



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 04 2014** OFFICE: TEXAS 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:

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 the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a dual language immersion teacher and research assistant at [REDACTED] in the [REDACTED]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a legal brief, asserting that the director “has applied an incorrect test for determining the national interest.”

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, 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 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 Form I-140, Immigrant Petition for Alien Worker, on January 30, 2012. On an accompanying Form ETA 750B, Statement of Qualifications of Alien, the petitioner described her duties with

Prepare lesson plans tailed [sic] to the learning patterns of students in the English as a Second Language program; Engage in instruction with regard to English linguistics such as syntax, phonology, semantics and pragmatics; Recognize and emply [sic] effective strategies for increasing communicative competence in English through the use of visuals and speech to make language comprehensible to the student; Prepare materialsand [sic] demonstrate strategies to help students transition from the use of social language to more formal vocabulary; identify culturally responsive instruction.

An introductory statement indicated:

[The petitioner's] nearly decade-long career as a Dual Language Immersion Instructor conclusively demonstrate [sic] that she is already serving the United States' national interest to a significantly greater extent than other educators in the field. . . .

[The petitioner's] services in dual language immersion instruction are critically important on a national level, and particularly in a state such as Texas, where the rate of English Language Learners (ELLs) continues to grow. . . .

. . . [The petitioner's] highly valuable services as an educator within Dual Language Immersion programs produces superior test results in comparison to English-only classrooms, and traditional "bilingual classrooms." . . . Based on the established, higher test scores of students participating in traditional bilingual as well as Dual Language Immersion programs, the services of bilingual instructors, such as [the petitioner], are invaluable in states with high levels of English Language learners, such as Texas, California, New York, and Florida.

The above assertions concern the intrinsic merit of dual language immersion programs; they do not establish that the benefit from the work of one such instructor is national in scope. Also, apart from establishing the significance of the occupation, the petitioner must establish how she, individually, qualifies for an exemption from the job offer requirement that normally applies to professionals such as her. The petitioner stated:

[redacted] where [the petitioner] is employed, will be implementing this program on a larger scale in the next school year. The program will be monitored and studied not only by the district's researchers, but also in cooperation with local university researchers. [The petitioner's] experience in the field will play a crucial and pivotal role in the success of the program and the development of study methods and measures. She will be able to assist the school and the researchers in identifying the areas of practice that are key for measurement while keeping the goals of the program intact for the learners.

The petitioner contended that "the supporting evidence amply confirms [the petitioner's] status as a critical and seminal figure in the field of Dual Language Immersion education," as well as "a key

figure substantially contributing to the development of the Dual Language Immersion pedagogy [sic].” Some of the supporting evidence consists of the petitioner’s basic credentials, such as academic degrees and certifications. Those materials show that the petitioner is qualified to teach, but do not establish her claimed standing in the field.

The petitioner also submitted an article by [redacted] published in the Winter [redacted] issue of the [redacted]. The authors summarized their “research findings of the past 18 years,” using data from “15 different states.” The study attests to the merits of the dual language model, while making it clear that this model has been in use for “decades.” A printout from the web site of the [redacted] identified 392 “Two-Way Bilingual Immersion Programs in the U.S.” The list does not name [redacted] or any school in [redacted].

The petitioner submitted letters signed by two former teachers, both of whom focused on the overall importance of the petitioner’s field, rather than the petitioner’s individual qualifications or achievements in that field. [redacted] a former dual immersion teacher in [redacted] California, is now a senior educational sales representative for [redacted] which sells “educational materials.” Ms. [redacted] discussed the benefits of dual language education, and asserted: “acquiring a second language [sic] requires a qualified bilingual educator.” Ms. [redacted] asserted that the petitioner “is exceptionally well-qualified to provide services in the field of bilingual education based on her formal college education, and her eight years of service as an educator in the United States.”

[redacted] a former bilingual educator for the [redacted] did not identify her current occupation (her résumé, in the record, stops at 2005). Ms. [redacted] stated that the petitioner “is exceptionally, [sic] well-qualified to provide services in the field of bilingual education based on her formal college education . . . , and her collective eight years of service as an educator in the United States.” She asserted: “I am in a position to appreciate [the petitioner’s] accomplishments as well as her impact on the education and future potential of our students,” but she did not describe those accomplishments or that impact. Ms. [redacted] did not indicate that the petitioner is contributing to the development of a new method of teaching language. Rather, she stated: “Dual Language Immersion programs continue to expand throughout the United States.” She further asserted: “acquiring a second language [sic] requires a qualified bilingual educator.”

The petitioner’s initial evidence, described above, indicates that the petitioner is qualified to work in her chosen field, but does not support counsel’s claim that the petitioner has earned “status as a critical and seminal figure in the field of Dual Language Immersion education.”

