

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: FEB 26 2014

Office: TEXAS SERVICE CENTER

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 immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. According to Parts 5 and 6 of the Form I-140, Immigrant Petition for Alien Worker, the petitioner seeks employment as an elementary school special education teacher. The petitioner worked for [REDACTED] from January 2008 – November 2011 at [REDACTED] and at [REDACTED]. 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 additional 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 record reflects 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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (IMMACT90), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

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

In re New York State Dept 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 she 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 she 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.

The petitioner has established that her work as an elementary school special education teacher is in an area of substantial intrinsic merit. It remains, then, to determine whether the proposed benefits of the petitioner’s work will be national in scope and whether she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

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

Eligibility for the waiver must rest with the petitioner’s own qualifications rather than with the position sought. Assertions regarding the overall importance of a petitioner’s area of expertise cannot suffice to establish eligibility for a national interest waiver. *Id.* at 220. Moreover, it cannot suffice to state that the petitioner possesses useful skills, or a “unique background.” Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the U.S. Department of Labor through the alien employment certification process. *Id.* at 221.

The petitioner filed the Form I-140 petition on June 26, 2012. In support of the petition, the petitioner submitted various letters of support from administrators, school staff, and parents discussing her work as an educator. As some of the letters contain similar claims addressed in other letters, not every letter will be quoted. Instead, only selected examples will be discussed to illustrate the nature of the references' claims.

[The petitioner's] innovative and detailed planning is evident in the students' success on a daily basis. Her daily teaching strategies are based on well-planned lessons that she prepares for the specific interests and abilities of her students. [The petitioner] modifies the content and the process of instruction to adapt them according to the learning styles, interests, abilities, and the complexities of student needs in order to meet curricular requirements as prescribed in the Individualized Educational Program or IEP of each student.

* * *

In addition, [the petitioner] is very successful in implementing the Individualized Education Program (IEP) of her students, specifically of those with Autism, developmental delays, and learning disabilities. She has become an expert in administering the Woodcock Johnson Test of Achievement and in using the WJ III CompuScore Program to accurately draw the significance and the educational implications of the test scores. She uses the results of the evaluation to determine the students' areas of strengths and weaknesses, as well as classroom observations and assessments to determine the appropriate goals and educational objectives for each child's specific needs. . . . [The petitioner] differentiates instruction by providing students with lessons and materials that are within their level of ability and each one learns at his own pace.

* * *

[The petitioner] also deserves recognition in having developed and successfully implemented Behavior Intervention Plans (BIP) that have greatly reduced and eliminated the occurrence of problem behaviors, specifically for students with Autism and with ADHD [Attention Deficit Hyperactivity Disorder]. I have observed how she has successfully managed her class, how her students have complied with instruction, and the extent that each child's skills has progressed from below grade level to on grade level which made them eligible for inclusion with the regular class.

comments on the petitioner's effectiveness as a special education teacher, successful adherence to her students' IEPs, and effective implementation of BIPs to manage problem behaviors in the classroom, but does not indicate how the petitioner's impact or influence as a special educator is national in scope. In addition, fails to provide specific examples of how the petitioner's work has influenced the field as a whole. At issue is whether this petitioner's contributions in the

field are of such significance that she merits the special benefit of a national interest waiver, a benefit separate and distinct from the visa classification she seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *NYSDOT* at 219, n. 6.

I have known [the petitioner] for almost two years now. . . . [The petitioner] demonstrated great dedication to her job as a teacher of children with special needs.

Each time her students would come to join my class, they were all well-behaved and engaged and they all participated in every class activity actively. Working with her even after school hours, [the petitioner] showed her dedication and unconditional devotion for the accomplishment of her goals.

[The petitioner's] classroom is very well-organized. Her bulletin boards display all the work of her students to celebrate their accomplishments. She has all the different learning centers where she differentiates instruction to suit the needs, abilities, and learning styles of her students. She manages her class very well. I was so impressed by the great improvement in behavior of one of her students Autism. The developmental reading assessments showed that her students' reading levels improved remarkably at the end of the school year.

points to the petitioner's dedication to teaching, classroom management skills, organization, differentiation of instruction, modification of an autistic student's behaviors, and improvement of her students' reading levels, but does not indicate that the petitioner's work has had, or will continue to have, an impact beyond

stated:

I have known [the petitioner] since August 2009 when she joined . . . Elementary School as a SPED [Special Education] teacher. In August 2010, she was assigned to the 1st grade level hence; our rooms were adjacent to each other.

