

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



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: JAN 23 2014 OFFICE: TEXAS SERVICE CENTER [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,

  
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 special education teacher/vocational counselor at the [REDACTED]

[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. The director also found that the petitioner had not submitted documentation required to properly apply for that exemption.

On appeal, the petitioner submits a brief from counsel, statements from the petitioner and her employer, and a copy of a partially completed application for labor certification.

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 director found that the petitioner has not 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 May 7, 2012. In an introductory statement, counsel stated:

This case is exactly the type of scenario for which National Interest Waivers were created. The rise in the number of autistic children in the United States, combined with a lack of funding or available educators and therapists has created a crisis which

has captured the national attention over the last months. . . . [W]e request that the Service grant a waiver and not require a specialized school, already short of resources, to pursue a labor certification. . . .

The United States is truly facing an epidemic, and it would be unconscionable to require programs and schools that are already lacking appropriate funding to have to pursue labor certifications and other expensive routes when they have individuals ready, willing and able to work.

. . . If our own President has issued proclamations regarding the need for educators and professionals trained specifically in the special needs that autistic children require, clearly this case is within the national interest.

Counsel cited no evidence (such as legislative history) to support the claim that “[t]his case is exactly the type of scenario for which National Interest Waivers were created.” When first enacted, section 203(b)(2)(B) of the Act made the waiver available only to aliens of exceptional ability in the sciences, the arts, and business. Only later did the enactment of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub.L. 102-232, 105 Stat. 1733 (Dec. 12, 1991), extend eligibility to members of the professions holding advanced degrees. This omission undermines the claim that Congress originally created the waiver with members of specific professions in mind.

Authority to create blanket waivers for entire occupations, professions, or specialties rests not with USCIS (*see NYSDOT* at 217) but with Congress, which has exercised that authority in the past. Section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Congress, to date, has not taken similar action with respect to educators. The national importance of an overall field (such as education) does not inherently lend national scope to the work of individual workers in that field. *See NYSDOT* at 217, n.3. Teachers are members of the professions (*see* section 101(a)(32) of the Act), and as such they remain subject to the job offer requirement at section 203(b)(2)(A).

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT* at 223. Counsel cited no statute, regulation, or case law to support the claim that the importance of a profession, or claimed funding shortages at institutions within that profession, creates an entitlement to the national interest waiver. It is not sufficient to assert that it is “unconscionable” to apply the statutory job offer requirement to special education teachers.

The petitioner submitted copies of several local job announcements to support the claim that there is a shortage of qualified professionals in her field. A local labor shortage does not justify a waiver claim, because the labor certification process exists specifically to address such shortages. *Id.* at

218. The Department of Labor, rather than USCIS, has authority to test the claim that qualified U.S. workers are unavailable for a given position. *Id.* at 221.

USCIS determines eligibility for the waiver on a case by case basis. *Id.* at 217. Turning to the petitioner's individual merits, counsel stated:

The intrinsic merit and national scope of [the petitioner's] work are clear, and supported by the evidence. Her salary is well above what other similar individuals make – a sign of recognition of her ability, training, and importance to the program. . . . [L]etters of recommendation . . . speak volumes of [the petitioner's] skills and abilities, and the important nature of her work. . . .

The record objectively indicates that Petitioner has performed a vital function in our nation, and will continue to do so. There are no persuasive negative factors. The petitioner has established, by a preponderance of the evidence, that she stands out in her field to a degree that a waiver of the job offer/labor certification requirement would serve the national interest.

There is no presumption of eligibility for the national interest waiver, and therefore the asserted absence of “persuasive negative factors” does not affirmatively establish the petitioner's eligibility for the waiver.

Counsel claimed that the petitioner's “salary is well above what other similar individuals make – a sign of recognition of her ability, training, and importance to the program.” [REDACTED] executive director of [REDACTED] stated that the petitioner's “school year salary will be \$74,878 (Master's Degree, Step 11).” The parenthetical reference indicates that the petitioner's salary is determined by a scale, rather than “her ability, training, and importance to the program.” The petitioner submitted a printout from Indeed, an online database, indicating that the average salary of a special education teacher in Boston was \$53,000 per year as of April 3, 2012. The petitioner's stated salary is close to the 90<sup>th</sup> percentile figure of \$74,975.

