



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAY 21 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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, Nebraska Service Center, denied the employment-based immigrant visa petition. The AAO rejected the petitioner's appeal, and then dismissed two subsequent motions; one a motion to reconsider and a subsequent motion to reopen and reconsider. The matter is now before the AAO on another motion to reconsider. We will dismiss the motion.

The petitioner seeks to classify the beneficiary under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences, the arts, or business. The petitioner, a biaxially oriented polypropylene and cellulose films supplier with a manufacturing plant in [REDACTED] is the United States subsidiary of a parent corporation based in the United Kingdom. The petitioner seeks to employ the beneficiary as a process engineer. 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 beneficiary 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 motion, the petitioner submits a brief from counsel and new evidence. A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 402-403 (BIA 1991). *See also* the definition of a motion to reopen at 8 C.F.R. § 103.5(a)(2).

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The present motion involves several issues, to be addressed individually below.

### Form G-28

Under the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a), if an attorney files an appeal with the AAO, the filing must include Form G-28, Notice of Entry of Appearance as Attorney or Representative, newly executed by the attorney filing the appeal. This requirement, which applies even if the record includes an older form from the same attorney with the underlying petition, applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (February 2, 2010).

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on July 30, 2009. At that time, [REDACTED] of [REDACTED] was the petitioner's attorney of record; a Form G-28 bearing her signature accompanied the petition at the time of filing. While the petition was pending, the petitioner filed a second Form I-140 petition, with receipt number [REDACTED]

on May 18, 2010. That petition included an original Form G-28, on blue paper, signed by human resources manager [REDACTED] on April 6, 2010 and by attorney [REDACTED] managing partner of [REDACTED] on May 17, 2010.

The director denied the present petition on May 27, 2010. No official of the petitioning company signed Form I-290B, Notice of Appeal or Motion. Instead, another attorney with [REDACTED] signed the appeal which was filed on June 24, 2010. The appellate filing did not include the required new Form G-28 from Mr. [REDACTED]. Rather, the petitioner submitted a photocopy of the aforementioned Form G-28 that [REDACTED] signed on May 17, 2010, to accompany the May 2010 Form I-140. The photocopy shows a receipt stamp dated "JUN 24 2010 - 8<sup>00</sup> AM." The same stamp appears on the Form I-290B signed by Mr. [REDACTED]. The record contains no other Form G-28, original or copied, stamped with that same date and time.

On August 31, 2011, we sent a message by facsimile (fax) to [REDACTED] instructing Mr. [REDACTED] to submit the required new Form G-28 within ten (10) calendar days. We received no response from Mr. [REDACTED] or any other attorney at the firm during the time permitted. We rejected the appeal on September 22, 2011, 22 days after requesting the Form G-28, stating:

A photocopy of an older Form G-28, from a different attorney than the one who signed Form I-290B, is not a newly executed Form G-28 from the attorney filing the appeal. The USCIS regulation at 8 C.F.R. § 292.4(a) requires the submission of a new Form G-28 in the event of attorney substitution, whether or not the two attorneys work for the same firm. Form G-28 relates to individual attorneys and does not establish or imply blanket representation for an entire firm.

The petitioner filed its first motion to reconsider on October 26, 2011. Our June 18, 2012 dismissal notice read, in part:

On motion, counsel [REDACTED] does not contest any of the facts stated in the AAO's September 2011 rejection notice, and counsel does not dispute that a newly executed Form G-28 was required on appeal. Counsel acknowledges that "Mr. [REDACTED] did not respond" to the AAO's request for a new Form G-28. Counsel explains that Mr. [REDACTED] had left the firm by the time of the AAO's August 2011 request, and asserts: "Had this matter been properly brought to my attention, I would have explained the circumstances to the AAO."

Regarding the initial filing of the appeal, counsel claims: [REDACTED] . . . had signed the I-290B form to appeal the denial but had not filed it. When I discovered that the I-290B form had not been filed and furthermore, that Mr. [REDACTED] had not obtained a G-28 form from the petitioner, I signed and included in the package a G-28 form. . . . The NSC [Nebraska Service Center] Director obviously found my G-28 acceptable."

The record shows that present counsel [REDACTED] did not sign a new Form G-28 to accompany the appeal. Rather, the Form G-28 that accompanied the appeal was a

photocopy of a Form G-28 that had Mr. [REDACTED] had previously signed and dated May 17, 2010.

Counsel has not disputed the basic facts underlying the AAO's rejection notice: the appeal did not include a new Form G-28 signed by an authorized official of the petitioning entity and by Mr. [REDACTED] (the party who signed the appeal form), and the AAO received no response when it requested that required form. Without that Form G-28, the AAO had no authority to accept the appeal as properly filed, and the regulations cited above therefore compelled the rejection of the appeal.

The petitioner filed its second motion on July 18, 2012. Our July 19, 2013 dismissal notice contains the following passage:

Before rejecting the appeal, the AAO had instructed the firm that filed the appeal to provide a "new Form G-28." In response, the firm submitted a photocopy of a Form G-28 signed by counsel on May 17, 2010, which was more than a month before the filing of the appeal. Furthermore, an official of the petitioning entity executed that Form G-28 in reference not to a Form I-290B Notice of Appeal or Motion, but in reference to a Form I-140 petition. The photocopied Form G-28, therefore, did not establish that counsel represented the petitioner with respect to the filing of the appeal . . . Counsel disputes the AAO's description of the Form G-28 as a "photocopy," and maintains that he submitted an original document, but even if this were so, it would not overcome the issues enumerated above.

