



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 24 2014** OFFICE: TEXAS SERVICE CENTER

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)

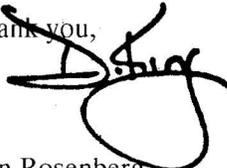
ON BEHALF OF PETITIONER:

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 AAO summarily dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen. The AAO will dismiss the motion.

In this decision, the term "prior counsel" shall refer to [REDACTED] who represented the petitioner at the time the petitioner filed the petition. The term "counsel" shall refer to the present attorney of record. Both attorneys belong to the same firm.

The petitioner filed Form I-140, Immigrant Petition for Alien Worker, on November 4, 2011, seeking 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 contracting specialist in contracting and project management relating to the construction and petrochemical industries. 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 denied the petition on October 1, 2012, having found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

The petitioner appealed the decision on October 30, 2012. On Form I-290B, Notice of Appeal or Motion, prior counsel checked a box indicating that a "brief and/or additional evidence will be submitted to the AAO within 30 days." Instructed to "[p]rovide a statement explaining any erroneous conclusion of law or fact in the decision being appealed," prior counsel provided one sentence, quoted further below. When the appeal reached the AAO, the record of proceeding contained no subsequent brief or additional evidence.

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.3(a)(1)(v) states: "An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal." The AAO summarily dismissed the appeal on February 19, 2013, stating:

On the Form I-290B Notice of Appeal, filed on October 30, 2012, counsel indicated that a brief would be forthcoming within 30 days. To date, more than three months later, careful review of the record reveals no subsequent submission; all other documentation in the record predates the issuance of the notice of decision.

The statement on the appeal form reads simply: "The decision is arbitrary and capricious and is not consistent with the statute from which the appellate provision derives its legal authority, nor is it consistent with published regulations." This is a general statement that makes no specific allegation of error. Counsel, for example, does not cite any specific regulation or explain how the decision is inconsistent with it. The bare assertion that the director somehow erred in rendering the decision is not sufficient basis for a substantive appeal.

The petitioner filed a motion to reopen on June 19, 2013. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. 8 C.F.R. § 103.5(a)(1)(i). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The appeal and motion process is not an open-ended opportunity for the petitioner to supplement the record or correct his own, or counsel's, prior errors. Before the underlying merits of the petition can receive any consideration, the petitioner must first demonstrate that the AAO erred in summarily dismissing the appeal.

Counsel, on motion, acknowledges that the motion is untimely, but asserts that the delay was reasonable and beyond the control of the petitioner because the decision "was only received by Petitioner on or about May 3, 2013, as a result of a mail delay," and therefore the petitioner could not have filed a motion within 30 days of February 19, 2013.

The petitioner's appeal included Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner on October 25, 2012 and by prior counsel on October 29, 2012. That form listed the petitioner's address as "[REDACTED]" and prior counsel's address as "[REDACTED]". The AAO issued two copies of the summary dismissal, and sent them to the two addresses specified on Form G-28.¹

The U.S. Postal Service returned the petitioner's copy of the decision, marked "undeliverable as addressed / unable to forward." The petitioner is responsible for providing a correct mailing address; USCIS cannot be responsible for postal authorities' inability to deliver mail sent to the address that the petitioner has provided. There is no evidence that the U.S. Postal Service returned counsel's copy as undeliverable. Therefore, the record indicates that USCIS duly served prior counsel with the dismissal notice in a timely manner, at the address specified on Form G-28. Counsel, on motion, does not claim that he or prior counsel was unaware of the decision before May 2013.

Even assuming that prior counsel did not receive the February 2013 dismissal notice, and therefore had no reason to begin preparing a motion until contacted by the petitioner in early May 2013, the motion is still untimely. Counsel signed Form I-290B on June 12, 2013, 39 days after the date that counsel claims the petitioner received the dismissal notice. Counsel's accompanying cover letter bears a date six days

¹ The motion to reopen includes a new Form G-28, signed by the petitioner on June 9, 2013 and by counsel on June 12, 2013. Part 3 of the form includes this instruction before lines 6a-6d: "Provide the mailing address of Petitioner . . . and not the address of the attorney." Despite this instruction, the form provides counsel's Manhattan address on lines 6a-6d.

later, June 18, 2013. USCIS received the motion the following day, June 19, 2013, 46 days after the claimed receipt date.

