



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **JAN 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:

[Redacted]

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,

  
2 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 physician. At the time he filed the petition, the petitioner was a PGY-2 (postgraduate year 2) resident at [REDACTED] New York, affiliated with [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.

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 Dept of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm’r 1998) (*NYS DOT*), 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 petition on November 4, 2011. The initial filing included an introductory statement from counsel, who discussed *NYS DOT* 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 analogous 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; evidence of recognition for achievements; and continued advanced scientific contributions to the United States, provide the basis for the 'national interest' waiver," but counsel did not elaborate by, for instance, describing the petitioner's scientific contributions or establishing their significance. The initial submission contained no "evidence of recognition for achievements." Counsel stated: "The record shows that beneficiary has a history of demonstrable achievement with some degree of influence on the field as a whole. His research projects corroborate this." Counsel provided no further details about the petitioner's research projects or their claimed influence on the field.

The petitioner's *curriculum vitae* listed "Research/Audit Experience" between 2002 and 2011. The petitioner described four of the seven listed items as "audits" and the two most recent items (including one of the audits) as "retrospective studies." The only project listed as "ongoing research" was a retrospective study of "[t]he incidence and clinical characteristics of infants with acute bronchiolitis with associated urinary tract infection in Bronx Lebanon in-patients."

The same document listed two "Career Objectives":

- To gain a broad based clinical experience and form a foundation to develop my core generic skills in Paediatrics.
- I would like to continue to gain an in-depth insight of the specialty, and on the long term complete a specialist training in same.

The petitioner did not indicate that his career objectives included a desire to pursue further research outside of the academic setting that had encompassed his entire medical career to date. As a second year resident, the petitioner was still a trainee at the time he filed the petition.

The petitioner's initial submission contained no documentary evidence about his work apart from a copy of his medical school diploma. The only other exhibit was a partial printout of *Science in the National Interest*, "a policy document, released on August 3, 1994, that details the Clinton Administration's commitment to Fundamental Science." This document, published eight years before the petitioner graduated from medical school, does not relate specifically to the petitioner and therefore cannot establish that the petitioner qualifies for the national interest waiver.

The director issued a request for evidence (RFE) on April 19, 2012. The director stated that the petitioner had not established that he "has widely published articles in the peer reviewed Journals, nor that the beneficiary's work has significantly influenced the field of his endeavor [*sic*]."

In response to the RFE, counsel referred to the petitioner as "a biomedical researcher" whose "work in the field of biomedical research has had broad national and international impact" and who seeks the waiver "to enable [him to] continue his biomedical research and develop a strong research program in the United States." The petitioner's initial submission consistently identified him not as a biomedical researcher, but as a physician whose training in pediatrics had included occasional research projects. The new assertion that the petitioner is "a biomedical researcher" who intends to

“continue his biomedical research” amounts to a significant and fundamental revision of the petition. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm’r 1998).

The petitioner submitted a statement that he filled out using a template provided by an unidentified third party. Under “Introduction to show your academic background and interest in your current field of endeavor,” the petitioner described himself as a “physician and researcher with lots of experience in pediatrics,” who has “done many clinical research and performance improvement projects.” Under “Details of your area of expertise/research,” the petitioner stated:

While in medical school I completed a research to uncover the factors that was [sic] affecting the use of the University Health centre by the medical students. This research has enabled the medical school and the University health centre to implement changes that have lead to increase [sic] use of their facilities by medical students. These have contributed to improved health of medical students in the [redacted] medical school.

My dissertation for the award of my master’s degree was on the use of vaccination and insecticide treated mosquito bed nets (ITNs) in preventing malaria. . . . My dissertation shows that proper use of insecticide treated mosquito bed net is cheaper and more cost effective in preventing this disease. Studies have continued to support the wide spread use of ITNs as a more effective and cheap tool to preventing [sic] malaria infection especially in developing countries. . . .

I led a performance improvement (PI) study on overall compliance rate for “hand washing” in preventing nosocomial infection (hospital acquired infection) in my current hospital in [redacted] USA. . . . Our findings and recommendation have been very vital in reducing the incidence of nosocomial infections in our hospital.

I am currently undergoing a retrospective study on the “incidence and clinical characteristics of infants with acute bronchiolitis with associated urinary tract infection” in [redacted]. . . . This research might change the management of bronchiolitis here in the [redacted] hospital and in the United States as a whole.

Another section heading on the template read: “Details of your past accomplishments at work, research presentation and publications., [sic] specifically that your skills and background are unique and innovative and serve the national interest. Take a look at the RFE.” The petitioner did not claim to have published any research articles, but stated that he “was chosen to present in [redacted]” The petitioner did not claim any national (as opposed to local or regional) dissemination of his research work.

The petitioner submitted a second copy of his *curriculum vitae*, with the "Career Objectives" section unchanged from the previous submission.

The petitioner submitted letters from five witnesses, all of whom worked with the petitioner during his training. Dr. [REDACTED], senior fellow in the Department of Pediatric Endocrinology at [REDACTED] stated:

I have known [the petitioner] for a period of over 3 years. I worked with him in [REDACTED] UK. . . . [The petitioner] was an excellent physician while he was with us. . . .

