(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: JUN 0 5 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 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 early childhood special educator for in Maryland, where she began teaching in 2005. 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 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 May 13, 2013. An accompanying introductory statement quoted *NYSDOT* as acknowledging that "Congress did not provide a specific definition of 'in the national interest,'" and that, therefore, any national interest "test [should be] as flexible as possible." *Id.* at 216. The petitioner contended that the *NYSDOT* test lacks the required flexibility, and that Congress sought to remedy the situation by passing the No

Child Left Behind Act of 2001 (NCLBA), Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002). From the introductory statement:

> Congress has in effect remarkably engraved the missing definition upon the concept of 'in the national interest,' which 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.'
>
> Indeed, the "NCLB Act" has elucidated the previously dark avenue for educator-national interest waivers.
>
> With this, the Service now has a definite working definition of '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. There is no longer vagueness or obscurity like what happened in the New York State Department of Transportation case, which left the Immigration Service with over-reaching discretion in imposing even the impossible from NIW self-petitioners.

The NCLBA does not define the term "national interest"; the phrase does not appear in the text of that statute. The NCLBA does not mention the national interest waiver or any immigration provisions for teachers. Therefore, there is no support for the assertion that "favorable decisions for the NIW teachers" is "honoring the Congressional intent [behind the] No Child Left Behind Act of 2001." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner quoted the phrase "national . . . educational interests . . . of the United States" from section 203(b)(2)(A) of the Act. That clause recognizes the existence of "national educational interests," but does not create or imply a blanket waiver for educators. The same statutory clause also subjects members of the professions to the job offer requirement, and school teachers are members of the professions as defined at section 101(a)(32) of the Act. Therefore, the Act subjects teachers to the job offer requirement, and the petitioner has not shown that the NCLBA has removed or modified that requirement.

The petitioner also stated that the federal government has emphasized science, technology, engineering, and mathematics (STEM) education. The record does not show that the petitioner has training or certification in STEM subjects; her education is in psychology and special education, and her certification is in "Early Childhood Education" and "Generic Special Education." Even if the petitioner were a specialized STEM teacher, Congress has created neither a blanket waiver nor special waiver provisions for STEM teachers.

After attempting to make a general case for national interest waivers for "highly qualified teachers," the introductory statement listed the exhibits submitted with the initial filing of the petition. These exhibits included witness letters; educational credentials; satisfactory teacher evaluations; training certificates; and other documents relating to the petitioner's work and activities in the United States and, earlier, in the Philippines, as well as five documents listed under "Professional Recognitions," as follows:

- A "Certificate of Appreciation," dated May 6, 2005, from the the Philippines, acknowledging the petitioner's work "as a volunteer in the Year, 2004, in the activities of the Best Buddies Philippines, a community Outreach Program of the
- A "Certificate of Achievement" from the county executive of "[i]n honor of [her] service as an educator in the Public School System. . . . This Certificate is presented during American Education Week 2006."
- A "Certificate of Appreciation" dated June 2012 from "in recognition for her hard work and dedication in leading the Home-School Relations Committee during the 2011-2012 school year."
- A December 8, 2012 "Certificate of Appreciation" from recognizing the petitioner's "hard work and dedication in leading the Home-School Relations Committee for the 2012-2013 school year."
- A January 28, 2012 "Certificate of Excellence" from the "for sharing her expertise in INCLUSION: Educators Working Together to Make it Happen."

The petitioner did not establish that any of the listed certificates relate to achievements of significance beyond a local level.

The credentials, certificates, and other materials show that the petitioner is well qualified in her field, but they do not demonstrate that her work has had more than a local impact, or that she has influenced her field as a whole. The witness letters demonstrated that the petitioner has been a valued employee at the schools where she has worked, but they did not establish that the petitioner has met all three prongs of the *NYSDOT* national interest test. The assertion that the petitioner is a superior teacher cannot suffice to qualify the petitioner for the waiver, because, by statute, exceptional ability does not exempt foreign workers from the job offer/labor certification requirement.

A letter collectively attributed to "[t]he staff of the " Capitol Heights, Maryland, and bearing over 100 signatures, reads, in part:

> [The petitioner] is a dedicated teacher and colleague; the loss of her services would negatively impact the school environment.

> [The petitioner] has proven to be an extraordinary special education teacher and is a great asset to the school. . . . [The petitioner] modifies her lessons reach [*sic*] all learners and uses manipulatives, technology, visuals aids [*sic*], and fun activities to keep all students actively engaged in the learning experience. [The petitioner] helps the special education [*sic*] make the academic gains they need to reach their goals and catch up to their typically-developing peers.
>
> [The petitioner] has proven to be a model of classroom management skills. . . . As one of the leaders of the Positive Behavior Committee, [the petitioner] is sharing her knowledge with the staff. She has presented strategies to the staff on several occasions and has helped teachers implement these strategies by providing support and materials.
>
> In addition to her duties as a teacher, [the petitioner] has proven to be a vital part of the school as chairperson of the Home-School Relations Committee. . . . The committee has provided school supplies for students at the beginning of the year, food baskets for families at Thanksgiving and Christmas, and coats during the winter. . . .
>
> [The petitioner] also provides her services to the When parents have concerns about their children's cognitive abilities, [the petitioner] assesses the children to determine whether or not they are experiencing cognitive delays. . . .
>
> [The petitioner] has proven to be an invaluable member of our school community. . . . The loss of a wonderful educator like [the petitioner] would harm our school and leave our students, who are already struggling, at a disadvantage.