The director issued a request for evidence on March 19, 2012, instructing the petitioner to “submit evidence that the [petitioner’s] contributions will impart national-level benefits,” and to “establish that the [petitioner] has a past record of specific prior achievement with some degree of influence on the field as a whole.” In response, the petitioner observed that, given the nature of her work, she would not influence her field through patents, copyrights, or published articles, but rather:

[The petitioner] serves as a vital link between researchers on curriculum development and the development of this educational pedagogy. Both [the petitioner's] experience and her multi-lingual background have made her exceptionally valuable to the development of this pedagogy. Her position as the tester and reporter of methodologies and her district's quality reputation in the field allow her to have a national degree of influence on the field as a whole.

In order to demonstrate this claimed influence, the petitioner submitted five additional letters, all from current or former staff members at [REDACTED]. Former principal [REDACTED] now principal of [REDACTED] stated:

[The petitioner's] work has proven to be extremely valuable in the development of an effective and results driven program that has benefitted children here and across the United States.

. . . [The petitioner's] Math and Science classes have produced the highest scores in the district. This is very promising, as her classes are the first to utilize the Dual Immersion Program, which she helped to establish. The district has taken her success and modeled other programs in the district with her input and direction. In addition, researchers from the local universities have studied the program and use it as part of their research in how to establish an effective program for second language programs.

The success of the program is also the topic of discussion when district representatives present at conventions or collaborate with other school districts across the country that are struggling with establishing such programs. . . . Other school districts across the country take from these presentations and discussions and utilize [the petitioner's] novel methods and approaches in their schools. As such, [the petitioner] has had a profound effect upon the establishment of Dual Immersion as an educational pedagogy.

Mr. [REDACTED] did not identify the "other school districts," and he did not indicate that the petitioner herself is developing the program. Rather, the following description suggests that the petitioner is field testing the program, under the direction of researchers:

[The petitioner] works with both researchers and school officials in identifying what works in these programs and why. She is able to test theories in the field and make reports back that allow the program to be changed as necessary. No scholarly research would be complete without the contributions of instructors who can also serve as research assistants to researchers like [the petitioner]. In addition, her work is copied by the other school districts when they look at our programs as our program is based on her successes.

Being among the first teachers to test a new program is not a contribution comparable to actually developing the program. Further, the record does not show that the petitioner herself has made modifications to the program, but rather has reported issues that lead others to make those modifications. 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. *See NYSDOT*, 22 I&N Dec. at 221 n.7.

██████████, principal of ██████████ stated that the petitioner's "years of experience and unique multi-lingual background allow her to make unique and effective contributions to curriculum development," and that "her work has significant influence in academic as well as scholarly circles."

██████████ bilingual reading specialist at ██████████ stated that the petitioner's "work . . . is often copied by other school districts. In addition, her methods . . . serve as the basis for the presentations that our Administration makes at educational conferences." Ms. ██████████ claimed that "[t]he District . . . suffers from a shortage of certified bilingual teachers," but nevertheless contended: "making the District recruit for her position would most likely result [in] a lesser qualified candidate." A claimed worker shortage does not warrant the national interest waiver, because the labor certification process is already in place to address such shortages. *See NYSDOT*, 22 I&N Dec. at 218.

Owing to subsequent events, the situation Ms. ██████████ described is no longer hypothetical. USCIS records show that ██████████ successfully obtained a labor certification on the petitioner's behalf, and used it as the basis for a new petition seeking to classify the petitioner as a professional under section 203(b)(3)(A)(ii) of the Act. The director approved the petition on August 7, 2014, with a priority date of November 18, 2013. Thus, the petitioner in this proceeding is the beneficiary of an approved immigrant petition, and was not displaced by the recruitment process that led to labor certification. Because it is now a demonstrable fact that labor certification did not displace the petitioner, hypothetical assertions to the contrary have no weight in this proceeding.

██████████, a counselor at ██████████ asserted that ██████████ had "problems . . . with recruiting enough qualified, culturally sensitive, and scholarly inclined teachers." As noted above, a local shortage of qualified workers would tend to support approval of a labor certification, as has proven to be the case here. Like Mr. ██████████ quoted above, Ms. ██████████ did not indicate that the petitioner developed ██████████ experimental dual language program. Rather, "██████████ selected only a few schools as 'test' sites for the implementation of Dual Language programs." Ms. ██████████ credited "teachers like [the petitioner]" for the success of the program, but did not specify how the petitioner actively shaped that program (as opposed to critiquing and commenting on the program after testing it in the classroom).

██████████, a curriculum specialist at ██████████ did not indicate that the petitioner had created or developed ██████████ dual language program. Rather, she stated: "The development of these bilingual programs could not move forward without teachers like [the petitioner], who can test theories and models in the field and still have the scholarly understanding of how to track, measure, and assess the effectiveness of new approaches."

The writers of the above letters praised the petitioner's contributions, but did not identify or describe those contributions. Because all of the letters are from [REDACTED], they are not first-hand evidence of the application of the petitioner's work outside of that district. The general claim that "other school districts" use the results of the petitioner's work does not establish the national scope or influence of the petitioner's work. 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 director denied the petition on January 16, 2014, stating: "The [petitioner's] national interest waiver request hinges on the assertion that her contributions to the [REDACTED] dual language immersion program will be widespread nationally." The director quoted some of the submitted letters, and concluded: "nothing in the record establishes that any schools outside of [REDACTED] have benefitted from [the petitioner's] work."