[The petitioner] has undertaken various research and performance improvements. [The petitioner's] dissertation for his master's degree was on the use of vaccination and insecticide treated mosquito bednet in preventing malaria. . . . Malaria is a global problem and [the petitioner's] study of its prevention is vital in preventing this disease with great public health concerns worldwide.

Dr. [REDACTED] did not state what measurable impact, if any, the petitioner's study has had in reducing the incidence of malaria.

The remaining four witnesses all work at [REDACTED]. Dr. [REDACTED] associate professor of pediatrics at the [REDACTED], is also a part-time attending physician at [REDACTED] stated:

[The petitioner] has always stood out as an excellent and intelligent resident in training. He is very thorough and [at] the same time quick in decision making. He is one of the best in his class because of his wealth of experience and a very nice personality. I have always found his work to be of a consistently good standard.

With respect to the petitioner's research work, Dr. [REDACTED] stated that the petitioner "completed a research project on the causes of re-admission (within 2 weeks) of babies discharged from the nursery. . . . The causes of this readmission if avoided could reduce a lot of expenditure from the already drained health system." Dr. [REDACTED] did not indicate that the petitioner's work had already produced measurable results in this area.

Dr. [REDACTED] director of [REDACTED] stated: "At a time when there is a dearth of highly skilled primary care pediatricians . . . [i]t is essential that we continue to retain physicians with exceptional abilities, such as those demonstrated by [the petitioner], because those skills are urgently needed." Generally, a shortage in a given occupation is not grounds for the national interest waiver. *NYS DOT* at 218. An exception exists for physicians in designated shortage areas, but to qualify for this exception, it is not sufficient for the petitioner (or a witness) simply to allege a shortage in the occupation. Rather, specific requirements appear in the

statute at section 203(b)(2)(B)(ii) of the Act, and in the regulations at 8 C.F.R. § 204.12. The petitioner has not followed these statutory and regulatory requirements, and therefore the general claim of a shortage does not establish the petitioner's eligibility for the waiver.

With respect to the petitioner's research work, Dr. [REDACTED] stated that the petitioner "spearheaded a team that studied our (then) current [hand washing] rates, shared the results and provided continual education which led to improvement in hand washing rates in our department. Additionally, he is conducting another research on the association between bronchiolitis and urinary tract infections in young children." Dr. [REDACTED] did not indicate that the hand washing project had implications beyond [REDACTED] or describe the outcome of the bronchiolitis study.

Dr. [REDACTED] assistant professor at [REDACTED] and a teaching attending physician at [REDACTED] stated:

[The petitioner's] clinical and research experience have contributed a lot on the success we are achieving here in the NICU [neonatal intensive care unit] in [REDACTED] . . . Excellent and experienced resident like [the petitioner] is [*sic*] very vital to reducing the incidence of Infant Mortality Rate (IMR) and the economic burden of low birth weight in the United States.

Dr. [REDACTED] praised the petitioner's "excellent research" but did not explain its impact.

Dr. [REDACTED], another assistant professor at [REDACTED] and attending physician at [REDACTED] emphasized the costs associated with nosocomial infections and bronchiolitis, and stated that the petitioner's "recommendations are very vital to reducing cost of the overstretched USA health care sector." Dr. [REDACTED] provided no specific figures relating to cost savings or improvement in patient outcomes arising from the petitioner's work, instead stating that the petitioner's work "will no doubt contribute significantly in the management of these conditions" and that there has been an unspecified degree of "improvement."

The director denied the petition on September 12, 2012. The director described the petitioner's evidence and quoted from several witness letters, and concluded that the letters emphasize the importance of the petitioner's field rather than his contributions to that field. The director also stated:

The evidence does not demonstrate that the petitioner's claimed research work has attracted the scientific community, nor that his work has been adopted by other scientists nationally or internationally. . . . The evidence does not demonstrate that the petitioner[s] research work has been published in recognized journals. Although the record of evidence demonstrates that the petitioner has an experience [*sic*] Physician in the field of child health management, however, the evidence does not establish that the petitioner's contributions have played a substantial role in the improvement of child health care in the United States.

On appeal, counsel asserts:

[T]he record shows that the petitioner met his burden of proof. In support of his petition, petitioner submitted a detailed statement in support of the National Interest waiver, in which he articulated how he stands apart from his peers; as well as corroborative evidence and third party testimony from five (5) . . . other professionals in his field, vouching that he is a cut above-the-average.

To qualify for the national interest waiver, it is not sufficient to show that the petitioner “is a cut above-the-average.” “A degree of expertise significantly above that ordinarily encountered” is the regulatory definition of exceptional ability at 8 C.F.R. § 204.5(k)(2). Exceptional ability, in turn, is not sufficient for the waiver, because aliens of exceptional ability are subject to the statutory job offer requirement at section 203(b)(2)(A) of the Act.

