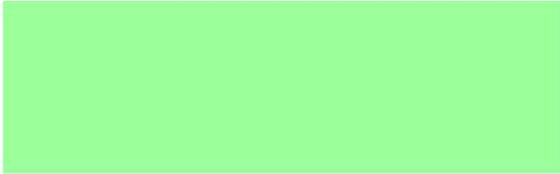


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

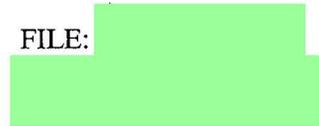


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OFFICE: TEXAS SERVICE CENTER

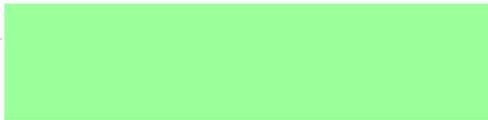
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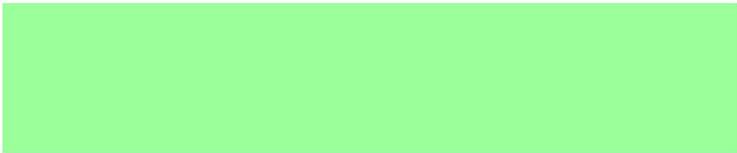
Petitioner:

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 an advanced degree. The petitioner seeks employment as a primary Montessori teacher in [REDACTED]

The petitioner began teaching at [REDACTED] a [REDACTED] school in [REDACTED] Maryland, in 2008. 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.

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 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,' 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 teacher 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 waivers for teachers are "mandated by 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 shows that the petitioner teaches children three to five years of age; it does not document a significant STEM emphasis (beyond general concepts such as counting and basic arithmetic) for students in that age group. The petitioner does not claim specialization in STEM 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 making 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 two “Certificates of Recognition” (one for judging a [REDACTED] and one “for rendering invaluable services to the [REDACTED]” of the [REDACTED] letters from teachers, administrators, and other witnesses; 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.

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.

[REDACTED] program coordinator at [REDACTED] stated: “The extensive training, which Montessori teachers must undergo, makes the recruiting and hiring of well-trained staff exceptionally challenging. . . . Montessori teachers are not easy to find because of their unique training.” A shortage of qualified workers in a given field does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. *NYSDOT*, 22 I&N Dec. at 218. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

The director issued a notice of intent to deny the petition on August 22, 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’s “proposed employment will not be national in scope” and that “[t]he evidence fails to establish that the beneficiary’s proposed employment would specifically benefit the national interest of the United States to a substantially greater degree than a similarly qualified U.S. worker.”

In response, 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 policy implies a blanket waiver for teachers without ever plainly or directly establishing that waiver.

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."

As an "equitable consideration," the petitioner stated:

She is firmly committed to continue teaching at [REDACTED]. However, [REDACTED] 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 [REDACTED]'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 [REDACTED] 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.

The petitioner submitted materials relating to her employment at the [REDACTED] a school that the petitioner helped to establish in [REDACTED] in the 1990s. The petitioner did not claim or establish that her past work on behalf of a private religious school in the Philippines has influenced public education as a whole in the United States.

The director denied the petition on November 22, 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 [REDACTED] is local in scope, and that the petitioner's assertions regarding national education policy "are general in nature, and therefore do not pertain specifically to the petitioner." The director also found that the petitioner had identified no "prior achievement . . . that yielded national benefits."

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 other petitions. We have not reviewed the approved petitions, and the petitioner did not submit their records of proceeding. Therefore, we cannot determine whether the other petitions were approved in error, or whether the present petition compares favorably to the approved petitions. 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 that the director should have relied on the NCLBA "as the guiding principle rather than the precedent case [*NYSDOT*] which involved an engineer." The petitioner asserts that *NYSDOT* offers little specific guidance as to what, exactly, serves the national interest. The petitioner contends that "[t]he obscurity in the law that *NYSDOT* sought to address has been clarified":

[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 elementary education sector. . . .

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. . . .

[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.

The NCLBA, however, did not amend the Act or mention the national interest waiver. 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.” While the beneficiary in *NYSDOT* was an engineer, the three-part national interest test outlined in that precedent decision is general in nature. It does not include specific evidentiary requirements that only an engineer could satisfy, and its application is not 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.

Improving public education would serve the national interest, and a foreign worker who had made demonstrable progress in that area, at a nationally significant level, could have a strong claim for the waiver. 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 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.