The petitioner filed its third and most recent motion on August 21, 2013. On motion, Mr. [REDACTED] states:

The AAO . . . has repeatedly alleged that I filed an improperly signed G-28 (a photocopy of a G-28 signed by the Petitioner) with the Notice of Appeal signed by Mr. [REDACTED]. In response to such allegations, counsel for the Petitioner respectfully requests the right to review, pursuant to 8 CFR §103.2(a)(16), the record of this case, and specifically, the photocopy of the G-28 form that I allegedly signed improperly.

. . . If the AAO would have accepted a faxed copy of a G-28 form [from Mr. [REDACTED] . . .], one could wonder why such protestations have since been raised over an alleged signing of a "photocopy" of a G-28 form. . . .

I will not accept the AAO's allegation about my "improper signing" of the G-28 form, until I personally see that form and confirm the allegations by the AAO. In that regard, I respectfully request the right to review that G-28 form, and the record of proceeding in this matter.

There was no allegation that Mr. [REDACTED] "improperly signed" the Form G-28, or signed a photocopy of a previously executed Form G-28. Rather, we found that, because [REDACTED] signed the

Form I-290B, a Form G-28 in Mr. [REDACTED] name, whether original or copied, cannot establish that [REDACTED] was the petitioner's attorney of record, with standing to sign Form I-290B on the petitioner's behalf.

Counsel compares the acceptance of a photocopied Form G-28 with the acceptance of a faxed Form G-28. In the present proceeding, the issue is not that the petitioner submitted a photocopy of a Form G-28; rather, the copy submitted by Mr. [REDACTED] (1) predated the denial of the petition; (2) related to a different petition; and (3) did not establish Mr. [REDACTED] representation of the petitioner.

The regulation at 8 C.F.R. § 103.2(b)(16), cited by counsel, states that a petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision. A party to a proceeding and his or her attorney or representative will be permitted to examine the record of proceeding in accordance with 6 C.F.R. § 5. 8 C.F.R. § 292.4(b). The present decision includes photocopies of both versions of Mr. Banta's April 6/May 17, 2010 Form G-28 as attachments.

The next two issues concern the interpretation of the USCIS regulations at 8 C.F.R. § 103.3(a)(2)(v)(A), including subsections. Because counsel has alleged our selective reading of the regulations, the full text of the relevant regulations follows.

*(v) Improperly filed appeal—*

*(A) Appeal filed by a person or entity not entitled to file it—*

*(1) Rejection without refund of filing fee.* An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

*(2) Appeal by attorney or representative without proper Form G-28—*

*(i) General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

*(ii) When favorable action warranted.* If the reviewing official decides favorable action is warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 to the official's office within 15 days of the request. If Form G-28 is not submitted within the time allowed, the official may, on his or her own motion, under Sec. 103.5(a)(5)(i) of this part, make a

new decision favorable to the affected party without notifying the attorney or representative.

(iii) *When favorable action not warranted.* If the reviewing official decides favorable action is not warranted with respect to an otherwise properly filed appeal, that official shall ask the attorney or representative to submit Form G-28 directly to the AAU. The official shall also forward the appeal and the relating record of proceeding to the AAU. The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.

### Request for Form G-28

In the brief submitted with the latest motion, Mr. [REDACTED] asserts that [REDACTED] had left [REDACTED] after the filing of the appeal but before we requested a new Form G-28. Counsel states:

On receipt of the AAO's August 31, 2011 fax, the Petitioner and my firm were in a dilemma. The Petitioner did not want Mr. [REDACTED] to represent the company in the pending appeal. By that time, Mr. [REDACTED] was employed by another law firm, in Raleigh, North Carolina, and [REDACTED] understood that having Mr. [REDACTED] submit a G-28, reflecting the name of his new law firm would block the Petitioner's choice of legal representation in the matter.

The purpose of requiring a new Form G-28 on appeal is to establish that the attorney named on that form truly represents the petitioner, and that the petitioner is aware of, and consents to, that representation. Counsel, on motion, acknowledges that "The Petitioner did not want Mr. [REDACTED] to represent the company in the pending appeal."

Counsel, on motion, states: [REDACTED] was unable to find, in 8 C.F.R. § 103.3(a)(2)(v)(A)(1) (the regulation cited by the AAO in its fax), the authority claimed by the AAO, to issue such a demand for a G-28 from Mr. [REDACTED] and to create and impose such an unreasonably short response time (10 calendar days)."

The AAO's August 31, 2011 fax cited the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) not as authority for requesting the Form G-28, or to support the length of the response period. Rather, the fax contained this passage:

As required by 8 C.F.R. § 103.3(a)(2)(v)(A)(2) and its subclauses, you must submit a duly executed Form G-28 signed by yourself and by an authorized official of the petitioning entity within ten (10) calendar days of the date of this notice. Failure to

submit this required document will result in the rejection of the appeal as improperly filed, under the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

Counsel states that the 10-day response period in the AAO's August 2011 fax was "unreasonably short." The June 2012 dismissal notice addressed this issue:

Counsel also protests that the AAO "erred again by giving only 10 calendar days" for the firm to submit the Form G-28 from Mr. [REDACTED]. Counsel observes that the regulation at § 103.3(a)(2)(v)(A)(2)(ii) allows a 15-day response period. Counsel does not show, however, that this five-day difference is what prevented counsel from submitting the required Form G-28 from Mr. [REDACTED] or even from providing an explanation regarding Mr. [REDACTED]'s departure from the firm. Therefore, counsel has not shown that the ten-day response period in any way prejudiced what would otherwise have been a timely and complete response to the AAO's August 31, 2011 notice.