[The petitioner] is a very organized teacher and her classroom is very conducive to learning. She has a lot of patience in dealing with her students with disabilities. She encourages her students to achieve success through positive reinforcements. She believes in the individuality of each learner thus implements varied strategies that suit her students. [The petitioner] is a diligent educator with so much passion for teaching.

comments on the petitioner's organizational skills, positive classroom environment, differentiation of instruction, diligence an educator, and passion for teaching, but her observations fail to demonstrate that the petitioner's work has influenced the field as whole, or that the petitioner

has or will benefit the United States to a greater extent than other similarly qualified elementary school special education teachers.

I have known [the petitioner] in the Graduate School of [redacted] since the time when she took her Master's Degree in Special Education. I was one of the members of the panel who sat on the day of her deliberation when she presented her [master's] thesis entitled [redacted]

* * *

All the members of the panel were greatly impressed by the novelty and uniqueness of her methods and approach in (1) developing a system of identifying and assessing the level and extent of the problem behaviors and (2) identifying the triggers and functions of problem behaviors that block and hinder students from learning. . . . Her work proved that a problem behavior can be reduced or eliminated by applying research-based interventions such as planned ignoring, teaching social skills, teaching incompatible behaviors, differential reinforcements, and employing positive behavior intervention supports, such as rewards for compliance, curriculum modification, and providing accommodations. In her thesis, [the petitioner] strongly recommended that teachers, parents, caregivers, and significant others who are involved with children with behavior problems, must undergo orientation and training seminars to help them learn how to address a behavior based on an assessment of the function of the problem behavior in order to be able to prevent the occurrence of challenging behaviors, to respond effectively to the needs of these children, and to improve their academic outcomes.

[redacted] comments on the petitioner's master's thesis that proposed an intervention model for students with special needs, but the record does not indicate that the petitioner continues to perform similar research activities in a university setting in the United States so as to demonstrate any potential future contribution. Regardless, there is no evidence demonstrating that the petitioner's proposed methodology has had any impact such as implementation by a number of schools, frequent citation by independent educational scholars, or has otherwise influenced the field of special education as a whole.

The petitioner's references praise her abilities as a special educator and personal character, but they do not demonstrate that the petitioner's work has had an impact or influence outside of the schools where she has taught. They also do not address the *NYS DOT* guidelines which, as published precedent, are binding on all USCIS (U.S. Citizenship and Immigration Services) employees. *See* 8 C.F.R. § 103.3(c). The record does not show how the petitioner's work will impact the field beyond PGCPS. With regard to the petitioner's teaching duties, there is no evidence establishing that the benefits of her work would extend beyond her elementary school students such that they will

have a national impact. *NYSDOT* provides examples of employment where the benefits would not be national in scope:

For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, n.3. In the present matter, the petitioner has not shown the benefits of her impact as a special education teacher beyond the students at her school and, therefore, that her proposed benefits are national in scope. In addition, the record lacks specific examples of how the petitioner's work as a special educator has influenced the field as a whole.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of the petitioner's references are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

In addition to the reference letters, the petitioner submitted the following:

1. A Master of Arts in Education degree from [REDACTED]
2. A Bachelor of Science degree in Elementary Education from [REDACTED]
3. A State of Colorado Teaching License;
4. A Maryland Educator Certificate;
5. A Republic of the Philippines Professional Teacher (Elementary) Certificate;
6. [REDACTED]

[The petitioner] started teaching 7th and 8th Grade Math at [REDACTED] School (Marian Luther King Community Center) in late fall of 2012. Recently, in April 2013, the school was advised that its performance series assessment, as of January 2013, showed that the Seventh and Eighth Grade Math scores had improved by over 100% and 200% respectively, due in large part to [the petitioner's] innovative and unique teaching style.

The petitioner submitted a [REDACTED] graphic for September 2012 – January 2013 reflecting student improvement in reading and mathematics, but the petitioner did not submit a letter from a school administrator indicating that the improvement in mathematics was primarily attributable to her work. 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)). Moreover, there is no documentary evidence showing that the petitioner's specific work has influenced the field as a whole. Regardless, the petitioner's appointment as a teacher at [REDACTED] campus and the September 2012 – January 2013 performance series assessment post-date the filing of the petition. Eligibility, however, must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Accordingly, the petitioner's work as a mathematics teacher at [REDACTED] cannot be considered as evidence to establish her eligibility at the time of filing the instant petition.