High compensation can support a claim of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(D), but, as noted previously, exceptional ability does not establish eligibility for the waiver. Furthermore, the record does not establish the reliability or relevance of the Indeed figures, which do not differentiate between public and private schools or take into account salary increases that arise from factors, such as seniority, that are independent of “ability, training, and importance to the program.” Also, the assertion that [REDACTED] pays the petitioner well above the average salary appears to conflict with counsel's unsupported claim that the employer is so underfunded that it can ill afford the expense of labor certification.

Counsel stated that the “national scope of [the petitioner's] work [is] clear, and supported by the evidence,” but counsel did not elaborate on the point. Some of the exhibits submitted with the initial filing of the petition establish the petitioner's professional credentials, the terms of her employment,

and the satisfaction of her employers and clients. These materials establish the nature of her work, but not that the benefit from that work is national in scope. Other materials, submitted as background evidence, demonstrate the intrinsic merit of the petitioner's profession but do not show that the efforts of one special education teacher or vocational counselor produce benefits that are national in scope.

In a June 9, 2011 letter, [REDACTED] described the petitioner's duties:

[REDACTED] is a regional consortium of 13 public school districts. [REDACTED] provides programs and services in public school buildings to students with substantial disabilities.

[REDACTED] seeks to employ [the petitioner] as a vocational counselor and teacher for the 2011-12 school year at the [REDACTED]

As a vocational counselor, [the petitioner] will fill a void for middle and high school students who require development of pre-vocational and vocational skills. [The petitioner] will work with other staff to further develop programs to teach important skills to students with substantial cognitive delays. . . . [The petitioner] will coordinate planning and instruction with a range of other service providers in accordance with Individual Education Programs (IEPs). [The petitioner] will consult with other staff and visit work sites for students with developmental disabilities to assist with data collection and transition planning to adult service agencies.

[REDACTED] wrote a second letter, dated December 21, 2011, in which she stated:

[The petitioner] has the ability to work with parents of students with autism and their children to address interfering behaviors and create purposeful engagement at home and in school. . . .

Not only does [the petitioner] directly impact students in her classrooms, she also shares her expertise and coaches developing teachers, training them in her techniques. . . . Due to the complexity of this multi-faceted disability, techniques for educating these students in an eclectic manner that prepares them to live in the wider society are often learned in isolation and not integrated for the maximum benefit of students. The effect on society will be greatly impacted, positively or negatively, by the ability of the United States to educate these students in an effective, comprehensive manner, customizing instruction to the individual student and demands of the task. [The petitioner] is an expert. Her ability to adapt instruction for these complex students maximizes their independent functioning and ultimately their contribution to society.

Based on all of the above, I think that you can see that [the petitioner] has been, and will continue to be an important and influential person in this area.

The petitioner claims to have worked as a special education teacher and vocational counselor in Massachusetts – first for the [REDACTED] and then for [REDACTED] – since 2001, ten years before the petition’s filing date. The petitioner provided no evidence that, during that decade, her work had a discernible impact outside of parts of Massachusetts. With respect to the petitioner’s instruction of others, the record does not establish that the petitioner has developed new modes of instruction that have since seen widespread use or adaptation. The reference to “customizing instruction to the individual student” serves to highlight the personalized and, thus, local nature of the petitioner’s work.

[REDACTED] stated that the organization plans to expand to the high school level and that the petitioner “will be a critical contributor to the planning and, possibly, the execution of this initiative. It would be a huge setback to [REDACTED] and the public schools in the region if [the petitioner] were unable to help us in this effort.” This assertion indicates the local/regional, rather than national, scope of the petitioner’s work.

The parents of two of the petitioner’s students provided letters in support of the petition. These individuals expressed appreciation for the petitioner’s work with their children. The petitioner’s skill in her profession is not at issue in this proceeding. Establishing that the petitioner possesses a degree of expertise significantly above that ordinarily encountered in her field – the regulatory definition of “exceptional ability” at 8 C.F.R. § 204.5(k)(2) – cannot suffice to establish eligibility for the waiver. Under section 203(b)(2)(A) of the Act, the job offer requirement routinely applies to foreign workers who, because of their exceptional ability, will substantially benefit prospectively the United States. Therefore, the petitioner cannot demonstrate her eligibility by asserting exceptional ability or a generalized benefit to the United States arising from her work.