Counsel notes that, if USCIS does not contemplate favorable action on appeal, the regulation at § 103.3(a)(2)(v)(A)(2)(iii) includes "[n]o regulatory time limit, during which the new Form G-28 was to be submitted to the AAO." The apparent implication is that a given petitioner should have an indefinite period of time in which to execute and submit the Form G-28.

In the second motion, filed in response to our June 2012 decision, counsel did not address the issue of the 10-day response deadline, effectively abandoning the issue. *Cf. Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2. (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998). *See also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (plaintiff abandoned his claims as he failed to raise them on appeal to the AAO).

In the present (third) motion, counsel states:

In support of the Petitioner's first MTR [motion to reconsider], [REDACTED] erroneously contended that the 10 day response time set by the AAO for Mr. [REDACTED] to file his properly signed G-28 should have been 15 days, as required by §103.3(a)(2)(v)(A)(2) (ii). The 15 day response time in §103.3(a)(2)(v)(A)(2) (ii) only applies when the reviewing official determines that favorable action is warranted on appeal. . . .

Subsection 103.3(a)(2)(v)(A)(2)(iii) . . . does not contain any time limit within which the attorney or representative must submit the properly signed G-28 directly to the AAO. . . .

In fact, §103.3(a)(2)(v)(A)(2)(iii) does not require the AAO to hold an appeal "in abeyance, potentially, for months or years," while waiting for a G-28. When the AAO is ready to adjudicate the appeal, [if] the G-28 has not appeared, then the AAO

can proceed with processing the appeal as if the improperly signed G-28 had never been submitted.

(Footnotes omitted.) The above discussion does not distinguish between an appeal filed by the petitioner and an appeal filed by an attorney or representative. This critical difference lies at the heart of the next issue to be discussed.

### **Rejection of Improperly Filed Appeal**

An applicant or petitioner must sign his or her benefit request. 8 C.F.R. § 103.2(a)(2). The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i) refers to “an appeal . . . filed by an attorney or representative,” thus permitting an attorney to file an appeal on behalf of the petitioner. Mr. [REDACTED] signed Form I-290B, meaning that he, not the petitioner, filed the appeal.

The USCIS regulation at 8 C.F.R. § 292.4(a) states: “a new form [G-28] must be filed with an appeal filed with the Administrative Appeals Office of USCIS.” “New,” in this instance, means that the Form G-28 relates specifically to the appeal, rather than to the underlying petition or some other proceeding. A Form G-28 executed before the denial of the petition is not “new” when submitted on appeal; it does not reflect that the petitioner specifically authorizes the attorney or representative to represent the petitioner on appeal.

Counsel cites chapter 12.3 of the Adjudicator’s Field Manual (AFM), which reads, in pertinent part:

#### **12.3 Proper Service of Documents & Notices**

Once an attorney or accredited representative has filed a properly completed Form G-28 or Form G-28I on behalf of an applicant or petitioner, USCIS is required to serve documents and notices on the attorney or accredited representative. . . .

In all other instances (e.g., where the applicant or petitioner is not represented), original benefit notices and documents evidencing lawful status that are issued based on the approval of a benefit request will be sent directly to the applicant or petitioner. In matters where the Form G-28 or Form G-28I is not accepted because the individual is not an eligible representative or because the form is not properly signed, the application or petition will be processed as if the applicant or petitioner is unrepresented. The receipt notice and any other notices will be sent only to the applicant or petitioner.

Counsel asserts that the chapter cited above establishes that the AAO erred in rejecting the appeal. That chapter, however, only concerns service of documents and notices. It does not address the issue of proper filing of benefit requests such as appeals. Counsel has not identified any chapter of the AFM that provides instructions to field adjudicators on rejecting appeals.

Chapter 10.1, “Receipting and Acceptance Processing,” discusses rejection of filings, but does not mention Form I-290B. AFM chapter 12.2 states: “When filing an appeal with the Administrative Appeals Office on Form I-290B, the attorney or accredited representative must file a new Form G-28.” The AFM does not give field adjudicators instructions on when or how to reject an improperly filed appeal. Instead, a note in AFM chapter 10.8 states that “[t]he AAO maintains jurisdiction over all appeals, even when it is . . . not filed by the affected party.” The same note indicates that, with certain exceptions that are not relevant here, “all appeals must be forwarded promptly to the AAO” even if the appeals were not properly filed. Therefore, it falls under the purview of the AAO, not the service centers, to determine whether or not to reject an appeal as properly filed.

Counsel contends that the AAO misread the regulation at 8 C.F.R. § 103.3(a)(2)(v), and that the regulation, read as a whole, does not permit the rejection of an appeal filed by an attorney without a new Form G-28. The full text of the regulation appears earlier in this decision. Below are the headings of the various subsections of the pertinent regulation:

*(v) Improperly filed appeal*

*(A) Appeal filed by a person or entity not entitled to file it*

*(1) Rejection without refund of filing fee*

*(2) Appeal by attorney or representative without proper Form G-28*

All regulations within subsection (v) concern “improperly filed appeals,” and all regulations within subsection (v)(A) concern an “appeal filed by a person or entity not entitled to file it.” Subsections (v)(A)(1) and (v)(A)(2) are not unrelated or mutually exclusive clauses. Rather, they deal with different aspects of an appeal that was “improperly filed” “by a person . . . not entitled to file it.” The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) provides the general instruction to reject such an appeal; the regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2) deals not with an entirely separate class of appeals, but rather with a particular type of improperly filed appeal that, like all improperly filed appeals, is subject to the rejection clause at 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

Counsel states:

§103.3(a)(2)(v)(A)(2) (i) clearly says that refusing or rejecting an appeal, accompanied by an improperly signed G-28, is not mandatory. If the USCIS were prohibited from accepting such an appeal, why would the final sentence of §103.3(a)(2)(v)(A)(2)(i) state that the USCIS has more than one “action” it can take after accepting such an appeal: “In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.”

