



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JAN 08 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 employment-based immigrant visa petition. The matter is now before the 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 high school science teacher for [REDACTED] in Maryland. Since 2007, the petitioner has chaired the Science Department at [REDACTED] Maryland. 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.

In this decision, the term “prior counsel” shall refer to [REDACTED], who represented the petitioner at the time the petitioner filed the petition. The term “counsel” shall refer to the present attorney of record.

On appeal, the petitioner submits a copy of her master’s thesis, a copy of a previously submitted personal statement, and a brief from 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 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, published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

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

*In re New York State Dept. of Transportation (NYS DOT)*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

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. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term “prospective” is 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.

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 petition on June 26, 2012. On Part 6 of that form, the petitioner did not specify a particular address where she would work, but she did state that she would work in [REDACTED] She also specified that she would “Teach General Science to 9<sup>th</sup> and 10<sup>th</sup>

graders integrating Environmental Science and the STEM initiatives implemented by [REDACTED] "STEM" is an acronym for "science, technology, engineering, and mathematics."

In a statement that accompanied the initial filing of the petition, prior counsel stated:

STEM educators who understand the local, national, and international nature and needs of STEM education and are better prepared for teaching in settings involving diverse learners are very much needed in the country. [The petitioner's] petition for waiver of the labor certification is premised on her Masters Degree in Teaching Science, over fifteen (15) years of dedicated and progressive teaching experience in Science Education, among others.

. . . Her patience, innovation, and sincerity in providing individualized and top-quality education to America's children, despite any challenges or specialized instruction required, has been acclaimed by her supervisors, peers, students' parents, and students alike.

The petitioner submitted recommendation letters from the witnesses whom prior counsel described above. The letters date from between February 2003 and February 2012. The witnesses attested to the petitioner's effectiveness as a teacher and to her personal character, but did not address the issue of why the petitioner qualifies for the national interest waiver.

The petitioner submitted copies of various certificates showing her recent training at [REDACTED], and other documents regarding her professional credentials, but the petitioner did not show that these materials distinguish her from other qualified teachers. Copies of evaluations and observations show that the petitioner performed at a "satisfactory" level (the highest of three categories, the others being "need to improve" and "unsatisfactory").

In a personal statement, the petitioner stated:

The US Department of Labor found Maryland's [REDACTED] Schools in willful violation of the laws governing the H1B temporary foreign worker program. With the Department of Labor's decision the debarment of [REDACTED] from the H1B program meant not only that the district wouldn't be able to bring in new foreign teachers but also prohibiting them from filing for the renewal of existing teachers whose H1B visas are set to expire in March 15, 2012 to March 16, 2014. Further the district is prohibited from filing permanent visa sponsorships to those teachers who intends [*sic*] to continue serving their respective schools and become permanent residents of the US.

By statute, the standard for waiving the labor certification requirement is not whether the employer can obtain a labor certification, but whether it is in the national interest to waive the requirement. Furthermore, USCIS records show that [REDACTED] filed a Form I-140 petition on the beneficiary's

behalf on July 13, 2009. The petition included an approved labor certification. USCIS approved the petition on August 18, 2009, classifying the beneficiary as a skilled worker or professional under section 203(b)(3) of the Act. The approved labor certification gave that petition a priority date of September 7, 2008. This approval remains in effect; the 2012-2014 debarment of [REDACTED] did not revoke or otherwise affect the approval of earlier petitions.

In a request for evidence dated November 10, 2012, the director stated that the petitioner had established only the “intrinsic merit” prong of the *NYSDOT* national interest test. The director stated that the “evidence . . . does not suggest that the petitioner’s influence has extended farther than her immediate school districts.”

In response to the director’s notice, prior counsel acknowledged that *NYSDOT* constitutes binding precedent, but asserted that the precedent decision offers little specific guidance as to what, exactly, serves the national interest. Prior counsel contended that “[t]he obscurity in the law that *NYSDOT* sought to address has been clarified”:

[T]he United States Congress has spelled out the national interest with respect to public elementary and secondary school education through the No Child Left Behind Act of 2001 (“NCLB Act”), 20 U.S.C. § 6301 et seq., which came into effect upon its enactment in 2001 – that is, more than a decade after *IMMACT 90* and *MTINA* were enacted and three years after *NYSDOT* was designated as a precedent decision. . . .

Accordingly, the NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public middle school [*sic*] special education sector.

. . . In effect, therefore, the United States Congress, with the enactment of the NCLB Act, has preempted the USCIS with respect to the parameters that should guide its determination whether a waiver of the job offer requirement based on national education interests is warranted.