An issue of [REDACTED] included an article regarding a study of [REDACTED]. A sidebar to that article identified the petitioner as the supervisor of a study location at the Malden YMCA. This further evidence of local-level work by the petitioner does not establish national scope or wider impact or influence to meet the second and third prongs of the *NYS DOT* national interest test.

The petitioner submitted copies of two articles from the [REDACTED]. The petitioner is not a credited author of the articles, and she did not otherwise explain their relevance. The petitioner appears, therefore, to have submitted the articles as background evidence. The articles discuss the effectiveness of particular teaching methods to develop verbal and empathy skills to autistic children. Publication of research can produce benefits that are national in scope, by disseminating information to practitioners throughout the field, but the petitioner did not claim any published work of her own.

The director issued a request for evidence (RFE) on September 4, 2012. The director stated that the petitioner’s initial evidence established benefit only at the local level. The director instructed the

petitioner to “submit evidence that the beneficiary’s contributions will impart national-level benefits” and “to establish that the beneficiary’s past record justifies projections of future benefit to the nation.”

The petitioner’s response included a statement from counsel, much of which repeated or paraphrased counsel’s initial statement. Counsel also cited newly submitted background evidence which, counsel asserted, establish “that autism is a national emergency and that we do not have the resources, educators, or plans to respond to the growing number of autistic children in schools.” These materials address the intrinsic merit of autism education, and they establish that a reproducible strategy for dealing with the problem would produce benefits that are national in scope. They do not, however, establish that the work of one autism educator produces benefits that are national in scope. The petitioner’s previous evidence indicated that she works with a small number of students, each of whom requires a custom-tailored educational strategy. Such methods may produce the best results for each student, but they also limit the number of students whom the petitioner’s work can directly affect.

A section of counsel’s statement begins with the heading: “[The petitioner’s] Work Has Been Influential and [She] Will Continue to Develop Programs and Resources to Be Implemented Nationwide.” In her own statement, the petitioner described her work and her goals, and stated: “I believe that I have developed a series of classrooms that serve students with autism and that the model is one that can be of great benefit to other schools all across America.” The petitioner described the [REDACTED] indicating, for instance, that the classes use Applied Behavior Analysis (ABA), and that “ABA is widely recognized as a safe and effective treatment for autism.” The petitioner did not state that the methods used originated with [REDACTED] or more specifically with her. It cannot suffice simply to describe the petitioner’s work. Such a description does not establish that the petitioner’s methods are consistently more effective than the prevailing methods, nor does it demonstrate that other educators have adopted those methods on a large scale. The assertion that they may adopt it later is unsupported speculation.

The petitioner stated: “We started our own version of a [REDACTED] program,” in which other students interact with the autistic students. The record contains a printout from the [REDACTED] web site, showing that [REDACTED] “has grown from one original chapter to almost 1,500 middle school, high school, and college chapters worldwide.” Founding or leading such an organization, or significantly expanding its growth, would produce benefits that are national in scope, but the petitioner has not done these things. Rather, the record shows that the program was “[f]ounded in 1989 by [REDACTED] when the petitioner was 13 years old. The existence of national organizations to benefit autistic children does not lend national scope to the efforts of every individual volunteer within that organization.

Participation in an already-existing program is not impact or influence that would qualify the petitioner for the national interest waiver. 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 United States is an issue under the jurisdiction of the Department of Labor.

*NYSDOT* at 221. An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. While innovation of a new method is of greater importance than mere training in that method, it must be stressed that such innovation is not always sufficient to meet the national interest threshold. *Id.* at n.7. 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.