The director denied the petition on June 19, 2013. The director indicated that the petitioner had not shown that the proposed benefits of her work as a teacher will be national in scope. The director also determined that the petitioner had not demonstrated that she "has a past history of achievement with some degree of influence on the field as a whole." The director therefore concluded that the petitioner failed to establish that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that "bridging the achievement gaps in the nation is a benefit that is national in scope." The petitioner's impact as a special education teacher, however, is limited to the academic achievement of the students under her direct tutelage. Counsel states that the petitioner's "work has tendency to bridge this nation's achievement gap by teaching Special Education students at America's underprivileged or underserved areas." Counsel mentions the petitioner's work for [REDACTED] is a county whose achievement rate is keeping the national achievement level low, raising PG's achievement level would elevate the national achievement gap, thereby having 'national ramifications.'" The petitioner, however, has failed to establish that her efforts have significantly closed the achievement gap in [REDACTED] or nationally. The national importance of "education" as a concept, or "educators" as a class, does not establish that the

work of one teacher produces benefits that are national in scope. *NYSDOT* at 217, n.3. A local-scale contribution to an overall national effort does not meet the *NYSDOT* threshold. The aggregate national effect from thousands of teachers does not give national scope to the work of each individual teacher.

Counsel points to findings in the Council on Foreign Relations Independent Task Force Report No. 68 entitled “U.S. Education Reform and National Security” indicating that “U.S. schools are failing to teach students the academic skills and knowledge they need to compete and succeed.” Counsel also cites to findings in a McKinsey & Company report entitled “The Economic Impact of the Achievement Gap in America’s Schools.” However, information regarding the need for educational reform in the United States only addresses the “substantial intrinsic merit” prong of *NYSDOT*’s national interest test, and does not establish that the petitioner’s specific impact on student achievement extends beyond her school to produce benefits that are national in scope.

Counsel argues that the “national interest would be adversely affected if a labor certification is required because [the] petitioner has contributed to raising the achievement gap.” The petitioner submits 2011 Maryland School Assessment (MSA) results for [REDACTED] reflecting various educational benchmarks that the county’s students have failed to meet. The petitioner worked for [REDACTED] from January 2008 through November 2011, and thus had been there for a number of years before the administration of the 2011 MSA tests. Counsel does not explain how the 2011 MSA results for [REDACTED] (which indicate a number of proficiency levels “Not Met” in reading and mathematics) establish that the petitioner has played an effective role in “closing the achievement gap” in [REDACTED]. The petitioner also submits mathematics examination “Class List Reports” for her students at [REDACTED] but the submitted reports fail to demonstrate that she has impacted the field to a substantially greater degree than other similarly qualified special education teachers, or to demonstrate her influence on the field as a whole.

Counsel asserts that the petitioner “was recruited by [REDACTED] and found to be more qualified than U.S. applicants.” The petitioner submits a Labor Condition Application for H-1B & H-1B1 Nonimmigrants, Form ETA 9035E, that was certified by the U.S. Department of Labor on September 26, 2007. Counsel states that the certified Form ETA 9035E “shows that there are not sufficient U.S. workers available, willing, and qualified to perform work at wages that meet or exceed the prevailing wage paid for the occupation in the area of intended employment.” The unavailability of qualified U.S. workers or the amelioration of local labor shortages are not considerations in national interest waiver determinations because the alien employment certification process is already in place to address such shortages. *Id.* at 218. Again, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the U.S. Department of Labor through the alien employment certification process. *Id.* at 221. The certified Form ETA 9035E submitted by the petitioner shows that there is a demand for qualified special education teachers, a demand that the alien employment certification process can and, in this instance, did address.

Counsel states that [REDACTED] was recently debarred . . . for unlawfully deducting fees from alien teachers' wages" and therefore the petitioner "has no U.S. employer to provide labor certification." Counsel refers to the debarment provisions of section 212(n)(2)(C)(i) of the Act invoked by the U.S. Department of Labor against [REDACTED] owing to certain immigration violations by that employer. As a result, between March 16, 2012 and March 15, 2014, USCIS cannot approve any employment-based immigrant or nonimmigrant petitions filed by [REDACTED]. This debarment means that [REDACTED] is, temporarily, unable to file its own petition on the petitioner's behalf, and thus explains why labor certification is not an option in the short term. The inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that she will serve the national interest to a substantially greater degree than do others in the same field. *NYSDOT* at 218, n.5. Any waiver must rest on the petitioner's individual qualifications, rather than on the circumstances that (temporarily) prevent [REDACTED] from filing a petition on her behalf.

A plain reading of the statute indicates that engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. There are no blanket waivers for special education teachers; USCIS grants national interest waivers on a case-by-case basis, rather than establishing blanket waivers for entire fields of specialization. *NYSDOT* at 217. The petitioner has not established that her past record of achievement is at a level sufficient to waive the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. 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. *Id.* 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"). 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.

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, that burden has not been met.

ORDER: The appeal is dismissed.

¹ The list of debarred and disqualified employers is available on the U.S. Department of Labor's website. *See* <http://www.dol.gov/whd/immigration/H1BDebarment.htm>, accessed on January 24, 2014, copy incorporated into the record of proceeding.