The reference to “regardless of the action taken” leads into the two subsections that follow (i), those being (ii) and (iii). Subsections (ii) and (iii) refer to actions that “the

reviewing official” may take, after accepting an appeal that has been otherwise properly filed (but for an improperly signed G-28).

Counsel has underlined the phrase “has accepted,” but this phrase refers to acceptance of the filing fee, not acceptance of the appeal. Subsections (ii) and (iii) provide a means to cure the defective filing (by soliciting the missing Form G-28). Whether or not the attorney does cure the defect, the “filing fee . . . will not be refunded regardless of the action taken.” If the attorney provides the form, adjudication of the appeal proceeds. Otherwise, the two subsections provide different courses of action for the “reviewing official,” but neither of those courses of action involves accepting an improperly filed appeal, and neither course of action precludes or replaces rejection of the appeal.

8 C.F.R. § 103.3(a)(2)(v)(A)(2)(ii) states: “the official may, on his or her own motion, under Sec. 103.5(a)(5)(i) of this part, make a new decision favorable to the affected party without notifying the attorney or representative.” 8 C.F.R. § 103.5(a)(5)(i), in turn, states: “When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision in order to make a new decision favorable to the affected party, the Service officer shall combine the motion and the favorable decision in one action.” In this situation, the official is not accepting the appeal as properly filed. The favorable action results not from the appeal, but rather from the reviewing official’s “own motion.”

8 C.F.R. § 103.3(a)(2)(v)(A)(2)(iii) states, in pertinent part: “The appeal may be considered properly filed as of its original filing date if the attorney or representative submits a properly executed Form G-28 entitling that person to file the appeal.” It necessarily follows that, if the attorney or representative does not submit “a properly executed Form G-28,” then USCIS may not consider the appeal to be properly filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states: “An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed.” The word “must” in this way requires rejection of the appeal; it does not leave the matter to the discretion of any USCIS official. The same regulation states that, in the event of rejection, “any filing fee the Service has accepted will not be refunded.” This same language about not refunding the filing fee also appears at 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i), because, even though special provisions exist for appeals filed without Form G-28, those provisions refer to actions taken in addition to, rather than instead of, rejection of the appeal.

In short, 8 C.F.R. § 103.3(a)(2)(v)(A)(1) states that all improperly filed appeals “must be rejected”; 8 C.F.R. § 103.3(a)(2)(v)(A)(2) describes one particular type of improperly filed appeal. The latter regulation provides opportunities to cure the deficiency, but does not prevent the rejection of an appeal when the deficiency remains uncured.

Counsel states: “When the AAO is ready to adjudicate the appeal, [if] the G-28 has not appeared, then the AAO can proceed with processing the appeal as if the improperly signed G-28 had never been submitted.” We did proceed with processing the appeal. In the absence of a new G-28 from

the attorney who filed the appeal, the appeal was “filed by a person . . . not entitled to file it,” and therefore it “must be rejected as improperly filed.”

For the above reasons, counsel has not shown that the rejection of the appeal resulted from an error of fact or law. The latest filing does not meet the regulatory requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3), and the we will therefore dismiss the motion as required by the regulation at 8 C.F.R. § 103.5(a)(4).

### **Child Status Protection Act (CSPA)**

Before turning to the merits of the petition, another issue warrants discussion. The July 2013 dismissal notice included the following passage:

Counsel asserts that the petitioner continues to pursue the present matter because the beneficiary’s “oldest child turned 21 subsequent to the filing of the NIW on the Beneficiary’s behalf, which means that if the appeal is rejected, the Beneficiary’s oldest child will not be able to obtain lawful permanent residence along with the Beneficiary, his wife and their other children.” The petitioner filed the present petition on July 30, 2009, four days before the beneficiary’s oldest child reached age 21. . . .

[T]he petitioner’s approved petition has a priority date of February 6, 2009, which is almost six months earlier than the July 30, 2009 filing date of the petition now before the AAO on motion. Approval of the present petition would not provide an earlier priority date.

On motion, counsel cites the Child Status Protection Act (CSPA), Pub.L. 107-208 (Aug. 6, 2002), which amended section 201(f)(1) of the Act to state:

Except as provided in paragraphs (2) and (3), for purposes of subsection (b)(2)(A)(i), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using the age of the alien on the date on which the petition is filed with the Attorney General under section 204 to classify the alien as an immediate relative under subsection (b)(2)(A)(i).

Counsel asserts that, because the above provisions concern the filing date of the petition, rather than the priority date, the previously approved petition will not allow the beneficiary’s eldest daughter to adjust status concurrently with the beneficiary. Counsel contends that “the Present Adjudicator has made an error of law in completely overlooking, or in misinterpreting the CSPA.” If there has been an error on this issue, however, it is not grounds for reconsideration. The ability of the petitioner’s daughter to adjust status is not material to the proceeding at hand. This proceeding is not an adjustment application. Rather, it is an employment-based immigrant visa petition. The director denied the petition based on a finding that the beneficiary does not qualify for a waiver of the statutory job offer requirement at section 203(b)(2)(B) of the Act. The statutory threshold for that

waiver is “the national interest,” rather than family circumstances that cause the beneficiary to prefer an earlier filing date.