Counsel stated that the [REDACTED] the unique and innovative program being developed by [the petitioner] being developed by [the petitioner,] hopefully will serve as a model and guide for other schools around the country." The petitioner must establish existing influence; it cannot suffice to claim that an unfinished problem "hopefully will serve as a model" for other schools. Counsel asserted that the petitioner has "almost a decade of successful and influential experience in the field." Because claims about the petitioner's future impact are, by nature, speculative, it is necessary to examine the impact and influence that the petitioner's work has already had. The assertion that the petitioner's "work and success will provide a template for other teachers and programs around the country to follow" has no weight in the absence of evidence that the petitioner's past work has already shown such influence.

The petitioner submitted third-party summaries of national interest waiver petitions approved at the service center level. Counsel claimed that the present proceeding is "extremely similar" to the approved petitions, and that the petitioner's credentials are superior to those of the beneficiaries of the approved petitions. Counsel observed that one approved petition was "for an elementary school teacher," and another was "for a Ph.D. student in education." While 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.

Furthermore, because the approvals were service center decisions rather than appellate decisions, no written decisions exist to establish the rationale behind the approvals. The third-party case summaries do not necessarily reflect the factors that led to the approvals. Counsel provided no evidence to establish that the facts of the present petition are comparable to those in the approved petitions.

The director denied the petition on February 27, 2013, stating that the petitioner had met only the first prong of the *NYSDOT* national interest test by demonstrating that her occupation has substantial intrinsic merit. The director stated that the petitioner's "employment is limited to a local impact," and asserted that a claimed shortage in the petitioner's profession is a factor in favor of approving, rather than waiving, a labor certification.

On appeal, counsel claims that the petitioner's "research and pilot programs are slated to be implemented in schools and programs across the United States, along with training protocols and guides for other professionals" in the petitioner's field. The appeal includes no information regarding the petitioner's "research and pilot programs," and no evidence that they "are slated to be implemented . . . across the United States." The unsupported assertions of counsel do not constitute

evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Later in the appellate brief, counsel makes a similar assertion: “as evidenced by the attached letters, the programs and teaching techniques that [the petitioner] has developed within her own school are slated to be implemented in schools and programs around the country.” The appeal includes no “attached letters” except an undated statement by the petitioner herself and an April 2013 letter from an official of

In her own statement, the petitioner describes her techniques and asserts: “I believe that I can make a difference with this population and I am passionate about sharing my style of teaching to impact as many individuals with autism as possible.”

called the petitioner “a critical link to initiating a first-rate high school program” and stated: “, her program can serve as a model for excellence in middle school programming for young adults with autism.” Neither of these statements indicated that the petitioner’s program is “slated to be implemented in schools and programs around the country,” and the record does not include any evidence that any school or other employer outside of is aware of the petitioner’s work or plans to implement it.

Counsel asserts that the petitioner “makes no . . . assertion of attempting to get a blanket waiver for all teachers.” The petitioner may not seek such a waiver “for all teachers,” but counsel’s assertions on appeal (and earlier) contend in favor of a blanket waiver for all teachers of autistic students. The appeal revisits prior assertions to that effect:

If our own President has issued proclamations regarding the need for educators and professionals trained specifically in the special needs that autistic children require, clearly this case is within the national interest. Funds are better spent on programs, supplies, and salaries for professionals, rather than pursuing labor certifications and other requirements.

The above statements are general assertions regarding the petitioner’s profession, rather than specific factors that distinguish the petitioner from her peers. By claiming that the labor certification requirement should not apply to teachers in the petitioner’s specialty, counsel calls, in effect, for a blanket waiver of that requirement.

Counsel contends that the petitioner’s “exceptional talents and educational expertise could have a profound national effect on the epidemic of autism.” Conjectural claims about the effect that the petitioner’s future work “could have” are not evidence of a past history of influential achievement.

Counsel states that the petitioner’s “preliminary work and efforts have already blossomed into positive regional and community effect, as evidenced in her supporting documentation.” That documentation does not show that the petitioner’s influence has spread since 2001 when she began her work in

Massachusetts. The petitioner has not established that her future work will have national scope when a decade of prior work has not.

Counsel states: “precedent exists to consider a localized EB2 alien worker[’]s effect on the national interest.” Counsel cites two 1992 appellate decisions, neither of which is a published precedent decision. These two unpublished decisions predate the standardized and binding guidance provided in *NYS DOT*, which, in turn, is the only published precedent decision that directly relates to the national interest waiver.