The petitioner's legal brief on appeal does not, for the most part, discuss the specifics of the petition. Instead, the petitioner relies on the argument that the director "applied an incorrect test for determining the national interest." The petitioner notes that section 203(b)(2)(A) of the Act refers to members of the professions holding advanced degrees "or" aliens of exceptional ability, and asserts that the conjunction "or" creates a meaningful distinction between the two classifications.

The petitioner asserts that, because "both the statute and the regulations make it clear that [alien of exceptional ability and member of the professions holding an advanced degree] are distinct classifications that address very different situations. There is not a scintilla of indicia that suggests the national interest standard for these two classifications is or should be the same." The petitioner, however, has not established that there should be any presumption that the national interest standard should be different for the two classifications.

The petitioner's argument rests, in part, on the wording of the regulation at 8 C.F.R. § 204.5(k)(4)(ii), which "clearly refers only to 'exceptional ability' while purposefully omitting references to aliens who are members of the professions holding advance[d] degrees." The petitioner asserts that this omission "demonstrates that treating these distinctive categories as one is not proper." The petitioner also claims: "By clearly omitting members of the professions holding advanced degrees or their equivalent from the proposed rules and comment period, while having full knowledge of this omission, violates the rule making procedures of the APA [Administrative Procedures Act]."

That regulation, as the petitioner acknowledges, was promulgated in 56 Fed. Reg. 60897 (Nov. 29, 1991). At that time, section 203(b)(2)(B) of the Act made the waiver available only to foreign workers "in the sciences, arts, or business." The statute included no provision to waive the job offer requirement for members of the professions. Therefore, the cited regulation reflects the statute as it existed at the time. The notice and comment requirements of the APA did not grant the Immigration and Naturalization Service (INS) the authority to expand the availability of the waiver on its own.

The regulation did not reflect any conscious effort to create or imply separate national interest standards for the two classifications; rather, it accurately reflected that the law allowed the waiver only for one of the two classifications.

After the promulgation of the above regulation, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Pub. L. 102-232, 105 Stat. 1733 (Dec. 12, 1991), amended section 203(b)(2)(B) of the Act by inserting the word “professions” after the word “arts,” and thereby made the national interest waiver available to members of the professions holding advanced degrees. MTINA made no further modifications to the national interest waiver clause.

In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95, 113 Stat. 1312 (Nov. 12, 1999), amended the Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Separate regulations exist for those physicians at 8 C.F.R. § 204.12. Thus, those physicians are subject to different waiver provisions, but only because Congress specified those provisions through legislation.

The petitioner asserts that members of the professions holding advanced degrees are entitled to a different, presumably lower, threshold for the national interest waiver, but the petitioner cites no authority to establish that threshold. *NYSDOT* makes no distinction between the two classifications, because there is no statutory or regulatory justification for such a distinction.

In 1995, INS published a proposed rule that would have included new regulations relating to the national interest waiver. *See* 60 Fed. Reg. 29771 (June 6, 1995). The petitioner submits public comments on that proposed rule, submitted by the American Immigration Lawyers Association. The proposed rule was never finalized, and public comments on proposed rules are not policy instruments of the United States government; the comments are not binding on USCIS employees. As a precedent decision, however, *NYSDOT* is binding on them. *See* 8 C.F.R. § 103.3(c). *NYSDOT*, in turn, has survived court challenges. *See, e.g., Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001). Therefore, *NYSDOT* remains binding precedent, and the director had no discretion to disregard *NYSDOT* in rendering the decision.

The petitioner states: “We believe that the work done by the [redacted] in developing an educational pedagogy is not only important to the nation, but that it has a national widespread effect despite its immediate local nature. We believe that the standard should not focus on whether the job is conducted locally, but whether that local work contributes to a national interest.”

Section 203(b)(2)(B)(i) of the Act permits immigration authorities to waive the job offer requirement when that waiver is “in the national interest.” This is not the same as finding that a given foreign worker’s “local work contributes to a national interest.” Arguably, every worker in a useful occupation contributes to a national interest to some extent, however small. The threshold proposed on appeal would limit the statutory job offer requirement to workers in occupations that provide no benefit to the United States.

Furthermore, as discussed above, the petitioner has not established that she has played a significant role “in developing an educational pedagogy” that “has a national widespread effect.” The petitioner has asserted that other schools have adopted the methods thus developed, but has not identified any such school or provided corroboration from those schools. Unsupported assertions from the petitioner and [REDACTED] staff members cannot meet the petitioner’s burden of proof in this regard. *See Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, the record indicates that the petitioner is among an unknown number of teachers who are testing methods developed elsewhere, and reporting on their effectiveness so that the researchers developing the methods are able to improve upon them. The petitioner has not shown that this field testing amounts to “developing an educational pedagogy.”

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. *NYS DOT*, 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 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.