



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 public health researcher. 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.

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, P.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 October 22, 2012. The initial filing included an introductory statement from counsel, who discussed *NYSDOT* and the national interest waiver, and cited an unpublished 1992 appellate decision to support the assertion that “improving health care in the United States” is grounds for approving the waiver. Counsel furnished no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. While the regulation at 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel stated that the petitioner’s “impressive educational background; [and] evidence of recognition for achievements provide the basis for the ‘national interest’ waiver,” but counsel did not elaborate on this claim. The petitioner’s educational background consists of a medical degree from

the University of [REDACTED] and a master's degree in public health from the University of [REDACTED]

The petitioner's *curriculum vitae* listed and described eight positions that he has held since 1998, all in Nigeria. Five of those positions did not include medical research in the job description. The three that did list it are as follows:

- [REDACTED]
[REDACTED], November 2001 to June 2008
- [REDACTED] 2010 to December 2010
- [REDACTED] December 2010 to the date of filing.

The petitioner claimed ten "peer-reviewed abstracts presented at meetings" between 2003 and 2006, and five "papers published/in-press." Three of the papers dated from 2005, the other two from 2011 and 2012, respectively. Counsel asserted that the petitioner's "publications, abstracts and presentations at international scientific conferences, show that he meets the requirements for [the] third prong" of the *NYSDOT* national interest test. The petitioner's initial submission, however, did not include any of the petitioner's "publications, abstracts and presentations." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner submitted copies of seven letters informing him that his abstracts had been selected for oral or poster presentation and a letter inviting him to participate in a 2006 conference in Cape Town, South Africa. These materials establish the petitioner's presentations at conferences between 2004 and 2006. They do not demonstrate that the petitioner remains active as a researcher, and they do not establish the impact or influence of the research that the petitioner presented in 2004-2006.

The most recent evidence submitted with the petition was a copy of a June 2007 "Invitation to join the [REDACTED]." The letter stated: "The [REDACTED] . . . comprises individuals selected for their expertise in the epidemiology of injecting drug use, HIV prevention or treatment." The petitioner's initial submission did not document the petitioner's acceptance of the offer or provide any information about the petitioner's subsequent activities with the group.

The director issued a request for evidence (RFE) on November 30, 2012. The director stated that the petitioner's initial "evidence is deficient to demonstrate that the petitioner's contributions are such that a waiver of the labor certification would be warranted." The director instructed the petitioner to "submit evidence to establish that the beneficiary's past record of achievements justifies projections of future benefits to the United States." The director specifically requested evidence to show the impact of his research, such as "[e]vidence of citation of the published articles." The director allowed the petitioner 87 days to respond to the RFE, and stated: "The deadline reflects the maximum period for responding to this RFE."

The 87-day deadline derived from the USCIS regulation at 8 C.F.R. § 103.2(b)(8)(iv), which states: “in no case shall the maximum response period provided in a request for evidence exceed twelve weeks. . . . Additional time to respond to a request for evidence or notice of intent to deny may not be granted.” Because the director served the RFE by mail, the director added three days to the response deadline, as required by the regulation at 8 C.F.R. § 103.8(b). The response deadline was February 25, 2013.

The director received the petitioner’s response to the RFE on the deadline, February 25, 2013. The response included copies of previously submitted materials, as well as a statement from the petitioner, evidence regarding the petitioner’s published and presented work, and new witness letters. The petitioner stated:

My application . . . is based on my outstanding qualities as a medical doctor and a public health physician with extensive knowledge of the subject, international training, and expertise in research and experience in the health policy process. My understanding of public health which has come by reason of interaction with some of the best minds in my field and my experience in the development of health policy programs in tobacco, alcohol and drug use are qualities which I hope to use to the advantage of the American people if I am granted this waiver. . . .

I regard my experience in advocacy targeted at key players in global public health as invaluable. I have had outstanding recognition in the field of drug policy having been a member of the United Nations [REDACTED] since the year 2008. . . . [M]y major interest has been in health policy as it concerns alcohol, tobacco and drugs. My noble contribution to this field can be seen from my publications in peer reviewed journals and my abstract presentations at international meetings.