Counsel contends that the director “failed to give appropriate weight and consideration to the letters and evidence submitted by the petitioner.” Counsel does not identify specific letters or evidence and explain why the director should have given them more weight. All of the witness letters are from the petitioner’s employers or parents of her students, and the documentary evidence either concerns the petitioner’s work at the local level. These materials do not establish that the petitioner’s work has had more than a local impact, or explain what has changed that would give that work national impact in the future.

Counsel revisits previous assertions regarding the approvals of other national interest waiver petitions, the petitioner’s high salary, and “the overwhelming need for trained professionals” in her field. For reasons explained previously, none of these factors establish the petitioner’s eligibility under the *NYS DOT* guidelines.

Most of counsel’s assertions on appeal repeat prior claims. Where counsel alleges error by the director, counsel does not elaborate with substantiated details to illustrate how the director erred. The assertion that the director should have approved the petition is not sufficient in this regard. The petitioner, on appeal, has not overcome the director’s stated grounds for denying the petition.

The primary basis for denial of the petition was the petitioner’s failure to establish eligibility for the national interest waiver. Separately, the director also found that the petitioner had not properly applied for the waiver. The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) states that an application for the national interest waiver must include Form ETA-750B, Statement of Qualifications of Alien, in duplicate.<sup>1</sup>

The petitioner’s initial submission did not include the required form. In the September 2012 RFE, the director instructed the petitioner to submit Form ETA-750B or parts J-L of ETA Form 9089. In the February 2013 denial notice, the director stated: “the petitioner did not submit a properly completed Form ETA-750B (or ETA Form 9089, Parts J, K, and L). Therefore, since the petitioner did not submit this required evidence, Form I-140 must be denied for this additional reason.”

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<sup>1</sup> Form ETA-750B is now obsolete; its current replacement is parts J, K, and L of ETA Form 9089, Application for Permanent Employment Certification.

On appeal, the petitioner submits a copy of the instructions to Form I-140. Counsel observes that these instructions do not mention the requirement for national interest waiver applicants to submit Form ETA-750B or Parts J-L of Form ETA 9089. Counsel asserts that “USCIS . . . cannot by law deny an application on the basis of something that should have been submitted, when the instructions do not state that.” The omission from the instructions does not nullify the regulatory requirement. Rather, the proper remedy is to allow the petitioner an opportunity to submit the missing materials before a final decision on the petition. The director allowed the petitioner such an opportunity by requesting the forms in the September 2012 RFE. At that point, the petitioner was aware of this primary evidentiary requirement, and the petitioner’s failure to submit the requested evidence is, itself, sufficient grounds for denial of the petition under the USCIS regulation at 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserts: “the petitioner did submit a Form 9089, and we re-submit a copy with this appeal.” Counsel claims to have “seen multiple cases in the last year where USCIS misplaced documents,” the implication being that the director separated the ETA Form 9089 from the rest of the RFE response, and then misplaced it. The appeal includes a photocopy of a partially completed ETA Form 9089, with parts J through L fully completed, signed, and dated November 25, 2012 (counsel mailed the RFE response on November 28, 2012). The record contains no evidence to show that the petitioner submitted this form with the RFE response.

The portion of the record containing the petitioner’s response to the RFE does not include either form. Counsel’s accompanying statement referred, in order, to 12 exhibits, tabbed “A” through “L.” All of the tabbed exhibits are in the record, in the proper order, with the RFE response. Counsel, in the RFE response statement, did not acknowledge the request for the required forms or state that the response included either form. Therefore, the petitioner’s RFE response, as now constituted in the record, contains no internal evidence to show that the response used to contain an ETA Form 9089.

There is no contemporaneous evidence that the petitioner submitted Parts J-L of ETA Form 9089 in response to the RFE as counsel claims on appeal. The untimely submission of previously requested evidence does not meet the petitioner’s burden of proof. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 537.

The record does not indicate that the petitioner properly applied for the national interest waiver by submitting the required documentation before the director denied the petition. Furthermore, the petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *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, with each considered as an independent and alternate basis for the decision. 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.