines is not evidence of her impact on education in the United States.

Counsel stated:

But for the unfortunate incident that happened to the [redacted] the school system and the entire nation as a whole remain in need of the professional services of [the petitioner] as a teacher and leader in developing young minds with much emphasis [on] children with disabilities to excel in their studies, personal and inter-personal growth.

Counsel did not identify or describe "the unfortunate incident," but it is a matter of public record that the U.S. Department of Labor invoked the debarment provisions of section 212(n)(2)(C)(ii) of the Act against [redacted] owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS could not approve any employment-based immigrant or nonimmigrant petitions filed by [redacted]. This debarment period began a month after the petitioner filed the present petition, and ended shortly before the writing of the present decision.

Before the debarment occurred, [redacted] filed a Form I-140 petition on the beneficiary's behalf on November 18, 2010, with an approved labor certification filed on April 20, 2010. The Texas Service Center approved that petition on May 14, 2011, classifying her as a professional under section 203(b)(3) of the Act. By applying for the national interest waiver, the petitioner has sought an exemption from a requirement that she has already met. The debarment order did not affect previously approved petitions, and the approval of the November 2010 petition remains in effect.

The petitioner submitted letters from [redacted] officials, teachers and administrators at [redacted] and other schools where the petitioner has taught, and a former student and his father. The witnesses offered praise for the petitioner's skills as a teacher. [redacted], credited the petitioner with a 20 percent increase in the number of special education students scoring proficient or advanced on standardized tests. However significant this result may be for [redacted] the record does not show that the petitioner's efforts have affected student achievement at schools where she herself has not worked. Her impact in this respect, therefore, is local.

Several of the witnesses asserted that [redacted] has an ongoing need for the petitioner's services. These witnesses did not acknowledge or mention [redacted] approved petition on her behalf.

The director issued a request for evidence on May 16, 2012, stating that the petitioner "must establish . . . a past record of specific prior achievement with some degree of influence on the field as a whole."

In response, the principal of [REDACTED] asserted that the special education students did not meet their testing targets following the petitioner's departure. (Submitted statistics show that [REDACTED] special education students met the proficiency target for reading in 2012, but not the target for mathematics.) Counsel asserted that this decline in student performance is evidence that the petitioner "possesses innovative skills." The record does not show that the petitioner's departure was the sole or primary cause of the drop in scores. The petitioner herself stated that "all the special education teachers at [REDACTED] resigned" between 2007 and 2012.

Citing the above attrition as an example, the petitioner stated that "special education teachers are hard to keep." A local shortage of special education teachers is not grounds for a national interest waiver, because the labor certification process is in place to address local shortages. Congress has created no blanket waiver for special education teachers, and attrition within the specialty does not establish the petitioner's impact or influence on her field as a whole.

Counsel claimed a "Dilemma in Labor Certification Process if Required," because the labor certification process cannot take the petitioner's experience and master's degree into account. Counsel did not acknowledge that [REDACTED] has in fact obtained an approved labor certification for the petitioner, which formed the basis for an approved immigrant petition. Given that [REDACTED] has, in fact, secured an approved labor certification for the petitioner, all of counsel's hypothetical reasons why [REDACTED] might encounter difficulty in obtaining a labor certification are moot.

The petitioner also submitted a copy of a new contract with [REDACTED], showing that the school system rehired her in June 2012 after she obtained employment authorization. Thus, the petitioner has already returned to the school system that, once the appropriate immigrant visa number is available (and assuming that the petitioner qualifies for adjustment of status), will be able to employ her permanently.

Many of counsel's assertions are general statements about the need for qualified special education teachers. Because Congress has created no blanket waiver for such teachers, these claims cannot suffice to show that any one particular special education teacher qualifies for the waiver.

Counsel cited statistics indicating that 59% of special education teachers have master's degrees, and 92% of special education teachers have full certification in the specialty. Counsel stated that "[a] little less than a majority of [children with special needs] either are not taught by Master's degree holder teachers or fully certified Special Education teachers." The cited figures show that most special education teachers have master's degrees, and almost all of them have "full certification." The petitioner's possession of these commonly-held credentials does not set her apart from others in her field. Given the above figures, those credentials represent a degree of expertise ordinarily encountered in the field of special education, and therefore a master's degree and full certification do not demonstrate exceptional ability. Exceptional ability, in turn, is not sufficient to qualify for the national interest waiver.