The petitioner has not accounted for the late filing of the motion. This late filing, by itself, is grounds for dismissal of the motion under 8 C.F.R. §§ 103.5(a)(1)(i) and (4).

Counsel alleges USCIS error in summarily dismissing the appeal, because “[t]he petitioner submitted the [appellate] brief to the address specified on the USCIS’ website within the proper timeframe.” Shipping receipts submitted on appeal show that counsel sent a brief to a USCIS address in Phoenix, Arizona, on November 26, 2012, and to another USCIS address in Dallas, Texas, on December 6, 2012. Counsel submits no printout from USCIS’s web site instructing the petitioner to submit a supplemental brief and/or evidence (as opposed to Form I-290B itself) to either of those addresses.

Every benefit request or other document submitted to the Department of Homeland Security must be executed and filed in accordance with the form instructions, and such instructions are incorporated into the regulations requiring its submission. 8 C.F.R. § 103.2(a)(1). The instructions to Form I-290B include the following passage:

You may submit a brief and evidence with Form I-290B. Or you may send these materials to the AAO within 30 days of filing the appeal. You must send any materials you submit after filing the appeal to:

USCIS Administrative Appeals Office
U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, N.W., MS2090
Washington, DC 20529-2090

The above instruction is consistent with the USCIS regulation at 8 C.F.R. § 103.3(a)(2)(viii), which states that appellants must submit supplemental briefs directly to the AAO. Rather than follow the above instructions in compliance with the regulations, counsel submitted appellate briefs to two other addresses not equipped to process briefs. The AAO did not receive the briefs, and the dismissal notice contained the factually correct assertion that the record did not contain an appellate brief at the time of the dismissal. Counsel has not established USCIS error on this point.

Counsel asserts that the “petitioner did provide sufficient allegation of USCIS error . . . on the Form I-290B submitted previously.” Counsel quotes from the initial appeal statement: “The decision is arbitrary and capricious and is not consistent with published regulations.” The summary dismissal notice indicated that prior counsel did “not cite any specific regulation or explain how the decision is inconsistent with it.”

On motion, counsel states that the cover letter submitted with the appeal identified the relevant regulation as 8 C.F.R. § 204.5(k). The cited section contains several different regulations, including evidentiary requirements and definitions of terms. Identifying the regulation as 8 C.F.R. § 204.5(k)

would not have made the appeal a substantive one. As the dismissal notice stated, the appeal was deficient because the petitioner did not “explain how the [director’s] decision is inconsistent with” the regulations. The initial appeal statement identified no deficiency, instead offering only the general allegation that the director’s “decision is arbitrary and capricious.” This statement is a conclusion, offered without supporting premises. Counsel endeavors to expand upon this statement on motion, stating that the director disregarded “overwhelming evidence” of eligibility. This assertion is still a general claim that identifies no specific error, but the initial appeal did not contain this claim. It consisted of one sentence, quoted above, that generally alleged error but did not identify any such error.

The record identifies errors and omissions by counsel with respect to the appeal and the motion, but it does not show adjudicative error by the AAO relating to the summary dismissal of the appeal. The petitioner’s untimely motion does not meet the requirements of a motion to reopen, and therefore the USCIS regulation at 8 C.F.R. § 103.5(a)(4) requires that the motion “shall be dismissed.”

Beyond the above discussion, the record does not show that consideration of the appellate brief would have resulted in approval of the petition.

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. By the wording of the statute, above, aliens of exceptional ability are subject to the job offer requirement. 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.” Therefore, evidence of such a degree of expertise in one’s field is not sufficient to establish eligibility for the waiver.

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 petitioner’s initial submission consisted primarily of letters from witnesses who have taught or worked with the petitioner; certificates and other materials showing the petitioner’s involvement in symposia, task forces, and other professional activities; and copies of the petitioner’s scholarly writings.