### **Merits of the Petition**

Notwithstanding the rejection of the appeal, the discussion below will establish that the petitioner would not have prevailed on the merits. 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 petitioner claims that the beneficiary is eligible for classification as an alien of exceptional ability in the sciences, the arts, or business. The director determined that the beneficiary, whose occupation meets the regulatory definition of a profession at 8 C.F.R. § 204.5(k)(2) and who meets the requirements set forth at 8 C.F.R. § 204.5(k)(3)(i), qualifies as a member of the professions holding an advanced degree. To make an additional determination regarding the petitioner’s claim of exceptional ability would confer no further benefit on the beneficiary and would not alter the outcome of the proceeding.

The denial of the petition rested on the question of 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, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

The Service [now 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 initial filing of the petition included Form ETA 750 Part B, Statement of Qualifications of Alien, which included the following description of the beneficiary’s duties with the petitioning company:

Responsible for effectively and efficiently managing to completion the process, development and management of a range of engineering projects, to include the development, design, and manufacturing trials of new products, technical process and product development, delivery of technical support to key customers of Tecumseh operations, project development and management, analysis, evaluation, and development of production issues and analysis and evaluation of new raw materials from suppliers.

In an introductory memorandum submitted with the petition, attorney [REDACTED] stated:

The Petitioner seeks an immigrant visa based on the Beneficiary's exceptional accomplishments in a field of national importance: cellophane film packaging production. . . .

This particular case is very timely considering our current domestic and global initiative of producing "green" products that will reduce the negative impact on our environment. The concept of attracting the best and the brightest from the international pool of professionals is considered to be a positive stimulus for our ailing economy. . . .

The Petitioner holds a unique place in the U.S. packaging industry, as it produces cellophane, and not a plastic-based packaging material. Cellophane is much more environmentally sensitive. It is made from natural fibers, including [REDACTED] which the Petitioner procures from [REDACTED] maintained by the U.S. [REDACTED] industry. In addition, the Petitioner's newest product, [REDACTED]<sup>TM</sup>, is both compostable and biodegradable – the only product of its kind in the U.S. market. . . .

An important component in this submission is to demonstrate how the Beneficiary's expertise will contribute to job creation. As such, the national interest in his employment outweighs the national interest of job protection. Again, the Beneficiary's expertise will ultimately create employment opportunities for U.S. workers!

Importantly, the Beneficiary's work and contributions to his field of expertise are so unique that they cannot be completely or accurately represented in a labor certification. . . .

The Beneficiary's job duties are completely proprietary and unique in the packaging industry in the United States, and there is no group of his peers that possesses the unique skills that he has. As such, it would be nearly impossible to represent this "job opportunity" in a traditional labor certification.

When Ms. [REDACTED] wrote that "the Beneficiary's work and contributions . . . cannot be completely or accurately represented in a labor certification," an application for labor certification was already pending on the beneficiary's behalf. Its subsequent approval formed the basis for an approved immigrant petition. Therefore, there is no need to speculate as to whether or not the petitioner would be able to obtain an approved labor certification for the beneficiary.

The petitioner submitted background information regarding efforts to reduce packaging waste, as well as printouts of online materials promoting the petitioner's products, including [REDACTED]. Some of these materials are from the petitioner's own web site, and others are articles deriving from the petitioner's press releases. These background materials do not identify the beneficiary.

The initial submission included four witness letters, all on the petitioner's letterhead. [REDACTED] identified above, provided the most detailed information. He asserted that the [REDACTED] group, comprising the petitioner, its parent company, and overseas affiliates, "is the ONLY large scale producer of cellophane films" in the world, other manufacturers having switched to oil-based plastics. He stated:

The methods used to generate plastic and cellophane films are very different, and require different machinery and processes to produce. As such, an individual who has worked in the plastic film industry will not have any experience or knowledge of how the chemical treatment process will affect the final product, or how to monitor, maintain, and troubleshoot the technology involved. This is but one of the many reasons that the Beneficiary's continued contributions to this product is so critical.

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 U.S. is an issue under the jurisdiction of the Department of Labor. As noted previously, the petitioner has been able to obtain an approved labor certification for the beneficiary. Assertions about the difficulty of replacing the beneficiary are, therefore, moot.

Mr. [REDACTED] stated that cellophane, which is derived from plant material is more environmentally friendly than polymer plastics that "will still be taking up room in our landfills for thousands of years." Mr. [REDACTED] focused on one of the petitioner's products:

[T]he Beneficiary is at the forefront of an exciting new packaging film: [REDACTED]™. [REDACTED]™ is the first fully compostable and biodegradable cellophane packaging that has ever been created. . . . [T]his cellophane product is [REDACTED] instead of plastic (polymer) based. . . . Best of all, our [REDACTED]™ packaging decomposes in a matter of days. . . .

[The petitioner's] production of [REDACTED]™ . . . has become a major strategic plan to change the face of the packaging industry in the U.S. Currently, there are no certified compostable films produced in the U.S. other than [REDACTED]™. . . .

