U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 1 2014 OFFICE: NEBRASKA 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, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before us at the Administrative Appeals Office on appeal. We 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 public school music teacher in , Arizona. 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 legal brief.

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, 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 December 4, 2012. An accompanying introductory statement including the following assertions:

> Immigration Act of 1990 (IMMACT 90) which enacted . . . the National Interest Waiver included 'educators' among the targets of this legislation[. President George H.W. Bush, in signing the bill into law], specifically stated: "this bill 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." . . .

The above passage implies that Congress created the national interest waiver for educators, but the job offer requirement for which the petitioner seeks a waiver was, itself, an integral provision of IMMACT 90. President Bush's quoted remarks did not specifically mention the national interest waiver, and there is no evidence that the remarks referred particularly to the waiver, rather than to IMMACT 90 as a whole. The national importance of "education" as a concept, or "educators" as a class, does not lend national scope to the work of a single schoolteacher. *See NYSDOT*, 22 I&N Dec. at 217 n.3.

The introductory statement included the observation that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and the claim that Congress subsequently filled that gap with the passage of the No Child Left Behind Act of 2001 (NCLBA), Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002):

> Congress has in effect remarkably engraved the missing definition upon the concept of 'in the national interest,' which centered it on the 'Best Interest of American School Children.' More importantly, U.S. Congress also provided the means to achieve this now defined 'in the national interest,' i.e., 'Hiring and Retaining Highly Qualified Teachers.' Interestingly, "NCLB Act" also specified the 'Standard of a Highly Qualified Teacher.'
>
> Indeed, the "NCLB Act" has elucidated the previously dark avenue for educator-national interest waivers.
>
> With this, the Service now has a definite working definition of 'in the national interest' including the clear standard on what qualifications must be required from NIW [national interest waiver] teacher self-petitioners, as mandated by No Child Left Behind Act of 2001. There is no longer vagueness or obscurity like what happened in the New York State Department of Transportation case, which left the Immigration Service with over-reaching discretion in imposing even the impossible from NIW teacher self-petitioners.

The NCLBA contains no mention of the national interest waiver or any immigration benefits for foreign teachers, and it did not amend section 203(b)(2)(B) of the Act (which created the waiver). With respect to the claim that the NCLBA provided a previously absent definition of the term "national interest," that phrase does not appear in the text of the NCLBA. The petitioner cited nothing from the text or the legislative history of the NCLBA to support the claim that Congress passed that law with the direct or indirect intention of facilitating the immigration of teachers through the national interest waiver.

The introductory statement also referred to "other Government initiatives for STEM," which stands for "science, technology, engineering and mathematics." The petitioner did not explain the relevance of this observation; she teaches music, which is not a STEM subject.

The introductory statement then addressed the three prongs of the *NYSDOT* national interest test. *NYSDOT* addressed the first two prongs in a footnote (cited previously), concluding that education has substantial intrinsic merit, but classroom instruction lacks national scope. The introductory statement contended that the national importance of education lends national scope to the petitioner's work, but its discussion of the national impact of education concerns the impact of teachers at a collective, rather than individual, level.

Noting that the petitioner has "over 25 years of dedicated service in [her] profession," the introductory statement claimed that it is "economically wholesome" to take advantage of the petitioner's experience "instead of waiting for over 25 years until U.S. workers become as highly qualified as she is." This assertion presumes that there are no experienced music teachers in the United States, and therefore it will take 25 years before any U.S. teacher reaches the level of experience that the petitioner has already attained. The petitioner submitted no evidence to support this assertion. 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)). Also, length of experience, by itself, does not convey influence on the field or benefit that is national in scope.

The introductory statement asserted that "retaining [experienced workers] is more cost effective than recruiting new [ones]." The threshold for the waiver is the national interest, rather than claimed cost-effectiveness.

The statement included the claim that the labor certification process would pose a "dilemma" because the petitioner's qualifications exceed the minimum requirements for the position, and "the employer is required by No Child Left Behind (NCLB) Law . . . to employ highly qualified teachers." The petitioner did not show that these two considerations are incompatible. Section 9101(23) of the NCLBA defines the term "highly qualified teacher." By the statutory definition, a "highly qualified" school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

The petitioner did not explain how the above requirements are incompatible with the existing labor certification process, and the petitioner submitted no evidence that the labor certification process has resulted in the widespread employment of teachers who are less than "highly qualified." The minimum degree requirement is the same for labor certification as it is for a highly qualified teacher (*i.e.*, a bachelor's degree). The introductory statement speculated that the Department of Labor would likely deny a labor certification application that required "a Master's degree plus over 25 years of experience," but the petitioner did not show that a less-qualified teacher could not adequately perform the necessary functions of the position.