Concerning the assertion that the petitioner should be able to remain at the record shows that filed an earlier Form I-140 petition on her behalf, seeking to classify her as a professional under section 203(b)(3)(ii) of the Act. USCIS approved that petition on June 23, 2009, with a priority date of August 12, 2008. 's petition included an approved labor certification. The approval of the earlier petition remains in effect, and the petitioner will be eligible to apply for an immigrant visa or adjustment of status based upon that approval once visa numbers become available for the priority date. Denial of the national interest waiver does not affect the approval of the earlier petition, and would not compel the petitioner's permanent departure from

Several witnesses attested to the petitioner's valued contributions to the schools where she has worked, but they did not establish that the benefit from her work is national in scope, or that her work has influenced the field as a whole.

The director issued a notice of intent to deny the petition on July 15, 2013. The director acknowledged that the petitioner is a member of the professions holding an advanced degree, and

that her occupation has substantial intrinsic merit, but found that the petitioner had "not established that [her] proposed employment will be national in scope." The director also instructed the petitioner to establish a "past record of specific prior achievement with some degree of influence on the field as a whole." The director acknowledged the petitioner's submission of various certificates, but stated that the petitioner had not established their significance. The director also noted that the petitioner had "already gone through the labor certification process."

In response, the petitioner submitted background materials about public education and various government initiatives that seek to improve it. None of the submitted materials mentioned the petitioner specifically or established her individual impact on her field. Some of the materials concern STEM education, despite the petitioner's lack of certification in STEM subjects.

The petitioner contended that her proposed employment is national in scope because the NCLBA seeks to reduce dropout rates, and a reduction in dropout rates will aid the U.S. economy by producing better qualified workers. The petitioner also asserted that the NCLBA seeks to close the "achievement gaps between minority and nonminority students, and[ ]between disadvantaged children and their more advantaged peers." These are collective goals, describing the impact of teachers in the aggregate rather than individually. As such, they address the intrinsic merit of the petitioner's field, but they do not establish the national scope of her own employment.

The response to the director's notice includes that claim that the petitioner "is an effective teacher in raising student achievement in STEM," and that her "proven success in raising proficiency of her students transcends the classroom and imparts national benefits." The petitioner submitted no evidence to support these assertions. *See Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner did not claim to have influenced her field as a whole. Instead, as "[e]vidence that the national interest would be adversely affected if a labor certificate [*sic*] were required," the petitioner again cited the NCLBA and other federal statutes and policy initiatives. In this way, the petitioner claimed, in effect, that federal statutes and policy collectively imply an unstated blanket waiver for teachers.

The NCLBA did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232, 105 Stat. 1733 (Dec. 12, 1991) made the national interest waiver available to members of the professions holding advanced degrees, where previously it was available only to aliens of exceptional ability. Following the publication of *NYSDOT*, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95, 113 Stat. 1312 (Nov. 12, 1999), specifically amended the Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Thus, Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so on two occasions, first to correct an omission of language, and later in direct response to *NYSDOT*. The petitioner identified no other legislation that directly addresses the national interest waiver in this way. In the absence of a comparable provision in the NCLBA or any other education-related legislation, there is no basis to conclude that the legislation indirectly implied a

blanket waiver for teachers. Without clearly expressed Congressional authority, USCIS will not designate blanket waivers on the basis of occupation. *See NYSDOT* at 217.

The petitioner stated that "replacing 'Highly Qualified Teachers' with those having only minimum qualifications" would adversely affect U.S. schools. This is another collective assertion, as the petitioner's employment directly affects only one school. Also, as defined at section 9101(23) of the NCLBA, a "highly qualified" school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

The petitioner did not explain how the above requirements are incompatible with the existing labor certification process, and the petitioner submitted no evidence that the labor certification process has resulted in the widespread employment of teachers who are less than "highly qualified."

The petitioner claimed a "Dilemma in Labor Certification Process if Required," because the labor certification process cannot take the petitioner's experience and advanced education into account. The petitioner did not address the director's observation that previously obtained an approved labor certification on her behalf.