I work currently as a lecturer in the [REDACTED] unit at the [REDACTED] in which capacity I am involved with teaching undergraduate and graduate health policy. I am also involved with research into community acceptability of policies and programs. I am currently a reviewer of the [REDACTED] Health. . . .

Health policy efforts in tobacco control, reduction of harmful use of alcohol and illicit drug use would greatly lead to improved public health in the United States. . . . I also look forward to joining colleagues in the United States to be in the cutting-edge of global public health research efforts. My skills have the potential to develop innovative strategies to improve public health and reduce the morbidity and mortality associated with non-communicable diseases.

In the RFE, the director had requested copies of the petitioner's published articles and evidence of citations of those articles. The petitioner submitted copies of six journal articles (or their abstracts) published between 2006 and 2012, but no evidence of citations.

A January 2, 2012 contract from [REDACTED] established the petitioner's appointment as a consultant to [REDACTED] . . . for the 2013-2014 timeframe," and a September 5, 2005 letter from the [REDACTED] stated that the petitioner "has been [REDACTED] . . . following an international scientific review by experts." The record contains no further documentary evidence about these projects or the petitioner's involvement therein.

Six witness letters accompanied the petitioner's response to the RFE. Four of the letters include the same typographical error in the address: [REDACTED]" and five of the letters refer to the petitioner's [REDACTED] under the [REDACTED] Category." Three of the four letters begin with the salutation "Dear Sir/Ma." These similarities suggest a common preparer. *Cf. Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

[REDACTED] Tennessee, stated:

I have known [the petitioner] for close to twenty five years and have observed his contributions to knowledge and the significance of his area of interest in tobacco control and the overall field of public health. His contributions have influenced his chosen field and have yielded significant results which have affected his peers. For example, one of his recent articles is currently being sought after by many others in the public health community in Africa and beyond.

[REDACTED] identified the article, published in the [REDACTED] in 2011, but the record includes no verifiable evidence that this article "is currently being sought after by many others" in the petitioner's field.

[REDACTED] while the petitioner was a graduate student there, stated that the petitioner's "genuine interest in public health issues made him stand out as one of our top 10% students in the [REDACTED] class of 2003," and that the petitioner's master's thesis "was published in 2004. . . . This article has been widely cited in [REDACTED] and remains one of the most commonly cited articles among researchers interested in working in the field of community acceptability of clinical and non-clinical vaccine trials."

The petitioner submitted no documentary evidence of this claimed citation of his article, and no figures showing that the petitioner's article is, as [REDACTED] claimed, "one of the most commonly cited" of its kind. [REDACTED] letter is not documentary evidence of the citation of the petitioner's

article. See *Matter of Soffici* at 165 and *Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (expert opinion testimony does not purport to be evidence as to fact).

[REDACTED], now at [REDACTED] “was appointed as [the petitioner’s] PhD thesis supervisor [at] the University of [REDACTED]. . . . [The petitioner] had earlier completed the Master of Public health at the same University. . . . His PhD focused on the impact of the [REDACTED] in his home country, Nigeria.” The record contains no evidence that the petitioner completed a doctoral degree, and the petitioner has not claimed to have earned such a degree, or to have completed a doctoral thesis. [REDACTED] offered general praise for the petitioner’s “keen interest in health policy” and “special ability to venture into novel areas of research,” but identified no specific contributions of demonstrable impact or influence on the field.

[REDACTED] assistant professor that [REDACTED] University, met the petitioner at a 2006 conference. The two have “continued to explore ways of collaborating” but, so far, “have not been able to work on any project together.” [REDACTED] stated that the petitioner “has a very good reputation in international tobacco control” but did not elaborate on this point except to state that the petitioner received a fellowship from the [REDACTED] “during which he conducted research on the health effects of passive smoking among bar and restaurant workers.”

[REDACTED] met the petitioner at a 2009 conference and “afterwards collaborated with him in conducting research in health disparities in Nigeria.” [REDACTED] stated that the petitioner’s “academic competence is without doubt” and that his “energy, motivation and passion . . . have made him stand out among many others around the world whom I serve as mentors unto.” [REDACTED] did not specifically identify any influential contributions by the petitioner.

