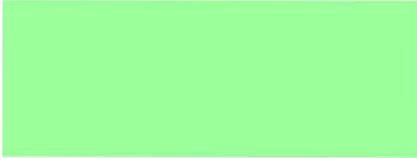




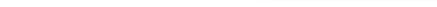
U.S. Citizenship
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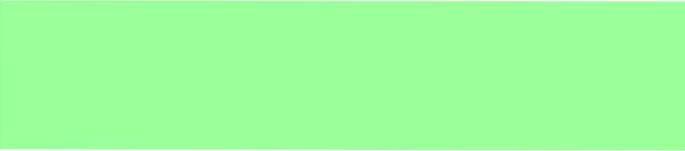
DATE: **JUL 02 2014** OFFICE: TEXAS SERVICE CENTER

FILE 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before 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 progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as an elementary teacher of English to speakers of other languages (ESOL) for [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 the defined equivalent of 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 legal brief.

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 the defined equivalent of an advanced degree under the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B). 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 June 1, 2012. An accompanying statement indicated that the petitioner’s “petition for waiver of the labor certification is premised on her Degree in Elementary Education and postgraduate studies in Bilingual Special Education.” The statement also indicated that the petitioner “has more than twenty (20) years of

professional and innovative and progressive teaching experience,” and “awards and outstanding contributions.”

Academic degrees, experience, and recognition for achievements and contributions are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. Particularly significant forms of recognition can indicate broader impact and influence, but the burden is on the petitioner to establish as much. *See* section 291 of the Act, 8 U.S.C. § 1361.

The list of the petitioner’s “awards and outstanding contributions” included four categories:

- a. Results of [the petitioner’s] students from Maryland State Assessment (MSA), 2008-2011, evidencing [the petitioner’s] results-oriented approach to and success with her teaching methodologies. . . .
- b. Certificate of Achievement from [redacted] for her unique and outstanding performance as an educator, for American Education Week 2006.
- c. Certificate of Excellence for sharing her expertise as a speaker and leader in “Collaborative Relationships in Education” Seminar, hosted by [redacted] dated Feb. 25, 2012
- d. Certificates for Training and Professional Development, evidencing [the petitioner’s] constant endeavors to remaining a life-long learner . . . [attending] over forty (40) conferences during her tenure as an educator in the United States.

The petitioner submitted graphs showing that, on some MSA tests, all of her students scored either “proficient” or “advanced.” The petitioner did not establish that her work with her own students had improved the MSA scores of students outside her own classroom. The MSA results do not show impact beyond the local level.

The certificate from American Education Week 2006 is from the [redacted] not from [redacted] and it does not refer to “unique and outstanding performance” as claimed. The body of the certificate reads:

In honor of your service as an educator in the [redacted]

The Office of the County Executive recognizes and recommends your hard work and dedication to the children of our County. I appreciate the knowledge and services you provide to the students of [redacted] County.

This certificate is presented during American Education Week 2006.

The general wording suggests that all [REDACTED] educators received such certificates in 2006.

The petitioner's participation in training and professional development courses does not distinguish her from other teachers, because ongoing professional development is a mandatory condition for continued certification as a public school teacher in Maryland. The web site of the Maryland Department of Education states:

The Code of Maryland Regulations (COMAR) stipulates that all professional, certified educators must pursue professional development, have individualized professional development plans throughout their careers, and complete at least six hours of course credits during each five year certification renewal cycle.¹

The remaining certificate is not from the [REDACTED] at the national level, but rather from its Maryland Chapter, indicating that the Collaborative Relationships in Education event was organized by, and for the benefit of, [REDACTED] teachers in Maryland rather than for a broader audience. Further emphasizing its local nature, the event took place in [REDACTED] Maryland, the seat of [REDACTED] County. The record does not otherwise describe the petitioner's involvement in the event, and there is no evidence that her presentation there had a wider impact or influence on the field of education.

The petitioner submitted letters from administrators, teachers, and others, praising her abilities and dedication as a teacher. Competency as a teacher is not sufficient to qualify the petitioner for the national interest waiver, because there is no blanket waiver for teachers. By statute, teachers are members of the professions (*see* section 101(a)(32) of the Act), and members of the professions are generally subject to the job offer requirement (*see* section 203(b)(2)(A) of the Act).

The director issued a request for evidence on December 5, 2012. The director discussed the petitioner's evidence and quoted several witness letters, and stated that the petitioner had not established that the benefit from her employment will be national in scope, or that she has influenced her field as a whole. The director also stated that, if the petitioner wished to rely partly on awards she has received, then she must submit evidence to establish the significance of those awards.