Counsel contended that “the Inherent Right to Privacy by Available U.S. Workers impedes [the petitioner] from squarely complying with the [NYSDOT] mandate.” Counsel’s contention rests on the incorrect assumption that the NYSDOT guidelines consist of an item-by-item comparison of the petitioner’s credentials with those of qualified United States workers. The key provision in NYSDOT is that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. This does not require a comparison of the petitioner’s credentials with those of other teachers.

Counsel stated: “In addition to her awards and recognitions previously submitted in the initial packet, we wish to submit Teacher/Performance Evaluations from 2006 to 2011 (enclosed) showing her consistent ‘Satisfactory Rating’ which is the highest choice in the diagram.” The evaluations offered only two choices, “Satisfactory” and “Unsatisfactory.” (An intermediate “Needs Improvement” category applied only to interim evaluations.) The petitioner did not establish that consistent ratings of “satisfactory” are rare or unusual. Furthermore, these evaluations do not establish influence outside of one school.

The petitioner submitted a letter from [redacted] president and publisher at [redacted], the company that published the petitioner’s previously mentioned book. [redacted] asserted that the book “has been widely accepted and used by schools all over our country,” but she did not elaborate or provide specific figures to support this general claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 existence of the book does not establish the petitioner’s ongoing or potential future impact on the field of education. The petitioner’s own statements do not include mention of plans for future books.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition “be treated in the same light.” While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. Furthermore, counsel has furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision.

The director denied the petition on October 27, 2012, stating that the petitioner had not established that she “plays a significant role in [her] field,” and that general assertions regarding that field did not establish the petitioner’s individual eligibility for the waiver. The director also noted that, between the earlier approved petition and the resumption of the petitioner’s employment with [redacted] “it’s unclear how the denial of this petition would negatively impact the [redacted]”

On appeal, counsel claims: “the reasoning behind the denial of the . . . I-140 Petition is a complete departure from the parameters elicited in the New York Department of Transportation case.” Specifically, counsel quotes the following passage from NYSDOT:

It appears from the record that the petitioner seeks to classify the beneficiary both as an advanced degree professional and as an alien of exceptional ability. The record establishes that the beneficiary holds a Master of Science degree in Civil Engineering (Structures) from [REDACTED] and thus qualifies as a member of the professions holding an advanced degree. The issue of whether the beneficiary is also an alien of exceptional ability is moot.

Id. at 216. Counsel states: “the issues raised in the denial dealing [with the petitioner’s] qualification[s] are academic since she has already met the Advanced degree requisite.” Counsel does not identify any specific passage from the decision in which the director purportedly required the petitioner to establish exceptional ability. The director did not cite the lack of evidence of exceptional ability as a basis for denial. In terms of the director’s claimed “complete departure from the parameters” of *NYSDOT*, that decision specified that a petitioner seeking the waiver must demonstrate prospective national benefit significantly above what would be required to qualify as an alien of exceptional ability. *Id.* at 216-17, citing 56 Fed. Reg. 60897, 60900 (November 29, 1991).

Counsel makes general statements about federal efforts to reform and improve public education, and asserts that “the benefits that would be conferred [by the petitioner’s work] spreads to the entire nation’s economy and security.” Counsel contends: “a single ‘Highly Qualified Teacher’ can inspire a national figure such as a President, a legislator, a member of the judiciary, a scientist, among others.” Eligibility for the waiver cannot rest on long-term speculation about the potential achievements of the petitioner’s students, even if it could be shown that the accomplishments of a high-ranking government official trace back to the influence of a single elementary school teacher.

General statements about education and educational reform address the intrinsic merit of education, but not the other two prongs of the *NYSDOT* national interest test. Likewise, assertions about the national importance of education as a whole do not lend national scope to the classroom efforts of one individual teacher. *See NYSDOT*, 22 I&N Dec. 217 n.3.