We are seeking to continue to employ the Beneficiary in the position of Process Engineer on an indefinite basis. In his key role at our manufacturing plant, the Beneficiary is the manager for all of our U.S. developments of our new film, [REDACTED]™. . . . He is responsible for effectively and efficiently managing to completion the process, development and management of a range of engineering projects, to include the development, design, and manufacturing trials of new products, technical process and product development, delivery of technical support to key customers of [REDACTED] operations, project development and management, analysis, evaluation, and development of production issues, and analysis and evaluation of new raw materials from suppliers. In addition, the Beneficiary will develop and document new test methods relating to new product development

projects . . . [and] conduct internal and external audits and provide process support to the VMA, Casting, Coating, and Finishing Departments. . . . Finally, the Beneficiary is responsible for ongoing ISO changes and training of operators and staff as required and monitoring production trials, modification to coating formulas, and process conditions. . . .

The Beneficiary's job duties are completely proprietary and unique in the packaging industry in the United States, and there is no group of his peers that possesses the unique skills that he has. . . .

has already garnered industry awards including:

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. . . [A] waiver of the job offer requirement with regards to the Beneficiary is in order as he is a key contributor to a project that is clearly in the national interest – protecting the environment by reducing waste on a national scale by using packaging products created from renewable resources.

production manager at was previously the cellophane plant manager for Mexico. Mr. stated:

[The beneficiary] is working on developing film at the plant. [The beneficiary] reports to me and is in charge of important developments in the Cellophane process field, one of the most important areas is the development and continuous improvements of Cellophane coating bath formulations. [The beneficiary's] work on the composition of these formulas ensures compostability and biodegradability. . . .

At [the beneficiary] was in charge of Technical service for US/Canada. This expertise in customer requirements gives him unique understanding of how biodegradable film is used in the marketplace. . . .

[The beneficiary] plays a leading role in the manufacture and development of new cellophane products and has made and will continue to make, measurable and significant contributions to Plant and US Environment.

technology support and product legislation manager for the petitioner's parent company in Great Britain, stated:

[The beneficiary] has many years experience in the development and manufacture of cellulose film. . . . The need for an experienced technical innovator to work in this area was recognized by [the petitioner], but because of the decline of the industry in the US it was found difficult to recruit someone with the right credentials, and technical support had to be provided from the UK. This was not a satisfactory solution and did not provide the continuous attention that was required to develop and implement the new generation of biodegradable and compostable products, [REDACTED]™, that the US market demanded. When we were able to recruit [the beneficiary] this resolved the issue and he has been able to adapt formulations and manufacturing conditions at the [REDACTED] plant to enable these prototype products to be made, leading to the launch of the first certified compostable packaging films in the US. It is inconceivable that this could have been achieved without [the beneficiary]. With [the beneficiary's] input the company can now plan to develop further biodegradable and compostable products; these are seen as vital for the future of [the petitioner's] operations in the US.

Mr. [REDACTED]'s letter indicated that the beneficiary's work allowed the petitioner to create "prototype[s]" of products such as [REDACTED]. Mr. [REDACTED] however, indicated that "[REDACTED]™ is new to the United States, but it has [met] with much success in the U.K.," and that the petitioner's parent company "manufactures [REDACTED]™ film there" at a plant in [REDACTED] where the beneficiary has never worked. Internal documents show that the beneficiary adopted new processes at the [REDACTED] plant in order to accommodate the manufacture of [REDACTED] but the petitioner did not submit evidence to show that the beneficiary played a significant role in the development of [REDACTED], as opposed to supervising its manufacture and building on plans developed by others.

An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. Innovation of a new method is of greater importance than mere training in that method, but such innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. *See NYSDOT, 22 I&N Dec. 221, n.7.*

[REDACTED] technical manager for the petitioning company, did not indicate that the beneficiary played a role in inventing [REDACTED]. Rather, he "has worked exclusively on the [REDACTED] plant's ability to manufacture [REDACTED]." The witnesses at the petitioning company emphasized the potential future impact of biodegradable packaging film rather than its existing impact, because the petitioner filed the petition shortly after its introduction to the U.S. marketplace.

On October 6, 2009, the director issued a request for evidence, instructing the petitioner to "demonstrate, to some degree, the beneficiary's influence on the field of employment as a whole." In response, counsel (Mr. [REDACTED]) stated that the beneficiary "has a proven track record of combining business savvy and technical expertise to develop new and better products for the cellophane industry."

The petitioner submitted additional witness letters. [REDACTED] now a production manager for [REDACTED] in Mexico, previously worked with the beneficiary at [REDACTED] from 1986 to 2000. Mr. [REDACTED] stated that the beneficiary “was a pioneer in the field, leading projects for new products and developing innovative ways to reduce costs. He was also instrumental in the exploration of utilizing new raw materials for production. He is truly one of the few people in this small industry with extensive expertise in cellophane coating and processing.” Mr. [REDACTED] did not identify the new products or otherwise elaborate on the above statement.

Dr. [REDACTED] an associate professor in the Department of Packaging Science at [REDACTED] South Carolina, claimed no prior knowledge of the beneficiary’s work. Instead, he stated:

I have had the opportunity to review [the beneficiary’s] resume and discuss his current role at [the petitioning company] with [the petitioner’s] staff. Based on this information, I can confirm that [the beneficiary’s] work has been and will continue to be in the national interest of the United States.

[The beneficiary’s] role at [the petitioning company] is an essential role within the cellophane industry. He is an expert in coating formulations and systems, and his work will allow [the petitioner] to manufacture a packaging film that meets the ASTM D6400 guidelines for compostability. . . .