In response, the petitioner submitted a legal brief, which stated: "With the strict implementation of *In the Matter of New York Department of Transportation*, the USCIS-Texas Service Center has determined National Interest Waiver self petitioner-teachers' evidences as insufficient and accordingly denied the applications." The brief also stated that the director "has discretion to enforce said precedent," *i.e.*, *NYSDOT*. 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 brief stated:

¹ http://www.marylandpublicschools.org/MSDE/divisions/certification/progapproval/prof_development.htm (printout added to record June 12, 2014).

[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, 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.'

Other comments in the brief clarified that 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 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.

Counsel 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.

The term "best interest," with respect to children, appears in the NCLBA 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). The NCLBA calls for the employment of highly qualified teachers, but never mentions immigration as a means for doing so.

The brief cited no specific language from the statute itself, its legislative history, or the implementing regulations to support the claim that the NCLBA "mandated" "what qualifications must be required from NIW teacher self-petitioners." 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)).

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. The petitioner has not supported 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. 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.

The brief discussed other federal initiatives beyond the NCLBA. These programs establish that the federal government places a priority on improving the quality of education, but the petitioner did not establish that any of these programs had the express or implied result of changing immigration policy toward teachers. 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 submitted background information about the NCLBA and other initiatives, as well as information about the importance of science, technology, engineering, and mathematics (STEM) education. The petitioner teaches English, not STEM subjects.

The director, in the request for evidence, instructed the petitioner to submit additional evidence about her claimed awards. The response brief repeated the list of "Awards, Merits and Recognitions" stated in the initial filing, without further elaboration or explanation of their significance.

The brief claimed that the labor certification process presents a “dilemma” because the petitioner’s qualifications significantly exceed the minimum qualifications that an employer could specify on an application for labor certification, and “the employer cannot overstate the qualification requirement for the job offer nor can it tailor-fit in favor of the alien worker.” The brief also requested “equitable consideration” of the Department of Labor’s debarment order which, at the time of filing and at the time the petitioner responded to the request for evidence, temporarily prevented [REDACTED] from petitioning for foreign workers. The petitioner, in the brief, offered several reasons as to why the labor certification process is purportedly contrary to the national interest in this proceeding, but she did not acknowledge that she has already met the job offer/labor certification requirement.

On March 31, 2010, [REDACTED] applied for labor certification on the petitioner’s behalf. The Department of Labor approved the labor certification on September 16, 2010, and on February 15, 2011, [REDACTED] filed an I-140 petition seeking to classify the petitioner as a member of the professions under section 203(b)(3) of the Act. The director approved the petition on July 28, 2011, with a priority date of March 31, 2010. The debarment order, in effect from March 16, 2012 to March 15, 2014, did not affect this previously approved petition. The approval of the earlier petition has not been revoked, and remains in effect.

The director denied the petition on June 3, 2013. The director acknowledged the petitioner’s claims regarding the NCLBA, but stated that eligibility for the waiver rests with the petitioner’s own qualifications rather than the intrinsic importance of the occupation she seeks. The director stated that the petitioner’s evidence does not establish that the petitioner “plays a significant role in [her] field.”

The petitioner’s appellate brief repeats the claim that, by enacting the NCLBA, “the United States Congress has spelled out the national interest with respect to public elementary and secondary school education”:

[T]he NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in connection with an E21 visa petition for employment as a Highly Qualified Teacher in the public school sector.

The obscurity in the law that *NYSDOT* sought to address has been clarified, at least with respect to questions about the national educational interest. Thus, an automatic application of *NYSDOT*’s exacting standards in a national interest waiver connected with a job in a public school district, without considering the wide-ranging impact of the NCLB Act, would be inapposite given the factual circumstances availing in *NYSDOT* and the post-*NYSDOT* enactment of the NCLB Act. More importantly, a straight-jacket [*sic*] application of *NYSDOT* constricts, instead of promoting, the national educational interests. In effect, therefore, the United States Congress, with the enactment of the NCLB Act, has preempted the USCIS with respect to the

parameters that should guide its determination whether a job offer requirement based on the national educational interests is warranted. Otherwise stated, the requirement of a job offer or labor certificate for the occupation of Special Education Teacher in a public school district should be waived if it is established that the alien will substantially benefit prospectively the national educational interests of the United States, as these interests are enunciated in the NCLB Act and the Obama Education Programs. . . .

The mandate for ‘flexibility in the adjudication of NIW cases’ . . . must be construed liberally rather than strictly compared to the New York State Department of Transportation case. USCIS is now required by United States Congress through the No Child Left Behind Act of 2001 . . . to make it “flexible[”] and thus possible rather than impossible in favor of the ‘Best Interest of the School Children,’ by granting waivers to ‘Highly Qualified Teachers’ who have already been serving the cause instead of requiring labor certification which may only reveal uncommitted U.S. workers with minimum education qualification.