Counsel claims that the director “applied the standard for extraordinary ability, and placed too much emphasis [on] past achievements without enough weight for prospective benefits to the national interest.” The evidentiary requirements for extraordinary ability, under section 203(b)(1)(A) of the Act, appear in the USCIS regulation at 8 C.F.R. § 204.5(h)(3) and its subsections. Counsel does not demonstrate that the director held the petitioner to those evidentiary standards.

A passage from *NYS DOT* explains the “emphasis [on] past achievements”:

The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The inclusion of the term “prospective” is used 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.* at 219 (footnote omitted). The omitted footnote read, in part, that the petitioner must establish “a past history of demonstrable achievement with some degree of influence on the field as a whole.” *Id.* at 219 n.6.

The director, in the denial notice, listed the petitioner’s evidentiary exhibits and quoted from several of the witness letters, but counsel contends that the director “did not appear to have considered the entire record.” Counsel states: “The record shows that [the petitioner] has a history of demonstrable achievement with some degree of influence on the field as a whole. [The petitioner’s] research projects, presentations, publications and letters of recommendations from well-known US experts, corroborate this.” Counsel offers no further details or elaboration, instead stating: “See the record in these proceedings.” The record does not support counsel’s general claim. The petitioner has not submitted, identified, or claimed any published work. His only identified research presentation was

at a regional conference, and the record does not establish that the witness letters are “from well-known US experts.”

Counsel quotes from an unidentified May 5, 1993 policy memorandum from R. Michael Miller, Acting Commissioner for Adjudications, noting that “many of the cases received by the AAU [now the AAO] have been heavily fortified by third party testimony as to the national interest involved in the case.” Counsel states that the petitioner “has submitted such ‘third party testimony’ in the form of letters from well-known US expert[s].” The quoted memorandum did not indicate that the submission of “third party testimony” mandates the approval of a given waiver application.

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”). *See also 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)).

Overall, the witnesses’ letters emphasized the petitioner’s contribution to practices at the individual teaching hospitals where he has trained, rather than any wider impact or influence on the field of pediatric medicine. All of the witnesses have worked with the petitioner at those hospitals, and their statements are not direct evidence of wider impact.

Counsel states:

The legislative history of the 1990 Immigration Act shows that the U.S. Senate had people like [the petitioner] in mind when it promulgated legislation creating the “national interest” waiver category. The Senators concluded that the bill serves the “national interest” because among other things – “it promotes the entry of those who are selected specifically for their ability to contribute their needed skills and talents to the development of our Country.” *See the Senate’s Immigration Act of 1989.*

Additionally, Congress recognized that "...immigration can and should be incorporated into an overall strategy that promotes the creation of the type of work force needed in an increasingly global economy.["] See H.R. Rep. 723, pt.1, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess[.] 41 (1990).

An identical passage appeared in counsel's introductory letter submitted with the Form I-140 petition. The first quotation derives not from "the Senate's Immigration Act of 1989," but from a May 30, 1989 letter from Senators Alan Simpson, Edward Kennedy and Paul Simon. Neither of the quoted passages are specific references to the national interest waiver. Rather, they referred generally to the Immigration Act of 1990. That legislation created the national interest waiver, but the legislation's "overall strategy" also included the requirement that members of the professions holding advanced degrees must, generally, have a job offer from a U.S. employer.

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). The plain meaning of the statutory language should control except in rare cases in which a literal application of the statute will produce a result demonstrably at odds with the intent of its drafters, in which case it is the intention of the legislators, rather than the strict language, that controls. *Samuels, Kramer & Co. v. CIR*, 930 F.2d 975 (2d Cir.), *cert. denied*, 112 S. Ct. 416 (1991). Where the language of a statute is clear on its face, there is no need to inquire into Congressional intent. *INS v. Phinpathya*, 464 U.S. 183 (1984). Here, the plain language of sections 203(b)(2)(A) and (B)(i) of the Act includes a generally applicable job offer requirement, to be waived only in specific instances when immigration authorities deem the waiver to be in the national interest. Congress subsequently introduced an exception when it added section 203(b)(2)(B)(ii) to the Act, but the petitioner has not met the requirements of that section of the statute.

The appellate brief contains additional quotations from, or references to, counsel's introductory statement, including references to the general importance of scientific progress and an unpublished 1992 appellate decision. These assertions predate the denial of the petition and therefore do not address or allege specific errors in the director's decision, and furthermore they are broad and general assertions rather than specific claims about the particular proceeding at hand. There exists no blanket waiver for biomedical researchers, and the petitioner has not met the requirements for the limited blanket waiver for certain physicians.

Counsel, in the appellate brief, contends that the evidence submitted, and the petitioner's past record, justify approval of the waiver. The brief, however, contains minimal discussion of those factors, and some of the discussion is inaccurate (such as the reference to "publications") or unsupported (such as the claim that the petitioner's witnesses are "well known"). The brief submitted on appeal does not establish that the director erred in denying the petition.

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 the petitioner's influence be national in

scope. *NYS DOT* 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.