[REDACTED] was an associate professor at [REDACTED] University when she met the petitioner during a trip to Nigeria in 2011. She stated:

[The petitioner] is a leading expert on health aspects of illicit drugs in Africa. His expertise was recognized by the United Nations when he was invited to be part of the [REDACTED]. . . . He has led advocacy with Nigerian authorities to take measures to avert a new HIV epidemic linked to drug injection, launching and maintaining an expert network in Nigeria for this purpose.

Some of the submitted materials concern developments that occurred after the petition’s October 2012 filing date. A copy of a November 22, 2012 invitation from Nigeria’s Federal Ministry of Health invited the petitioner to attend a “[REDACTED]” in December 2012, and a February 11, 2013 letter from [REDACTED] elsewhere identified as the petitioner’s collaborator, congratulated the petitioner “on being awarded the 2013 [REDACTED] in [REDACTED].” The record provides no other information about these events. Furthermore, because these events took place after the petition’s filing date, they cannot establish the petitioner’s

eligibility 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). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

On March 19, 2013, the director received a second response to the RFE, consisting of two further witness letters and copies of previously submitted materials. Counsel asked the director to accept this submission "out of time . . . because [the petitioner] received the additional evidence after responding to [the] Request for Evidence . . . , and after the due date."

The regulations do not permit acceptance and consideration of the petitioner's second, untimely response to the RFE. Additional time to respond to a request for evidence may not be granted. 8 C.F.R. § 103.2(b)(8)(iv). All requested materials must be submitted together at one time. Submission of only some of the requested evidence will be considered a request for a decision on the record. 8 C.F.R. § 103.2(b)(11). Where an applicant or petitioner does not submit all requested additional evidence, a decision shall be issued based on the record. 8 C.F.R. § 103.2(b)(14).

The two untimely letters would not have established eligibility for the waiver. [REDACTED] collaborated with the petitioner during the petitioner's studies at the [REDACTED] resulting in a 2006 article in [REDACTED]. [REDACTED] stated: "This article has been widely cited and remains one of the most commonly cited articles among researchers interested in working in the field of community acceptability of clinical and non-clinical vaccine trials." This exact language, and other passages in [REDACTED] letter, appeared in [REDACTED] letter discussed above. The two letters were at least partially written by the same person. Part of the address on [REDACTED] letter reads "[REDACTED] of Homeland Security," which ties the letter to still others in the record.

[REDACTED] president and chief executive officer of [REDACTED] "previously served as Senior Advisor for [REDACTED]. [REDACTED] stated that he "worked very closely with [the petitioner]" in 2011-2012, "in connection with [the petitioner's] responsibilities managing the [REDACTED] initiative in Nigeria." [REDACTED] stated that the petitioner organized training programs that "culminated in the launch of a well publicized and highly praised intervention focused on tanker and bus drivers on two major highways." The petitioner did not submit documentary evidence to support [REDACTED] claims.

The director denied the petition on May 6, 2013. In the decision notice, the director acknowledged the substantial intrinsic merit of the petitioner's occupation but stated: "the evidence shows that the beneficiary's proposed employment will not be national in scope . . . because the beneficiary's work and his contributions will be primarily limited to certain geographic region in the Atlanta area." The director listed the petitioner's submitted exhibits and stated:

The evidence submitted does not demonstrate that the petitioner[']s contribution[s] have been greater tha[n] other workers in the field.

The evidence submitted does not show that the petitioner has published research findings in reputable journals pertaining to community and public health issues. The documentation submitted shows that the petitioner has published two co-authored research papers and two abstracts in the Nigerian medical journals. The evidence does not demonstrate that the petitioner's published research works have widely attracted the public and community health care professionals, nor [that] his work has been adopted and relied upon by other scientists at [a] national level.

The director quoted from some of the witness letters, and stated that the authors of those letters "failed to elaborate [on] how the petitioner's contributions have been greater tha[n] other workers in the same field."