The NCLB Act, however, did not amend the Immigration and Nationality Act or even mention the national interest waiver. The statute contains several references to “immigrant children and youth” (*e.g.*, section 301 of the NCLB Act bears the title “Language Instruction for Limited English Proficient Children and Immigrant Children and Youth”), but no references to immigrant teachers. 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*. In the absence of a comparable provision in the NCLB Act or any other education-related legislation, the petitioner has not established that the legislation indirectly implied a blanket waiver for teachers.

Prior counsel claimed that the NCLB Act gives the petitioner's work national scope because the legislation aimed to effect national-level changes in the quality of public education. This assertion concerns the national scope of public education as a whole, and of the NCLB Act as a statute, but it does not follow that every worker affected by the statute produces national-level benefits at an individual (rather than cumulative) level.

Prior counsel claimed that "the National Educational Interests . . . would be adversely affected if a labor certification were required of [the petitioner]." As stated above, the petitioner is already the beneficiary of an approved immigrant petition with an approved labor certification. There is no need for prior counsel to speculate about what might happen if an employer pursues labor certification, because PGCPS has already (successfully) done so.

The director denied the petition on February 23, 2013. The petitioner has appealed that decision, represented by a new attorney. Counsel, on appeal, does not pursue prior counsel's assertions regarding the NCLB Act. Instead, counsel contends that the petitioner's credentials establish her eligibility for the waiver:

[The petitioner] possesses Advance [*sic*] Professional Certificate (APC) in Biology, a higher teaching certification granted by the Maryland State Department of Education. This teaching certification "is only granted in the State of Maryland and at least rendered [*sic*] three years of full-time professional school-related-experience or a master's degree, or a minimum of 36 semester hours of post-baccalaureate course work."

Counsel places the description of the APC requirements in quotation marks but did not identify the source of the quotation. A similar, but not identical, passage appeared in the petitioner's introductory statement, reproduced on appeal.

Specialized certification, such as an APC, can form part of a successful claim of exceptional ability under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(C). Exceptional ability is not grounds for the waiver, and therefore partial evidence of exceptional ability is not presumptive grounds for the waiver. The petitioner has not established that APC certification is so significant that it warrants closer consideration. If, as claimed, a teacher is automatically eligible for APC certification based on experience and/or education, then APC certification would appear to be a routine step in Maryland's teacher credentialing process.

After discussing the petitioner's APC certification and her position as the science chair at Annapolis Road Academy, counsel states: "Hence, there is no doubt, that [the petitioner] is an outstanding teacher with exceptional ability in the field of Science Education. Her extraordinary scholastic achievement and unique experience as an educator has created a national impact in the area of Science Education in the United States."

The petitioner submits a copy of her master's thesis, [REDACTED] Counsel discusses and quotes from the thesis, and states:

The findings, conclusions and recommendations of her thesis when adopted in the national level by our public schools, teachers and educators presents a significant level of benefit to all students in general. . . .

[The petitioner's] vision and proposal when afforded the opportunity to be adopted in the national scale combined with her rich professional teaching experience in the field of Science education reveals somehow her influence in her field as a whole. . . .

[I]f this system of learning and educating our children are [*sic*] replicated and adopted in the national level, it can effectively improve the academic, social and psychological acumen of all students across the nation.

The record does not show that the petitioner's recommendations have, in fact, been "adopted [on a national level]," or that they have attracted significant notice. The hypothetical possibility of such an event does not "reveal[] somehow her influence in her field as a whole." At most, it shows that the petitioner would have such influence, in the event of national adoption of her work. The potential for impact is not the same as impact, and the presence of pedagogical recommendations in a master's thesis is not a basis for approving the national interest waiver.

Counsel states that the petitioner "intends to undertake this project and implement her vision as her contribution to the national public education of students with special needs. Her thesis and project proposal is designed to benefit students nationwide." The petitioner had not yet implemented the project on any significant scale as of the petition's filing date. The assertion that she plans to do so in the future cannot show that she was already eligible for the waiver as of the filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The petitioner has not established any track record of influencing education policy, and therefore the assertion that she will soon begin to do so is unfounded.

Counsel states that the "labor certification process is standardized" and therefore cannot "take into account . . . crucial factors" that distinguish the petitioner from her peers. As stated earlier, the petitioner already received labor certification, thereby settling the question of whether or not she would be able to do so.

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established the existence of any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather 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.