

(b)(6)

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

DATE: **JUL 02 2014** OFFICE: NEBRASKA 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:

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before us at the Administrative Appeals Office on appeal. We 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 physical education teacher at [REDACTED] in [REDACTED] part of [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 and copies of recent certificates she has received for her work and fulfillment of continuing education requirements.

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 (IMMACT 90), Pub. 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 July 2, 2012. An attorney cover letter submitted with the petition reads, in part:

[The petitioner] is one of the most sought-after physical education teachers today. She has a Masters Degree in Physical Education, and a Bachelors Degree in the same field. She is also qualified to teach in four states: New York, New Mexico, Maryland and Arizona. Likewise, she is more than qualified to teach Special Physical Education to

handicapped students by virtue of her PRAXIS 1 and 2. Moreover, she has published a number of academic books about health and physical education.

In a time in our country when youth obesity is a major cause for concern, [the petitioner's] tireless devotion to physical education, not to mention her expertise, is a vital ingredient in the fight to curb our nation's ballooning waistlines and health dangers.

For a teacher to convince her young pupils to love and embrace physical activities and sports in a world that has succumbed to video games, sugary foods and activities that promote idleness, it takes remarkable skills and incredible teaching methodology, which my client no doubt possesses. That's why the parents and community leaders of her current school in Arizona are practically begging to have her continue on as their children's Physical Education teacher.

Indeed, [the petitioner] transformed the habits and lifestyles of her young students and have [sic] instilled in them the value of not only a sound mind but a healthy body.

It is without question that our nation, which is struggling to combat childhood obesity, is in dire need of Physical Education experts like [the petitioner]. That's why it is considered by many that her vocation as a teacher is a matter of National Interest, hence this humble request for a waiver.

If not for this waiver, a whole community will be deprived of her complete dedication to bring forth healthy Americans, who in just a short span of time, will become the leaders and citizens of this great country.

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 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). The petitioner has not submitted evidence to support the claim that she "is one of the most sought-after physical education teachers today," and she has not demonstrated that she, as an individual, has had a significant effect on childhood obesity rates in the United States since she began teaching in the United States in 2005.

In her own statement, the petitioner stated:

I came here as an H1B worker. The Human Resource officer from [redacted] recruited me from the Philippines and offered me a job. I taught there for three years and moved to [redacted] in Maryland. . . . I was qualified and recommended for Permanent Residency processing based on my performance and evaluation . . . but due to [redacted] violation of H1B program, the Department of Labor debarred them from sponsoring, renewing, and

filing [immigrant and nonimmigrant visa petitions]. . . . This is the reason why my Permanent Residency is not filed in a timely manner. For this reason, I am requesting your kind heart to please approve my application for a National Interest Waiver. That way, I can serve my students in [REDACTED]

The debarment of [REDACTED] (which expired on March 15, 2014) explains why [REDACTED] was unable to pursue labor certification and a petition in 2011, but it had no effect on any other employer, such as [REDACTED]. Furthermore, the statutory threshold for the waiver is the national interest. The petitioner must therefore satisfy the *NYSDOT* guidelines.

The petitioner submitted copies of several documents under the heading “Certificates of Recognition & Appreciation / Awards / Commendation.” The cover letter submitted with the petition identified one of these awards as a [REDACTED]. Review of the record does not reveal this document. The description of the document, however, indicates that the award went not to the petitioner, but to [REDACTED] where the petitioner formerly worked. Apart from the lack of documentation of the award itself, the record contains nothing from the awarding entity to state that the school received the award in large part because of its physical education program. The petitioner does not claim that any of her other employers received recognition at the bronze level or higher.

Two of the certificates recognized the petitioner as “Educator of the Month” at [REDACTED] Middle School for February 2010. Other documents include “Certificates of Appreciation” for activities such as judging a 2004 dance competition and delivering a 2003 lecture on “Adapted P.E. and Sports for Special Children,” as well as materials showing that the petitioner participated in various training exercises and workshops.

