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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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: DEC 08 2014 OFFICE: TEXAS SERVICE CENTER

FILE: [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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "R. Rosenberg".

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. 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 with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a middle school reading teacher for [REDACTED]; she began teaching at [REDACTED] 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 the equivalent of 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 short statement. She also stated that a “brief and/or additional evidence will be submitted to the AAO within 30 days,” but the record contains no further submission from the petitioner. Therefore, we will consider the record to be complete as it now stands.

Attorney [REDACTED] previously represented the petitioner in this proceeding. There is, however, no evidence that Mr. [REDACTED] participated in preparing or filing the appeal. The instructions to Form I-290B, Notice of Appeal or Motion, advise that attorneys must attach a Form G-28, Notice of Entry of Appearance as Attorney or Representative, to the appeal, as required by the regulation at 8 C.F.R. § 292.4(a). The appeal does not include this form. The petitioner signed Form I-290B herself, and mailed it from her address. We will therefore consider the petitioner to be self-represented, and refer to Mr. Reyes as “prior counsel.”

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 with the defined equivalent of 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 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 June 22, 2012. Accompanying the petition was a statement from prior counsel, which reads, in part:

In 2006, American education officials in Maryland handpicked [the petitioner] and hired her to bring her extraordinary skills to [REDACTED]

. . . Truly, there was a compelling reason why her employers had to bring her to the US from the Philippines in 2006. They wanted only the best educators to teach our American kids for the future of our nation. And in this regard, my client has provided exactly that and more.

The record does not support prior counsel's claims regarding the specific circumstances of [REDACTED] recruitment of the petitioner. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Prior counsel, in the introductory statement, made general assertions that the petitioner is a superior teacher, but did not explain how the petitioner meets the *NYS DOT* guidelines to qualify for the national interest waiver.

Prior counsel stated that the petitioner "immediately made an impact in her new American classroom and soon garnered awards from the system, including an [REDACTED] [REDACTED] during the American Education week. Just recently, in 2011, she was given the [REDACTED] by the [REDACTED] school administrators." Recognition for achievements and contributions to the field can form part of a claim of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(F), but exceptional ability does not establish eligibility for the national interest waiver, because aliens of exceptional ability are subject to the job offer requirement under section 203(b)(2)(A) of the Act.

Particularly significant awards may serve as evidence of the petitioner's influence on the field, but the petitioner has not shown the significance of the awards that she received. Awards from individual schools or districts are inherently local, and do not show that the petitioner's work has had a wider effect or impact. The body of the certificate issued by the [REDACTED] Executive reads:

In honor of your service as an educator in the Prince George'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 [REDACTED]

This certificate is presented during American Education Week 2006.

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

The petitioner submitted letters from [redacted] administrators, teachers, and students, praising her abilities and dedication as a teacher. Competency as a teacher is not sufficient to qualify the petitioner for the national interest waiver, because there is no blanket waiver for teachers. By statute, teachers are members of the professions (*see* section 101(a)(32) of the Act), and members of the professions are generally subject to the job offer requirement (*see* section 203(b)(2)(A) of the Act).

Furthermore, the letters attested to the petitioner's impact at the local level. For example, [redacted] a reading specialist at [redacted] stated:

When [the petitioner] began at [redacted] the seventh grade reading scores on the Maryland School Assessment were at a dismal level of only 50.9% proficient. . . . As a result of [the petitioner's] work, the scores increased more than 25% in five years to a high of 77.3% proficiency in 2011. While there is still much work to do, it is imperative that [the petitioner] is here to help us continue this work toward the goal of ALL students reaching proficiency in reading.

The petitioner has not shown that her work has affected test scores outside [redacted] or that other schools have adopted methods that she created. The improvement cited in Ms. [redacted] letter appears to be significant, but the petitioner has not shown how [redacted] ranks alongside other schools in terms of test scores.

The director issued a request for evidence on December 4, 2012. The director quoted from some of the letters, and stated that the petitioner had submitted "no corroborative primary evidence" to show "the direct role [her] work has played in the field of Education as a whole." The director instructed the petitioner to "submit evidence to establish that [her] past record justifies projections of future benefit to the nation" (emphasis in original). Regarding awards that the petitioner has received, the director stated that the petitioner must provide information to establish their significance.

In response, the petitioner listed the certificates previously submitted, but provided no evidence or information regarding their importance. The petitioner also submitted documentation of training courses that she completed after she filed the petition. These materials do not distinguish her from other teachers; public school teachers in Maryland are required to take ongoing professional development courses as a condition for renewal of licensure.¹

¹ See [redacted] (added to record November 20, 2014).

Prior counsel stated: “With the strict implementation of *In the Matter of New York Department of Transportation*, the USCIS-Texas Service Center has determined National Interest Waiver self petitioner-teachers’ evidences as insufficient and accordingly denied the applications.” Prior counsel asserted that the director “has discretion to enforce said precedent,” *i.e.* *NYSDOT*. Following published precedent decisions is not a matter of discretion. Rather, such decisions are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c).

Prior counsel stated:

[USCIS] has legal and factual bases to approve teachers’ National Interest Waiver applications without offending the principles enunciated in the *Matter of New York Department of Transportation*. . . .