The introductory statement listed seven "Certificates of Awards and Recognitions," and referred to photographs of others. The submitted photographs show a and two inscribed trophies. Both trophies are from ' of the ; the record does not establish the extent to which these trophies relate directly to the petitioner's teaching work. The photograph of the plaque is out of focus and therefore difficult to read, but it appears to name the petitioner ' for the 1999-2000 school year.

Most of the certificates are from the Philippines. They indicate that the petitioner trained the first place winner at a municipal contest in 1994, and trained students for a mathematics competition in 2004. A certificate from the Music Competitions for does not mention the petitioner; it indicates that the received an Honorable Mention at the 1993 A 1997 certificate thanked the petitioner for judging a church song and dance competition. Other certificates acknowledge her contributions to two seminars, as a resource speaker in 1995 and as a lecturer in 2005. The certificates do not establish the petitioner's impact on music education beyond a local level. Training or coaching students in a competition, even at the national level, does not demonstrate or imply that the petitioner has had an effect on the way others in her field teach music.

The only submitted certificate that dates from the petitioner's time in the United States is a "Certificate of Achievement" from the County Executive, in commemoration of American Education Week 2006, when the petitioner was teaching for County Public Schools in Maryland. The body of the certificate reads:

> In honor of your service as an educator in the s County Public School System
>
> The Office of the County Executive recognizes and recommends your hard work and dedication to the children of our County. I appreciate the knowledge and services you provide to the students of County.
>
> This certificate is presented during American Education Week 2006.

The general wording suggests that all educators received such certificates in 2006.

Evidence of recognition can help support a claim of exceptional ability, under the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(F), but exceptional ability does not establish or imply eligibility for the waiver. Aliens of exceptional ability are subject to the statutory job offer requirement in section 203(b)(2)(A) of the Act. To establish eligibility for the waiver, it cannot suffice for the petitioner to show that her peers consider her to be a very good teacher.

The petitioner submitted letters from third parties including teachers and administrators at schools where she has taught. These writers described the petitioner as a skilled and conscientious teacher, but

they did not claim that the petitioner has had a greater impact on music education than other qualified teachers.

The director issued a request for evidence (RFE) on May 9, 2013. The director requested "additional documentary evidence to demonstrate that the prospective benefit of [the petitioner's] employment [will] be national in scope." The director stated that the evidence submitted "does not demonstrate . . . a degree of influence on the field of education as a whole."

The petitioner's response to the RFE consisted primarily of a statement, much of which repeated assertions from the earlier introductory statement. The new statement acknowledged that "the No Child Left Behind Act of 2001 is not an immigration law per se," but maintained that the law nevertheless directly bears on the issue of granting national interest waivers to teachers, and "must be understood as responsive to the declarations of IMMACT 90 in the sense of providing a more specific set of implementing rules for its effectuation." The petitioner did not identify any "more specific set of implementing rules" within the provisions of the NCLBA, or cite any evidence to support the claim that Congress passed the NCLBA as a response to *NYSDOT*.

The RFE response includes the claim that the petitioner "is an effective teacher in raising student achievement in STEM, given the exceptional intellectual condition realized by students through her teachings in music." The petitioner submitted no evidence to establish that her work as a music teacher has improved "student achievement in STEM," and this unsupported claim has no weight as evidence. *See Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, even if the petitioner's work as a music teacher had an appreciable effect on her students' performance in other subjects, this would be a purely local effect with no impact on the field of music education as a whole.

The RFE response quoted various sources regarding a claimed crisis in U.S. public education, and asserted that a nationwide improvement in student performance would benefit the United States. The petitioner has worked in the United States since 2006, but she did not show that her work has effected such an improvement during that time. Therefore, there is no basis to conclude that her future work will eventually lead to such a result.

The petitioner also submitted new materials relating to her recent work in including a "Certificate of Appreciation . . . In recognition of valuable contributions to Primary School AdvancED External Visit on December 11 and 12, 2012"; a program from the "Spring Music Concert" of Primary School and School; printouts of electronic mail messages from school officials regarding that concert; a July 23, 2012 letter from the minister at a church in Maryland, where the petitioner then served "as the pianist for . . . worship services"; and new letters from writers in , including school officials and a local physician. These materials, like those submitted previously, establish that the petitioner is a respected and civic-minded member of her local community as well as an able music teacher. Being competent and well-regarded in one's field, however, is not sufficient to establish eligibility for the national interest waiver.