More recent documents show that the petitioner has coached various sports at [REDACTED] and helped the school to obtain \$20,000 in grant funding. These materials establish the role that the petitioner has played at [REDACTED] but they do not demonstrate the petitioner’s impact or influence on her field beyond the local level.

The petitioner submitted copies of favorable performance evaluations from some of the schools where she has worked. Witness letters, mostly from teachers, administrators, students, and parents, praised the petitioner’s character and work ethic, but did not show how the petitioner’s work has had, and will continue to have, an influence on her field as a whole, such that a waiver of the job offer requirement would be in the national interest. Because, by statute, exceptional ability is not sufficient grounds for the national interest waiver, the petitioner cannot establish that she qualifies for the waiver by showing that her colleagues consider her to be a very good teacher.

Under the heading “Publication,” the petitioner submitted a copy of [REDACTED]. The initials [REDACTED] stand for the [REDACTED] in the Philippines, where the petitioner earned her two degrees. Comments in the text indicate that the petitioner adapted the article from her master’s thesis. The record does not identify the

publication in which this paper appeared, and therefore it is not evident that the paper was distributed outside of the teacher training college where the petitioner wrote the paper.

The one submitted article does not support the claim that she “has published a number of academic books about health and physical education.” The petitioner did not identify the books, submit any evidence of their existence and publication, or establish that she will continue to produce similar materials in the future. Conducting and publishing original research while in graduate school does not imply that one will continue to conduct and publish research.

The director issued a request for evidence on January 24, 2013. The director acknowledged the substantial intrinsic merit of the petitioner’s occupation, but instructed the petitioner to submit documentation to meet the other two prongs of the *NYS DOT* national interest test.

The petitioner’s response included a legal statement that reads, in part: “With the strict implementation of *In the Matter of New York Department of Transportation*, the Immigration Service has determined National Interest Waiver self petitioner-teachers’ evidences as insufficient and accordingly denied the applications.” The response also included the assertion that the director “has discretion to enforce said precedent,” *i.e.* *NYS DOT*. Following published precedent decisions is not a matter of discretion. Rather, such decisions are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c).

The statement continued:

[USCIS] has legal and factual bases to approve teachers’ National Interest Waiver applications without offending the principles enunciated in the *Matter of New York Department of Transportation*. . . .

Firstly, Immigration Act of 1990 (IMMACT 90) which enacted . . . the ‘National Interest Waiver[?]’ included ‘educators’ as among the targets of this legislation, [and] specifically stated – ‘this bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas.’

As acknowledged elsewhere in the statement, the quoted language comes not from the statute itself, but from comments made by then-President George H.W. Bush as he signed the legislation. IMMACT 90 did in fact create the national interest waiver, and the president mentioned “educators” in his remarks, but it does not follow that a blanket waiver for educators was either the intent or the result of the legislation. The same statute plainly subjected professionals – including “scientists and engineers and educators” – to the job offer requirement. IMMACT 90 promotes the immigration of educators, but the default mechanism for doing so is the job offer requirement and labor certification process, not the national interest waiver.

The response statement contended that the *NYS DOT* decision provided no specific definition of the “national interest,” and that Congress filled this void with the passage of the No Child Left Behind Act of 2001 (NCLBA), Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002):

Congress has in effect remarkably engraved the missing definition upon the concept of 'in the national interest,' centered on the 'Best Interest of American School Children.' More importantly, U.S. Congress also provided the means to achieve this now defined 'in the national interest,' i.e., 'Hiring and Retaining Highly Qualified Teachers.' Interestingly, "NCLB Act" also specified the 'Standard of a Highly Qualified Teacher.'

With this, the Service now has a definite working tool in defining what is 'in the national interest' including the clear standard on what qualifications must be required from NIW [national interest waiver] teacher self-petitioners, as mandated by No Child Left Behind Act of 2001.