Counsel repeats prior assertions regarding attrition rates among special education teachers. As above, these statements are general claims regarding the petitioner’s field rather than specific information showing that the petitioner serves the national interest to a greater extent than other qualified professionals in her field.

Counsel quotes then-President George H.W. Bush who, upon signing IMMACT 90 into law, stated that the law “provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas.” Counsel also notes that IMMACT 90, “which is the very law creating [the] ‘National Interest Waiver,’ affirms the critical role of ‘educators’ in for [*sic*] this purpose.” Section 203(b)(2)(A) of the Act does cite “the national . . . educational interests . . . of the United States,” but the same section of the statute incorporates a requirement that the immigrants’ “services . . . are sought by an employer in the United States.” The legislation does not show that teachers automatically qualify for the waiver; it proves the opposite.

President Bush's comments were about IMMACT 90 as a whole, including the job offer requirement clause, not about the national interest waiver specifically.

Authority to designate blanket waivers rests with Congress. USCIS will not designate blanket waivers for entire fields or specialties. See *NYSDOT*, 22 I&N Dec. 217. Section 203(b)(2)(A) of the Act did not create or imply a blanket waiver for teachers or any particular subset of teachers. Rather, it held all members of the professions, including teachers, to the job offer requirement. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Thus, Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*. Counsel has not identified a comparable provision relating to teachers in any statute. Counsel refers to the No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002), but counsel has not cited any provision of that statute that amended the Immigration and Nationality Act to create a blanket waiver for teachers.

Counsel repeats the contention that "the tedious process of labor certificate [*sic*]" presents a "dilemma," even though, as the director noted in the denial decision, the petitioner is already the beneficiary of an approved petition with a labor certification. Counsel, on appeal, does not address the approved petition, instead treating the job offer requirement as a barrier to the petitioner's continued employment with [REDACTED]. Speculation about factors that might prevent the petitioner from obtaining a labor certification cannot outweigh the plain fact that the petitioner already has one.

Having begun the appellate brief by alleging that the director's decision "is a complete departure from the parameters elicited in the New York Department of Transportation case," counsel concludes by asserting that "strictly enforcing the rudiments behind the New York State Department of Transportation Case to Highly Qualified Educators is unjust, unreasonable and damaging to the Best Interest of the American School Children." Counsel contends that *NYSDOT* should not apply to teachers because, whereas the beneficiary in *NYSDOT* was an engineer who worked with inanimate objects (bridges), teachers like the petitioner work with "children, human persons." Counsel asks the AAO to "[d]etermine that the cause of American School children is deserving [of] a new thought process, distinct from considerations employed by the Immigration Service in adjudicating the New York State Department of Transportation case."

By design, the three-pronged *NYSDOT* national interest test is broadly applicable to the range of occupations covered by section 203(b)(2) of the Act; the test is not specific to bridge engineers. A teacher who meets the three prongs would qualify for the waiver, but, as the *NYSDOT* decision indicated at 217 n.3, the teacher would not meet those prongs simply by being effective in the classroom. There are ways that an educator can have a broader impact, for instance by contributing to the development of national initiatives such as the Common Core State Standards Initiative or by developing widely used curricular or teacher training materials. The petitioner in this proceeding has not claimed involvement in these wider activities, relying instead almost entirely on her reputation within [REDACTED]. The petitioner co-wrote a school book in the Philippines in 2005, but the

record does not establish that the book had a greater impact on elementary education than other books for the same subject and grade level, and the petitioner has not continued to produce published material in the United States.

The exhibits submitted on appeal (such as copies of the *NYS DOT* decision and a study on special education) are general in nature, rather than specific to the petitioner as an individual. Because there exists no blanket waiver for special education teachers and the AAO does not claim authority to create one, these materials support specific claims of fact in the appellate brief, but not counsel's overall claim that teachers are, or ought to be, exempt from *NYS DOT*'s provisions.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYS DOT*, 22 I&N Dec. 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

As is clear from 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 AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.