The cellophane industry is a small industry. However, its role in the future of packaging materials is critical. . . . What the industry needs is a cellophane coating that improves its performance while maintaining its biodegradability. I believe that [the beneficiary] has the unique expertise to bring these coatings to the marketplace.

The director denied the petition on May 27, 2010, stating that the petitioner had established that the beneficiary’s occupation has substantial intrinsic merit, and that the benefit from his work would be national in scope. The director concluded, however, that “[t]he record indicates that the beneficiary’s impact has been limited.” The director also found that the petitioner’s witness letters, which stressed that the manufacture of cellophane products requires specialized training, “do not demonstrate why labor certification would be inappropriate in this case.”

Attorney [REDACTED] filed the appeal on June 24, 2010. On Part 3 of Form I-290B, “Basis for the Appeal or Motion,” Mr. [REDACTED] did not articulate any specific grounds for appeal. Rather, he requested 30 days to submit “a separate brief explaining why we believe the Nebraska Service Center erred in its conclusion of law.” The record does not establish the submission of any brief during the requested 30-day period.

The regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part: “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 skeletal appeal, not supplemented by any timely brief, failed to identify any erroneous conclusion of law or statement of

fact. Therefore, the above regulation would have compelled the summary dismissal of appeal. As it stands, however, the appeal was not properly filed, and therefore the AAO rejected the appeal on September 22, 2011.

The petitioner's first motion to reconsider, filed on October 26, 2011, includes a photocopy of an appellate brief dated June 14, 2010. The petitioner offered no evidence of prior mailing of this brief. Instead, Mr. [REDACTED] stated: "I have attached copies of supporting documents that should have been submitted to the AAO in support of the present appeal. . . . I am submitting them again now, just in case my former employee, [REDACTED] did not." The date on the brief appears to be incorrect, because it is not consistent with the chronology of the proceeding. Mr. [REDACTED] signed the Form I-290B on June 23, 2010, nine days after the date on the brief, and if the brief were already complete on June 14, then there would have been no need for an extension of time to submit it. Without independent corroborating evidence, the date on the appellate brief is not evidence of its timely submission on appeal.<sup>1</sup> The brief itself is unsigned, but the initials "[REDACTED]" appear on the last page. The author, therefore, is evidently [REDACTED] rather than [REDACTED].

This untimely submission of these materials, 16 months after the filing of the appeal, would not overcome a finding that the original appeal failed to identify specifically any erroneous conclusion of law or statement of fact. When we initially reviewed the appeal in August 2011, the brief was not yet in the record. Therefore, the record of proceeding, as it stood at the time, would have warranted summary dismissal of the appeal.

In the appeal brief dated June 14, 2010, counsel stated:

the Director's insistence that [the beneficiary] obtain labor certification is now misplaced. **THE PETITIONER OBTAINED A LABOR CERTIFICATION FOR THE BENEFICIARY AFTER THE FILING OF THIS PETITION PRIOR TO THE DENIAL.** . . . [The beneficiary] is the beneficiary of an approved EB-3 petition based on that approved certification. . . .

Accordingly, [the petitioner] fully respected and complied with the "national interest inherent in the labor certification process" cited by the Director.

(Emphasis in original.) Counsel cited no legal authority to support the position that the approved labor certification and approved petition are factors in favor of granting the waiver. Counsel stated: "the Petitioner is not contending that any alien with an approved labor certification should automatically qualify for a National Interest Waiver. Such a contention would be unjustified." Counsel asserted:

the labor certification process is based on requiring an employer to define a job offered to an alien in terms of the minimum education, training and experience

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<sup>1</sup> Mr. [REDACTED]'s appellate brief is not the only misdated brief in the record. Counsel filed the latest motion on August 21, 2013, but the first page of the brief bears the date "August 19, 2011."

necessary to perform it. Expecting a minimally qualified US chemical engineer . . . to perform the type of pioneering work described by the various experts submitting letters in support of the Petition would be unrealistic under any circumstances.

The petitioner had previously contended that experience in the plastics industry would be of little use in the cellophane industry, and that the labor certification process could not take the distinction into account. The approved labor certification, however, shows that the petitioner was able to require “two years experience within cellophane industry,” thereby addressing this key distinction.

Counsel asserted that “the Director summarily dismissed [the beneficiary’s] accomplishments in a single sentence: ‘The record indicates that the beneficiary’s impact has been limited.’” Counsel stated that this conclusion contradicted the director’s finding that the petitioner had met the “national scope” prong of the *NYSDOT* national interest test. That prong, however, relates to the nature of the occupation rather than to the beneficiary’s individual contributions to his field.

Counsel rhetorically asked: “Where in the law is the Petitioner required to satisfy any standard about [the beneficiary’s] ‘impact’?” before concluding “nothing in the law requires the Petitioner to satisfy any standard about [the beneficiary’s] ‘impact.’” *NYSDOT* includes a discussion of examples of occupations that serve national goals, but individual workers in those occupations have only a local “impact.” *Id.* at 217 n.3. *NYSDOT* also requires “a past history of demonstrable achievement with some degree of influence on the field as a whole.” *Id.* at 219 n.6.

Counsel stated:

As of today, [the petitioner’s] [redacted] plant is the only manufacturer of [redacted]™ in the United States. However the opportunity for job and revenue growth in the [redacted]™ industry in this country is enormous, given the rapidly growing awareness of the environmental degradation caused by plastic packaging. Increased sales will require more employees in [the petitioner’s] [redacted] plant.