None of the phrases presented in quotation marks are actually quotations from the text of the NCLBA. The term "best interest," with respect to children, appears only in provisions relating to homeless students. The NCLBA contains no mention of the national interest waiver or any immigration benefits for foreign teachers, and it did not amend section 203(b)(2)(B) of the Act (which created the waiver).

With respect to the above claims regarding legislative intent, statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). 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). Here, the petitioner has not established that Congress intended to exempt teachers from the job offer requirement, either through section 203(b)(2) of the Act, the NCLBA, or any other federal legislation. Congress's only direct statement on the matter has been to apply, not waive, the requirement. There is no support for the claim that the NCLBA amounts to Congress's definitive statement on waiving the job offer requirement for "highly qualified teachers."

The NCLBA did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, the petitioner has not established that the NCLBA indirectly implies a similar legislative change. Section 203(b)(2)(A) of the Act remains in effect, and therefore teachers, "highly qualified" or otherwise, remain subject to the job offer requirement.

"Highly Qualified Teachers," as a class, play a significant collective role in implementing the provisions of the NCLBA. It does not follow, however, that every such teacher individually qualifies for special immigration benefits as a result, or that collective benefit justifies a blanket waiver for every such teacher, when the waiver otherwise rests on the specific merits of individual intending immigrants.

The petitioner's response cited a recent emphasis on science, technology, engineering and mathematics (STEM) education, and stated: "As a Physical Education teacher, [the petitioner] ably prepares the

American students' 'healthy mind in a healthy body' for them to adequately achieve the end result of said educational programs." The petitioner submitted no evidence that her work as a physical education teacher has consistently improved her students' grades in academic subjects.

The response statement included the claim that "[t]he demand for 'Highly Qualified' teachers has escalated in the last few years." The petitioner did not show that the demands of the NCLBA are incompatible with the requirements to obtain labor certification for teachers. Furthermore, the petitioner did not establish that the actions of any one teacher have had, or will have, a nationally significant impact on the overall quality of education in the United States.

While the majority of the response statement consisted of variations on the claim that the NCLBA indirectly exempts highly qualified teachers from the job offer requirement, the statement did address the petitioner's qualifications, repeating the list of awards claimed in the initial submission. The petitioner did not elaborate or establish the significance of the awards.

The director denied the petition on August 27, 2013, stating that the petitioner "failed to establish that the proposed benefit will be national in scope." The director acknowledged the award certificates that the petitioner had submitted, but noted: "recognition of achievements and significant contributions to the field relate to the criteria for classification as an alien of exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(F), a classification that normally requires an approved labor certification." The director added that some of the materials that the petitioner had claimed as awards were actually certificates showing completion of training courses. The director stated that the NCLBA and related federal education initiatives did not create a blanket waiver for highly qualified teachers, and that general claims about the state of education in the United States cannot suffice to give national scope to the efforts of one teacher.

On appeal, the petitioner's appellate brief repeats the claim that Congress passed the NCLBA with the intention of creating a blanket waiver for highly qualified teachers, even though that statute did not amend the Immigration and Nationality Act or mention the waiver specifically, or immigration provisions in general. The brief alleged that USCIS took the NCLBA into account when it approved the nonimmigrant petition allowing the petitioner to work in the United States as an H-1B nonimmigrant, but the petitioner submits no evidence to support this claim and therefore it has no evidentiary weight. *See Matter of Soffici*, 22 I&N Dec. at 165.