On appeal, counsel states: "Beneficiary believes that there was not a review [of] the entire record and/or [that the director] applied an incorrect legal standard in denying the petition. . . . Applying the law, the record shows that petitioner met his burden of proof." Counsel also asserts that the petitioner submitted "seven (7) letters from other professionals. . . . Appellant is respectfully resubmitting the 10 [*sic*] letters for quick and easy reference." The appeal does not include copies of the letters, but those copies would have been unnecessary because the record already contains the letters in question.

In an accompanying brief, counsel states: "The legislative history of the 1990 Immigration Act shows that the U.S. Senate had people like beneficiary in mind when it promulgated legislation creating the 'national interest' waiver category." The provided quotations from the legislative history consist of general praise for highly skilled workers. The same legislation that created the national interest waiver also indicated that, generally, professionals holding advanced degrees (such as the petitioner) are subject to the job offer requirement.

Counsel states: "The denial decision applies the standard of professions where research and publication can and should be used in deciding the cases. However, there are professions where the professionals could demonstrate eligibility without publications because publications are not necessarily used in the industry." This general observation may be true, but it is not relevant. The petitioner claims to be a published researcher with "widely cited" publications. This is a testable assertion of fact, and the petitioner cannot avoid the burden of proof by observing that some professionals do not publish their work.

Counsel states: "In beneficiary's case, she [*sic*] has submitted . . . letters from well-known U.S. expert[s], as well as documents that evidence the impact of her [*sic*] work in the United States. . . . Beneficiary submitted . . . three (3) letters witness letters [*sic*]." Counsel, on appeal, has thus stated that the petitioner submitted three, seven, and ten witness letters. Counsel does not quote from any of these letters, demonstrate that the witnesses are "well-known U.S. expert[s]," or explain how the letters establish the petitioner's eligibility for the waiver. A section of the brief reads:

2. Beneficiary's past record of specific prior achievement has some degree of influence in her [sic] field as a whole.

On her part, [REDACTED] states:

3. Beneficiary's previous [sic] on the field as a whole justifies projections of future benefits to the national interest. . . .

In the passage quoted above, counsel appears to introduce a quotation from a witness letter, but no quotation follows. Instead, counsel proceeds to the next numbered part of the appellate brief. Furthermore, the record does not contain a letter from [REDACTED]. This discrepancy, coupled with counsel's use of feminine pronouns when referring to the petitioner, suggests that counsel prepared this portion of the brief for a different client.

While counsel has provided no specific examples that apply to this proceeding, counsel has made the general assertion that the director paid insufficient attention to the witness letters discussed above. 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 experts in the field are not without weight and have received consideration 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 from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Some witnesses, for example, asserted that the petitioner's published work is widely cited. This is not an opinion, but an assertion of objective, verifiable fact. The petitioner submitted no evidence to support this claim. In the absence of such evidence, witness claims of wide citation cannot suffice. *See Matter of Soffici* at 165.

The letters that the petitioner submitted contain general praise for the petitioner's work, and descriptions of some of his projects, but provide no verifiable evidence to show how the petitioner's work has influenced the field. Counsel claims that "some" of the witness letters are "from people who a professional [sic] demonstrably independent from the petitioner," but counsel does not identify these independent witnesses. The demonstrable similarities between many of the letters, discussed previously, are not consistent with claims that the letters are of independent origin.

Counsel makes general claims about the importance of scientific research, but scientific researchers are generally subject to the job offer requirement at section 203(b)(2)(A) of the Act; there is no blanket waiver for researchers. Furthermore, counsel has referred to the petitioner as a “biomedical researcher,” whereas the evidence of record more accurately describes him as a public health researcher.

In sum, counsel’s appellate brief consists largely of general claims rather than specific assertions about the proceeding at hand. Many of counsel’s specific assertions appear to pertain to a different proceeding, because they do not fit the fact pattern in the record of proceeding. Counsel has not shown that the denial of the petition resulted from errors of law or fact.

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 his 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.”).

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

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

ORDER: The appeal is dismissed.