On April 26, 2012, the director issued a request for evidence (RFE). The director requested additional evidence relating to all three prongs of the *NYSDOT* national interest test. The director stated that the petitioner did not provide a sufficient description of his work to establish its intrinsic merit. The director asserted that the submitted letters were from employers and colleagues rather than independent witnesses, and that the petitioner’s work appeared to benefit primarily his own employers and clients. The director found that the petitioner had not sufficiently explained how his future work would benefit the United States on a national scale. The director stated that the petitioner “must establish a record of specific prior achievement with some degree of influence on the field as a whole.”

The petitioner’s response to the RFE consisted of a statement from prior counsel, a copy of the petitioner’s previously submitted introductory statement, and “an expert Advisory Opinion Letter” from [REDACTED]. Prior counsel stated that the petitioner’s occupation has substantial intrinsic merit because it addresses “project time overruns,” which are “of particular importance in both the Construction Industry and Petrochemical Industry.” Prior counsel contended that the petitioner’s work would produce benefits that are national in scope because he will “find ways to further reduce time and cost while maintaining quality of construction and petrochemical projects,” which “will ultimately attract investors to commence new projects” and “in turn, create new jobs for Americans.” Prior counsel stated:

As Contracts Specialist [at [REDACTED] one of [the petitioner’s] primary tasks [at [REDACTED] was to review thousands of technical and contractual documents of an under-

construction Polyethylene Plant (approximate value of US \$0.5 billion) in order to uncover reasons and find solutions for US \$125 million cost overage and a 10-month time overrun.

Prior counsel stated that a four-member task force, including the petitioner, “held several meetings with the contractor’s senior management and legal advisors to precisely present them the true picture,” which allowed [REDACTED] . . . to achieve the intended goals. . . . As a learned lesson, [REDACTED] decided to use this expertise on other projects in order to avoid a similar situation.”

Prior counsel asserted that the national interest waiver is in order because the petitioner “possesses exceptional and unique international expertise in the field of Project Management, he has influenced his field to a substantial degree and will continue his extraordinary work in the U.S., if permitted to immigrate.” Prior counsel also asserted that the petitioner’s “skills are urgently needed now in the U.S.,” whereas “the Labor Certification Process . . . [takes] at least 2-3 years to complete,” and that the petitioner’s “background and skills are unique and cannot be properly articulated on a labor certification application.” Prior counsel further stated that the petitioner “will likely not work for any one traditional employer.”

Prior counsel stated that the petitioner’s “work has been published in refereed peer review journals and cited in multiple international journals,” and claimed that “[o]nly the leading professionals in the field have their research published in prestigious journals. . . . Most noteworthy, his research paper “[REDACTED] is cited by ten researchers.” The RFE response did not include documentation of the claimed citations or evidence to show that the number of claimed citations was particularly high in the specialty. The petitioner’s co-authors on that paper are on the faculty of [REDACTED] where the petitioner earned his graduate degrees between 1997 and 2003.

Prior counsel quoted remarks made by [REDACTED] on July 12, 1989, in support of an immigration “policy that encourages skilled workers and people with exceptional abilities to come to our country.” The debate at that time led to the passage of the Immigration Act of 1990, which generally holds professionals and aliens of exceptional ability to a statutory job offer requirement.

[REDACTED] stated that his “[t]eaching and research concentration” were in the areas of “Supply Chain Modeling and Analysis, Statistics, Simulation Systems, Logistics, Inventory Management, and Production Planning.” He added: “Prior to my current position, I worked 21 years in the textile industry both as a consultant, executive, and owner.” Regarding the petitioner, [REDACTED] stated:

His unique and exceptional set of skills in project management, arbitration, human capital, and risk analysis were also demonstrated when he was able to review for [REDACTED] a Japanese Contractor claim of \$120 million [sic], and based on his analysis and recommendations, the claim was friendly settle on [sic] less than \$10 million.

In the October 1, 2012 denial notice, the director acknowledged the intrinsic merit of the petitioner's occupation, but found that the petitioner had not established that the proposed benefit is national in scope. The director stated: "The record shows that the petitioner has made contributions to his employers, who are located in the Middle East. However, the record has not shown how the petitioner's work has impacted the field." The director discussed the petitioner's evidentiary exhibits and noted the lack of evidence that the petitioner's "scholarly article had provided widespread public commentary in the field or had the beneficiary widely cited by others in the field."