Firstly, Immigration Act of 1990 (IMMACT 90) which enacted . . . the ‘National Interest Waiver[.]’ included ‘educators’ as among the targets of this legislation, [and] 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.**’

(Emphasis in original.) As acknowledged elsewhere in the statement, the quoted language comes not from the statute itself, but from comments made by then-President George H.W. Bush as he signed the legislation. IMMACT 90 did in fact create the national interest waiver, and the president mentioned “educators” in his remarks, but it does not follow that a blanket waiver for educators was either the intent or the result of the legislation. The same statute plainly subjected professionals – including “scientists and engineers and educators” – to the job offer requirement. IMMACT 90 promotes the immigration of educators, but the default mechanism for doing so is the job offer requirement and labor certification process, not the national interest waiver.

Prior counsel noted that the *NYSDOT* decision provided no specific definition of the “national interest,” and prior counsel contended that Congress filled this void 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,’ centered 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.’ . . .

With this, [USCIS] now has a definite working tool in defining what is ‘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.

None of the phrases presented in quotation marks are actually quotations from the text of the NCLBA. The term “best interest,” with respect to children, appears only in provisions relating to homeless students. 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).

Prior counsel maintained that granting the waiver to the petitioner, as a highly qualified teacher, would be “honoring the Congressional intent in [the] No Child Left Behind Act of 2001.” Prior counsel, however, provided no evidence that Congress intended to provide immigration benefits through the NCLBA. Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int’l. Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). Here, the petitioner has not established that Congress intended to exempt teachers from the job offer requirement, either through section 203(b)(2) of the Act, the NCLBA, or any other federal legislation. Congress’s only direct statement on the matter has been to apply, not waive, the requirement. There is no support for the claim that the NCLBA amounts to Congress’s definitive statement on waiving the job offer requirement for “highly qualified teachers.”

The NCLBA did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 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. Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*. The petitioner has not established that the NCLBA indirectly implies a similar legislative change. Section 203(b)(2)(A) of the Act remains in effect, and therefore teachers, “highly qualified” or otherwise, remain subject to the job offer requirement.

“Highly Qualified Teachers,” as a class, play a significant collective role in implementing the provisions of the NCLBA. It does not follow, however, that every such teacher individually qualifies for special immigration benefits as a result, or that collective benefit justifies a blanket waiver for every such teacher, when the waiver otherwise rests on the specific merits of individual intending immigrants.

Prior counsel cited a recent emphasis on science, technology, engineering and mathematics (STEM) education. This assertion addresses only the intrinsic merit of STEM education. Furthermore, the petitioner is not a STEM teacher, and prior counsel did not explain why “[t]he focus on STEM” should be interpreted as making the waiver available to reading/language arts teachers.

Prior counsel claimed 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.

Prior counsel 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.” (If the labor certification process has not caused such a result, then the objection is not consistent with the facts.) Prior counsel stated that the labor certification standards are inadequate because they “require only a bachelor’s degree,” but that is also the minimum degree requirement for a highly qualified teacher (and the highest actual degree that the petitioner holds).

Prior counsel requested “equitable consideration” as follows:

[The petitioner] is firmly committed to continue teaching at [REDACTED]. However, [REDACTED] is currently barred for a two-year period (i.e. from March 16, 2012 to March 15, 2014) from filing any employment-based immigrant and/or nonimmigrant petition . . . arising from [REDACTED] willful violations of the H-1B regulations at 20 C.F.R. Part 655, subparts H and I. . . . Thus, through no fault of her own, [the petitioner] would not be able to continue teaching in [REDACTED] unless her E21 visa petition is approved, not to mention the fact that she has already firmly established a life here in the United States.

By statute, the standard for the waiver of the job offer requirement is neither the petitioner’s desire to remain in the United States nor her prospective employer’s temporary inability to petition on her behalf. The temporary debarment order (now expired) is not grounds for granting a permanent immigration benefit, and a declared intention to work for a debarred employer does not meet the *NYSDOT* national interest test.

The director denied the petition on June 24, 2013, stating: “Eligibility for the waiver must rest with the petitioner’s own qualifications rather than [n] the position sought.” The director concluded that evidence of “the petitioner’s effectiveness and her ability to raise the students['] achievement level” establishes “the capabilities of the petitioner and her dedication to working with children,” but does not establish that the benefit from her employment will be national in scope or of sufficient magnitude to warrant a waiver of the statutory job offer requirement. The director found that the petitioner had not documented any impact beyond the local level.

On appeal, the petitioner stated that her “services are vital in the improvement of literacy at [REDACTED]” and claimed that the school’s Maryland State Assessment Reading scores had risen significantly from 2006 to 2013 due to her work. The petitioner stated: “These results are significant

contributions to the achievement of the state of Maryland [being] named as the Number One Public Schools System in the US for five consecutive years.” The petitioner submits no evidence to support the claimed figures, or to show that the claimed improvement at [REDACTED] played a significant part in Maryland’s overall national ranking. Also, whatever her role at [REDACTED] the petitioner has not shown that her work has had a significant impact outside that school.

The petitioner asserts that many schools have difficulty filling vacancies for teachers in bilingual or English as a second language classes. The petitioner’s earlier submissions did not place emphasis on such classes, and [REDACTED] officials indicated that the petitioner taught a wide range of students, only a fraction of whom were native speakers of other languages. The labor certification process is the means by which the Department of Labor verifies that qualified United States workers are unavailable for a given position. Therefore, a claimed shortage of qualified workers is not grounds for waiving the job offer/labor certification requirement. *See NYSDOT*, 22 I&N Dec. at 218.

The petitioner’s statement on appeal does not address many of the issues raised in the director’s denial notice. That statement, therefore, does not overcome the denial of the petition. The petitioner had indicated that a brief and/or additional evidence would follow, but the record does not contain any such supplement to the appeal.

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*, 22 I&N Dec. 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”).

As is clear from 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.

We 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.