Regarding the petitioner's individual qualifications, the brief states:

USCIS-Nebraska Service Center has not specified what constitutes 'unusual significance' in the field of education. It concluded that "in this case, it has not been shown that the petitioner's individual accomplishments are of such an unusual significance that he¹ qualifies for a waiver of the job offer requirement." There is no clarity on this particular requirement and yet, the Director has easily dismissed the incomparable accomplishments of [the petitioner] as submitted in her Case File. By

¹ *Sic.* The director's decision correctly used the pronoun "she"; the appellate brief erroneously substituted "he."

requiring the petitioner to submit evidence of ambiguous nature is ‘unduly burdensome’ and in effect tantamount to requiring ‘impossible evidence’ since nobody has control over who and how her works are accessed and used, in the same way that it is impossible to realistically determine that [the petitioner] “will serve the national interest to a substantially greater degree than would . . . similarly trained U.S. workers.[”]

NYS DOT does not require the petitioner to have control over others’ use of her work. Rather, it requires evidence of influence beyond a local level, on the field as a whole. *NYS DOT* indicates that the best available gauge of likely future benefit is an inference drawn from one’s past contributions to one’s field. *See id.* at 219.

The appellate brief repeats the list of “Awards and Commendations” previously described in the initial submission and the response to the request for evidence, adding “additional awards and recognition” in the form of several new certificates, all dated after the petition’s 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).

Apart from their late date, the newly submitted certificates do not demonstrate the petitioner’s eligibility for the waiver. Many of the certificates are “Principal’s Awards” from [redacted] thanking the petitioner for her work not only as a teacher, but in other capacities such as an “Acting Administrator on Duty” and “Dance Club Moderator.” [redacted] also presented the petitioner with certificates relating to her contributions to professional development at the school. Other certificates show the petitioner’s ongoing professional training in topics such as “School Health Teacher Training” and “Learn More about Common Core.” The petitioner has not shown that her participation in professional development activities sets her apart from other teachers in Arizona.

The brief contends that factors such as “the ‘Privacy Act’ protecting private individuals” make it “impossible” to compare the petitioner with other qualified workers, and asserts: “the Immigration Service should have presented its own comparable worker and deliberated its point in the proceeding, allowing the petitioner to rebut such a solid finding of fact.” The *NYS DOT* guidelines are not an item-by-item comparison of an alien’s credentials with those of qualified United States workers. That decision indicated that the petitioner must establish a record of influence on the field as a whole. *Id.* at 219, n.6. To do so does not require an invasive review or comparison of other teachers’ credentials. Regarding the assertion that USCIS “should have presented its own comparable worker,” there is no presumption of eligibility that the director must overcome in order to justify denying the petition. The burden of proof rests with the party seeking an immigration benefit. Section 291 of the Act, 8 U.S.C. § 1361.

The brief asserts that “the Director is requiring more from the beneficiary’s credentials tantamount to having exceptional ability,” even though one need not qualify as an alien of exceptional ability in order to receive the waiver. The statutory requirements to establish exceptional ability are below, not above, those for the national interest waiver; it is possible to establish exceptional ability but still not qualify for

the waiver. Also, the director did not require the petitioner to establish exceptional ability in her field. Instead, the director found that the petitioner's evidence failed to establish that her work has had an influence beyond the school districts where she has worked.

After addressing the petitioner's specific qualifications, the brief again attempts to make the case for a blanket waiver for teachers, claiming that "U.S. workers in the teaching industry are not as competitive in the job market as against their foreign counter-parts"; that the NCLBA "trumps the Labor Certificate since job opportunities for U.S. workers are guaranteed once No Child Left Behind Act of 2001 is faithfully executed"; and that schools that fail to hire highly qualified teachers face "closure" as a result of losing federal funding. The petitioner cites no source for these claims. See *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, as expressed in *NYSDOT* at 217, it is not USCIS's role to establish blanket waivers based on occupation. That authority belongs to Congress, as shown by its addition of section 203(b)(2)(B)(ii) to the Act. Therefore, by urging the creation of such a blanket waiver in an appellate brief, the petitioner seeks a degree of relief that USCIS has no authority to provide.

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. *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, engaging in a profession (such as teaching) does not exempt professionals from the requirement of a job offer. Congress has not established any blanket waiver for teachers. 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 statutory job offer requirement will be in the national interest of the United States.

We 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.