In the subsequent appellate brief, prior counsel claimed that the RFE was deficient because it "did not articulate the type of evidence and/or documentation" that the petitioner needed to submit in order to establish eligibility, and was contrary to USCIS policy against issuance of "broad brush" RFEs.

When prior counsel first responded to the RFE, there was no allegation that the RFE was overly broad or lacked sufficient detail for the petitioner to be able to submit a meaningful response. In the four-page RFE, the director acknowledged that the petitioner had submitted sufficient evidence to establish that he is a member of the professions holding an advanced degree. The director did not request redundant evidence regarding a requirement that the petitioner had already met. The director only requested evidence relevant to the national interest waiver application.

The director addressed each of the three prongs of the *NYS DOT* national interest test and provided examples of evidence that could satisfy those prongs. For example, the director stated that the petitioner could establish national scope with:

- Evidence that [his] work has provided widespread public commentary in the field or has been widely cited; and
- Evidence of [his] work being implemented by others throughout the nation. Possible evidence may include but is not limited to:
 - Contracts with companies using [his] ideas and products;
 - Licensed technology being used by others; or
 - Patents currently being utilized and shown to be significant in the field.

The director also indicated that qualifying evidence could include:

- Documentation to show [the petitioner has] created jobs domestically for U.S. workers;
- Additional letters from current or former employer(s) or client(s) with personal knowledge of the significance of [his] present and past contributions. . . .
- A detailed statement that describes, in plain English, the significance of [his] accomplishments in the fields of contracting and project management, supported by corroborating, independent, documentary evidence . . . ;
- A list of current and prospective clients in the United States.

The record does not support prior counsel's claim, not raised until the appeal, that the RFE lacked specificity or failed to take prior evidence into account.

Prior counsel asserted that the decision "clearly did not meet the 'preponderance of the evidence' standard . . . The decision dismissed many of the strongest pieces of evidence, failed to mention others and imposed evidentiary requirements which are nowhere to be found in any USCIS regulation, field manual or operating instruction." In expanding on this claim, prior counsel identified only one prior submission, specifically [REDACTED]'s letter. Prior counsel asserted: "[REDACTED]'s expert opinion letter is an independent testimonial letter. The failure to give any significant weight to this letter clearly raises the presumption that this decision did not meet the 'preponderance of the evidence' standard." Prior counsel did not show how the stated premises support the stated conclusion.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795.

In this instance, after the director requested letters from independent experts, the petitioner responded with a letter from an individual with a background in the textile industry, who claimed no experience in the petrochemical industry and no expertise in contracting management. [REDACTED] did not explain how he knew the petitioner's accomplishments to be particularly significant in the context of his specialty.

Prior counsel stated:

The [adjudicating] officer further dismisses the Appellant[']s research and publications by stating that his work had not "been widely cited by others in the field." The facts, however, speak otherwise. [REDACTED]'s expert opinion letter clearly notes "that his work is cited by US researchers from prestigious universities. . . ."

The evidence, however, clearly demonstrates that [the petitioner's] work has been cited, discussed and utilized by researchers in the United States and around the world.

[REDACTED]'s letter is not evidence of citation of the petitioner's work. It is, rather, a claim to that effect. *See Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)) (going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

The appellate brief includes the web addresses for search results on the [REDACTED] database. Prior counsel stated that these results establish numerous citations of the petitioner's published work. The petitioner did not submit printouts of the actual search results, and [REDACTED] is a subscription service that requires users to log in with a username and password. Therefore, the appellate brief did not include verifiable documentary evidence of the claimed citations.

Furthermore, the director had requested such evidence in the RFE, and the petitioner did not submit evidence of citation at that time. When the director puts the petitioner on notice of required evidence and gives him a reasonable opportunity to submit it before the issuance of the decision, the AAO will not consider this evidence when offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

For the above reasons, the appellate brief would not have resulted in the approval of the petition, even if prior counsel had properly sent that brief directly to the AAO. As it stands, prior counsel did not submit the brief directly to the AAO, and the AAO correctly found that the record, at the time of its decision, contained no such brief. The motion was untimely filed, even allowing for the delay in delivery of the petitioner's copy (but not counsel's copy) of the appellate decision.

The AAO will dismiss the motion for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion is dismissed.