The petitioner had employed the beneficiary for three years before it filed the present petition on his behalf, and the petitioner has emphasized the beneficiary’s decades of prior experience. The record contains no evidence that, during that time, the beneficiary’s efforts led to job creation on a nationally significant scale, or to a nationally significant increase in the use of biodegradable packaging materials in the United States. To assert that the beneficiary’s work will eventually produce such results is unsupported speculation. 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)).

Counsel stated that the director improperly relied on *Matter of Treasure Craft of California*, to rebut the witnesses’ letters. Counsel stated: “*Treasure Craft* stands for the proposition that mere assertions by a party in a petition or application, absent supporting documentary evidence, are not

sufficient to meet a burden of proof.” The opinions of experts in the field are not without weight and have received consideration above. 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; *see also 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”).

The witness letters, mostly from employees of the petitioning company or its affiliates, attested to the beneficiary’s role in the manufacture of [REDACTED] but did not establish that the beneficiary’s contributions in this regard rise to the level of serving the national interest. Conjectural claims about what may result from increased use of biodegradable packaging cannot suffice in this regard.

The July 2011 motion included copies of additional evidence, with a photocopied memorandum dated May 10, 2011, titled “Additional Evidence to Support Pending Appeal of Denial of I-140 Petition.”<sup>2</sup>

In an April 25, 2011 letter, Dr. [REDACTED] supplemented his earlier letter (dated November 26, 2009), stating that the denial notice contained inaccurate information about his first letter. Dr. [REDACTED] stated:

[The beneficiary’s] impact on this market since joining [the petitioning company] has been anything but “limited.” With new and improved coatings developed by [the beneficiary], cellophane is once again offering an important alternative to petroleum-based plastics in certain uses, and the industry has begun taking notice. The packaging market is once again considering cellophane as a viable alternative due to the facts that it is bio-derived and biodegradable. For example, [REDACTED] a major chip manufacturer, has begun using [the petitioner’s] product, [REDACTED], in its chip bags being sold in [REDACTED] grocery stores. [REDACTED] is using [REDACTED] in its carry-out box for a sustainable sauce barrier.

The petitioner submitted copies of press releases identifying companies that had begun using [REDACTED] in their product packaging. Apart from the earliest press release, dated June 2009, all of the press releases date from 2010, after the petitioner’s July 2009 filing date. Also post-dating the filing date are statistics showing that the petitioner’s average monthly production of “[REDACTED]” increased from 21,070 pounds in 2009 to 56,130 pounds in 2011. (The petitioner only produced the film for nine months in 2009; disregarding those months, monthly production averaged 28,093

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<sup>2</sup> There is no evidence in the record to show that these materials reached the record in May 2011. The filing of an appeal does not grant an indefinite or open-ended period to supplement that appeal. Rather, the petitioner must, in advance, provide good cause for additional time to supplement the record. *See* 8 C.F.R. § 103.3(a)(2)(vii). Counsel did not explain why the petitioner did not submit these materials during the 30-day period originally requested at the time Mr. [REDACTED] filed the appeal in June 2010.

pounds.) An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1), (12). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Other materials in the "May 10, 2011" exhibits consisted of background information about a competing cellophane manufacturer in China and the environmental hazards of polymer plastics. These materials address the intrinsic merit of the beneficiary's occupation, but not his influence on the field.

The petitioner's second motion to reconsider, filed July 18, 2012, focused on procedural matters rather than on the merits of the national interest waiver application. The brief submitted with the third motion, filed August 21, 2013, likewise addressed only procedural issues rather than the merits of the waiver application. The August 2013 motion, however, also included additional exhibits relating to the beneficiary and to the petitioning company.

The newest exhibits include a bar graph showing the number of "Full time Jobs for [REDACTED] film production 2009-2013." The highest bar on the graph (corresponding to 2011) stops short of "5.0." That number dropped below 3.0 for 2012, rising in 2013 to a level just below the 2011 level. The graph shows the number of "Full time Jobs," not the number of new hires. The graph, therefore, indicates that at any given time between 2009 and 2010, the petitioner has employed fewer than five full-time workers "for [REDACTED] film production." In an accompanying letter, Matt [REDACTED] the petitioner's regional human resources manager, acknowledges: "The current production rate of [REDACTED] equates to about four full-time operators on the production floor."

Section 203(b)(5) of the Act created a lower preference immigrant classification for immigrants who create at least ten jobs. It is not evident that the creation of less than ten jobs should entitle the beneficiary to a higher preference classification. Even then, the petitioner did not show or claim that these were newly created jobs, rather than internal reassignments of the petitioner's existing employees; and if the jobs were newly created, this job creation did not occur until after the petition's June 2009 filing date. Therefore, the new information does not establish that the director should have approved the petition based on the record at the time of filing.

Other materials submitted on motion concern the beneficiary's present (2013) activities, such as "a project designed to replace solvent based coatings with water based ones" that Mr. [REDACTED] describes. A 2013 project does not retroactively establish eligibility relating to a petition from 2009. *See Matter of Katigbak*, 14 I&N Dec. 49.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that the beneficiary's influence be national in scope. *NYSDOT* at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole.").

On the basis of the evidence submitted, the petitioner has not satisfied the *NYS DOT* guidelines to establish that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. Therefore, absent the procedural issues that led to the rejection of the appeal and would otherwise have resulted in its summary dismissal, we would have dismissed the appeal on the merits. 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.

The AAO will dismiss the motion for the above stated reasons.

**ORDER:** The motion is dismissed. The petition remains denied.

Encl: (2)