In the passage quoted above, the petitioner’s appellate brief contended that a waiver is in order “if it is established that the alien will substantially benefit prospectively the national educational interests of the United States.” The plain text of section 203(b)(2)(A) of the Act, however, states: “Visas shall be made available . . . to qualified immigrants who . . . will substantially benefit prospectively the national . . . educational interests, or welfare of the United States, and whose services . . . are sought by an employer in the United States.” In this way, Congress specified that substantial prospective benefit to the educational interests of the United States is not sufficient for the waiver; an intending immigrant who offers such benefit must still be “sought by an employer in the United States.” The NCLBA did not establish a separate or lower standard for teachers. The brief contains the claim that “USCIS is now required . . . [by] the No Child Left Behind Act . . . [to grant] waivers to ‘Highly Qualified Teachers,’” but the brief does not identify any provision of the NCLBA setting forth that requirement. The petitioner has submitted numerous claims regarding the immigration consequences of the NCLBA, but, lacking support, those assertions have no weight in this proceeding. *See Matter of Soffici*, 22 I&N Dec. at 165.

Counsel states:

The *Matter of New York State Dept. of Transportation* obviously is good in so far as NIW cases filed by Engineers are concerned but does not give justice to other professionals especially since the facts are definitely distinct from each other, not to mention subsequent legislations intended to provide guiding principles to implement Immigration Act of 1990.

The petitioner provides no support for the assertion that Congress “intended to provide guiding principles to implement [the] Immigration Act of 1990” when it passed the NCLBA.

The brief contends that *NYSDOT* “required vague and overly burdensome evidence more fitting to the cause of an Engineer. USCIS is expected to stipulate clear basis for evidences requested and at least meritoriously rebut the evidences submitted in the initial filing and in the response to Request for Evidence.” The beneficiary in *NYSDOT* was an engineer, but the guidelines in that decision are intentionally broad, and not restricted to engineers. Because the waiver is potentially available to workers in a wide range of occupations, there is no single, rigid set of specified evidentiary requirements; the available evidence will vary on a case-by-case basis. The director is not required to speculate as to how a school teacher might exert widespread influence on her field. Rather, the petitioner must submit evidence that demonstrates such influence. Strong credentials and favorable performance reviews do not show influence or impact on the field. The claim that USCIS must “rebut” the petitioner’s previously submitted evidence implies that the petitioner’s evidence established an initial presumption of eligibility, which is not the case. The burden of proof is on the petitioner to establish eligibility for the benefit sought. See section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

The appellate brief repeats the claim that federal initiatives “focus on STEM” subjects, but does not explain why that should be a favorable factor for a non-STEM teacher.

In the denial notice, the director stated that the petitioner’s “evidence must establish that the petitioner’s contributions in the field are of such unusual significance that she merits the special benefit of a national interest waiver.” The brief somewhat misquotes this passage:

USCIS-Texas Service Center has not specified what it meant by ‘any contributions of unusual significance that would warrant a national interest waiver.’ 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 requiring the petitioner to submit evidence of ambiguous nature is ‘unduly burdensome’ and in effect tantamount to requiring ‘impossible evidence’ for being extremely subjective.

The director, in the decision, had acknowledged witness letters calling the petitioner an effective teacher, but the director concluded: “The evidence submitted does not establish that the petitioner’s work has been utilized or has made an impact on a national level, since all the support letters are from . . . those who have worked with the petitioner in some capacity.” The director also concluded that “the petitioner did not provide any detailed evidence to show how her work has made a contribution to the field as a whole.” The petitioner, on appeal, does not demonstrate that her accomplishments are “incomparable” as claimed in the brief.

The appellate brief repeats the list of “Awards and Recognitions” previously described in the initial submission and the response to the request for evidence, and calls those materials “overwhelming evidence,” but the petitioner has not established that any of these documents have more than local significance.

The petitioner has not rebutted the director's finding that the petitioner has failed to meet the requirements spelled out in *NYSDOT*. Instead, the petitioner has contended at length that *NYSDOT* does not, or should not, apply to "highly qualified teachers." This contention lacks legal and factual support and does not supersede the status of *NYSDOT* as a precedent decision or the basic provisions of section 203(b)(2)(A) of the Act, which subjects professionals, including teachers, to the job offer requirement. As the beneficiary of an approved petition with a labor certification, the petitioner has already met the job offer requirement in a separate proceeding; the petitioner has not established that it would serve the national interest to waive that same requirement here in order to qualify her for a different immigrant classification.

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. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, such as teaching, 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; *Matter of Otiende*, 26 I&N Dec. 128. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.