The petitioner requested "equitable consideration" as follows:

> She is firmly commited to continue teaching at . However, is currently barred[ ]for a two-year period (i.e. from March 16, 2012 to March 15, 2014) from filing any employment-based[ ]immigrant and/or nonimmigrant petition . . . arising from 's willful violations of the H-1B regulations[ ]at 20 C.F.R. Part 655, subparts H and I. . . . Thus, through no fault of her own, [the petitioner] would not be able to continue teaching in unless her E21 visa petition is approved, not to mention the fact that she has already firmly established a life here in the United States.

By statute, the standard for the waiver of the job offer requirement is neither the petitioner's desire to remain in the United States nor her prospective employer's temporary inability to petition on her behalf. The temporary debarment order (now expired) is not grounds for granting a permanent immigration benefit, and a declared intention to work for a debarred employer does not meet the *NYSDOT* national interest test. Furthermore, the assertions quoted above fail to acknowledge that the petitioner has already received the approved labor certification that she has since claimed she might be unable to acquire.

The director denied the petition on December 3, 2013, stating that the petitioner had met only the first prong (relating to intrinsic merit) of the *NYSDOT* national interest test. The director found that the petitioner's work for is local in scope, and that "the record does not contain any evidence

that the self-petitioner has developed or produced any innovative teaching research or research books or materials that would otherwise benefit this country on a national scale."

On appeal, the petitioner asserts that "USCIS has previously approved NIW cases for highly qualified teachers." The petitioner lists exhibits submitted in support of her own petition, as well as materials submitted with the approved petitions. We have not reviewed the approved petitions, and the petitioner did not submit their records of proceeding. Unlike the Administrative Appeals Office, service centers do not routinely issue written approval decisions to explain the specific reasons behind a given approval. Therefore, we cannot determine whether the other petitions were approved in error. Service center approvals are not binding precedent decisions under 8 C.F.R. § 103.3(c), and therefore the cited approvals have no weight in the present proceeding. The approval of individual petitions does not demonstrate that every foreign teacher who meets the NCLBA's definition of a "highly qualified teacher" is therefore entitled to a national interest waiver.

The petitioner asserts:

> [T]he United States Congress has spelled out the national interest with respect to public elementary and secondary school education through the No Child Left Behind Act of 2001 . . . which came into effect upon its enactment in 2001 – that is, more than a decade after IMMACT 90 and MTINA were enacted and three years after NYSDOT was designated as a precedent decision. . . .
>
> Accordingly, the NCLBA and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public education sector.
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> The obscurity in the law that NYSDOT sought to address has been clarified, at least with respect to questions about the national educational interest. . . . 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 waiver of the job offer requirement based on national educational interests is warranted. Otherwise stated, the requirement of a job offer or labor certificate for the occupation of Math 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. . . .
>
> [I]n the instant case, USCIS gave insufficient weight to the NCLB Act because it confined its consideration of that law to the first NYSDOT factors.

In the passage quoted above, the petitioner contends 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 petitioner identifies no statute, regulation, or case law that would give the NCLBA force as an immigration statute or otherwise create a blanket waiver for teachers.

The petitioner claims: "a new thought process must be designed by USCIS with respect to NIW petitions by 'Highly Qualified Teachers' instead of routinely applying the Matter of New York State Dept. of Transportation generically." As a precedent decision, *NYSDOT* is binding on all USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c).

The petitioner claims that *NYSDOT*, which concerned a bridge engineer, "obviously is good in 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 . . . IMMACT 90." The three-part national interest test in *NYSDOT* is, by design, broad and flexible. It does not include specific evidentiary requirements that only an engineer could satisfy, and its application is not, and was not intended to be, limited to engineers. The petitioner has cited no primary source in the statute or legislative history to support the claim that "Congress legislated NCLB to serve as guidance to USCIS in granting legal residence to 'Highly Qualified Teachers.'" As such, the petitioner's unsupported assertion carries no weight. *See Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner claims that *NYSDOT* "requires overly burdensome evidence on the qualification [*sic*] of the self-petitioner, identical to EB-1 extraordinary requirements when the law makes it available to those either 'with advanced degree' or 'exceptional ability.'" The evidentiary requirements to establish extraordinary ability, listed in the regulations at 8 C.F.R. § 204.5(h)(3), are neither identical nor similar to the guidelines in *NYSDOT*. Concerning the assertion that the waiver is "available to those either 'with an advanced degree' or 'exceptional ability,'" those qualifications are necessary, but not sufficient; they make one eligible to apply for the waiver, but do not guarantee the approval of that application.

The petitioner, however, has not shown that her work has had or is likely to have a national impact on educational achievement. The petitioner has not shown direct influence beyond the students in her own classroom. The petitioner claims to have played "a primary role in . . . closing the achievement gap," but quotes statistics indicating that [redacted] students continue to underperform, several years after the petitioner began working for that school system. The petitioner has discussed the goals of the NCLBA and other federal educational initiatives, but has not established the impact her work has had on those goals outside of her own classroom.

The petitioner has not established the national scope of her employment or 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*, 22 I&N Dec. 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.

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, 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.