The director denied the petition on October 15, 2013. The director acknowledged the intrinsic merit of education, but stated: "While educators, as a collective, have an impact that is national in scope, the evidence of record does not demonstrate that the self-petitioner as an individual will have a demonstrable benefit that will be national in scope." The director discussed the petitioner's evidence and the claim that "the No Child Left Behind Act provides the United States of America greater ability to hire educators," and concluded that "the record falls well short of establishing that the third prong of the national interest waiver test has been met."

On appeal, the petitioner submits an appellate brief, contending that the director gave "insufficient weight to the national educational interests enunciated in the No Child Left Behind Act of 2001." The petitioner does not explain why the NCLBA has any weight with respect to immigration policy (as opposed to educational policy, which is outside the scope of this proceeding).

Throughout this proceeding, the petitioner has submitted briefs claiming that the NCLBA effectively establishes a blanket waiver for highly qualified teachers, and that Congress enacted the NCLBA with that goal specifically in mind. Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). The statutory language of section 203(b)(2)(A) of the Act subjects professionals, including teachers, to the job offer requirement, and the statutory language of the NCLBA does not address the issue of national interest waivers for teachers.

The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 (Dec. 12, 1991) made the national interest waiver available to members of the professions holding advanced degrees, where previously it was available only to aliens of exceptional ability. Following the 1998 publication of *NYSDOT*, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999 amended the Act by adding section 203(b)(2)(B)(ii), to create special waiver provisions for certain physicians. In both instances, Congress acted clearly and directly, referring directly to the national interest waiver in the language of the statute and/or amending the Act itself. The petitioner has identified no comparable provision for teachers in the NCLBA or in any other federal statute.

The brief states: "Although not an immigration law per se, the NCLB[A] was in all likelihood considered by the Immigration Service in adjudicating [the petitioner's] H-1B [nonimmigrant] Petition." The petitioner cites no evidence to support this assertion, and unsupported claims have no evidentiary weight. *See Matter of Soffici*, 22 I&N Dec. at 165.

Regarding the petitioner's individual qualifications, the brief states:

> USCIS-Nebraska Service Center has not specified what constitutes 'unusual significance' in the field of education. It concluded that "in this case, it has not been shown that the petitioner's individual accomplishments are of such an unusual significance that he qualifies for a waiver of the job offer requirement." There is no

> clarity on this particular requirement and yet, the Director has easily dismissed the incomparable accomplishments of [the petitioner] as submitted in her Case File. By requiring the petitioner to submit evidence of ambiguous nature is 'unduly burdensome' and in effect tantamount to requiring 'impossible evidence' since nobody has control over who and how her works are accessed and used, in the same way that it is impossible to realistically determine that [the petitioner] "will serve the national interest to a substantially greater degree than would . . . similarly trained U.S. workers.["]

The quoted passage concerning "unusual significance" does not appear in the director's decision. Furthermore, *NYSDOT* does not require the petitioner to have control over others' use of her work. Rather, it requires evidence of influence beyond a local level, on the field as a whole. *NYSDOT* indicates that the best available gauge of likely future benefit is an inference drawn from one's past contributions to one's field. *See id.* at 219.

The brief contends that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers, and asserts: "the Immigration Service should have presented its own comparable worker and deliberated its point in the decision, allowing the petitioner to rebut such a solid finding of fact." The *NYSDOT* guidelines are not an item-by-item comparison of an alien's credentials with those of qualified U.S. workers. Rather, *NYSDOT* indicated that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers' credentials. Regarding the assertion that USCIS "should have presented its own comparable worker," there is no presumption of eligibility that the director must overcome in order to justify denying the petition. The burden of proof rests with the party seeking an immigration benefit. Section 291 of the Act, 8 U.S.C. § 1361.

The brief repeats the list of certificates and awards from previous correspondence, but does not explain how the petitioner's achievements are "incomparable." The brief asserts that "the Director is requiring more from the beneficiary's credentials tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. It is evident from the statute that the threshold for exceptional ability is below, not above, the threshold for the national interest waiver; it is possible to establish exceptional ability but still not qualify for the waiver. Also, the director did not require the petitioner to establish exceptional ability in her field. Instead, the director found that the petitioner's evidence failed to establish that her work has had an influence beyond the school districts where she has worked.

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. *NYSDOT* at 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.").

The petitioner has established that she is a member of the professions holding an advanced degree, but the classification she seeks also requires a job offer (including labor certification). Congress has passed no statute exempting teachers from this requirement. The petitioner has not established that she meets the *NYSDOT* guidelines for the national interest waiver, and there is no alternative standard in existing statute, regulations, or case law to create a blanket waiver for highly qualified teachers. 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.