

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

[Redacted]

DATE: **OCT 10 2014** OFFICE: NEBRASKA SERVICE CENTER [Redacted]

IN RE: Petitioner:  
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 matter is now before us at the Administrative Appeals Office (AAO) 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 an alien of exceptional ability in business and as a member of the professions holding an advanced degree. The petitioner seeks employment as the chief executive officer (CEO) of [REDACTED] (The capitalization of [REDACTED] varies in the record.). 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 the classification sought, 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 and three letters.

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 eligibility for classification as an alien of exceptional ability in business and as a member of the professions holding an advanced degree. The record establishes that the petitioner, whose occupation requires at least a bachelor’s degree and who holds two post-baccalaureate degrees, qualifies as a member of the professions holding an advanced degree. An additional determination regarding the petitioner’s claim of exceptional ability would be moot. 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 USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on May 8, 2012. In an accompanying statement, the petitioner stated:

My technology startup company is located in [REDACTED] California.  
[REDACTED] is a smarter and innovative way to provide healthcare answers [to]

Americans and a pioneer of a radically new approach to internet health information search. At www [REDACTED] anybody anywhere in the country with Internet, web or mobile, can ask any health or medical questions to our health Question-Answer engine. [REDACTED] uses artificial intelligence and machine learning algorithms to understand the meaning of your health questions and provide instantaneous perfect answers with complete sentences, as if you were talking to another human being. [REDACTED] doesn't require healthcare experts because we don't create a new health-medical body of knowledge. We create processes that use the existing body of medical knowledge on the web[,] develop algorithms that understand natural language questions and can find answer[s] in complete sentences.

In a supplementary statement, the petitioner provided technical information regarding the structure of the [REDACTED] web site, and asserted: "[REDACTED] technology can save money to Americans every year and many hours by dramatically lowering the rising healthcare costs facing American citizens, corporations and the medical industry." The petitioner also stated:

I establish that I have a past record of specific prior achievements which justifies projections of future benefit to the national interest. I establish in various capacities my ability to serve the national interest to a substantially greater extent than a majority of my colleagues. I demonstrate my influence in my field with the following:

- Official Academic Transcripts
- Past university teaching performance [REDACTED] evaluations
- Recognition of my exceptional ability by the [REDACTED]
- 2011 [REDACTED]. I won out of 160 entrepreneurs. My technological innovation is recommended through letters of recommendations by the CEO of [REDACTED] in this field.
- Resume
- Letters of Recommendation
- Proof of [REDACTED] investment by a [REDACTED] investor. . . . [REDACTED] invested \$80,000 for 14% equity in my company.

The petitioner submitted documentation corresponding to the above descriptions, but did not explain how his academic transcripts and teaching evaluations "demonstrate [his] influence" in business.

A business plan submitted by the petitioner indicated that "[REDACTED] will need one \$1.3 million round of financing during the first year." The petitioner documented its receipt of \$80,000, as described by the petitioner above.

The petitioner listed three third-party letters of recommendation submitted with the petition, stating: “I don’t know [the writers] closely. My letters are NOT coming from an inner circle (collaborators, colleagues or advisors) and they reflect only their personal objective [sic] opinions.” All three writers have past or present connections to [REDACTED] where the petitioner earned three post-secondary degrees. In her letter, Dr. [REDACTED], president of [REDACTED] stated:

I had the pleasure of meeting [the petitioner] this year, when he won the \$30,000 first prize in the student category of the Business Plan Competition that is conducted annually by [REDACTED] College of Business. [The petitioner’s] entry was the prototype he has created for [REDACTED], a “Health and Medicine Knowledge Engine” that automatically answers health and medicine questions, acting like a virtual doctor on the Internet. I consider [the petitioner] to be among the top one percent of students with whom I have had contact during my 30 years in higher education.

The petitioner submitted a letter from [REDACTED], whom the petitioner identified as “the CEO of [REDACTED]” Mr. [REDACTED] however, is the president and CEO not of [REDACTED] but rather of a subsidiary company, [REDACTED] He stated:

I earned a bachelor’s degree in Mechanical Engineering from [REDACTED] . . . It is through my work with [REDACTED] that I met [the petitioner] and became aware of his leading edge work in medical technology. . . .

While I have not worked directly with [the petitioner] I am very aware of his work and his contributions while both a student and adjunct faculty member in statistics and information technology at [REDACTED] He bested more than 165 teams in [REDACTED] Business Plan Competition while a student there, winning the \$30,000 competition designed to create an entrepreneur eco-system to enhance the success of entrepreneurs and business owners. . . .

[The petitioner] founded [REDACTED] a Health and Medicine question-and-answer website designed to provide intelligent, factual answers to health questions using artificial intelligence and serving as a personal virtual doctor to its users. His developing technology will save millions of American users – and medical personnel as well – time and money, and has the potential to dramatically lower the rising healthcare costs facing our citizens, corporations and the medical industry.

. . . His unique and exceptional knowledge of cutting-edge algorithms for artificial intelligence technology sets him apart from other professionals in his field.

Dr. [REDACTED] associate professor at [REDACTED] provided a letter that is similar to that of Mr. [REDACTED]

I know [the petitioner] well, and I have no doubt that America will benefit from having someone of his personal and professional quality as well as the technologies that he is developing at [REDACTED] . . .

[The petitioner] is the CEO and chief artificial intelligence officer of [REDACTED]. He is developing a technology that can save millions of American users and medical personnel time and money, with the potential to dramatically lower the rising healthcare costs facing our citizens, corporations and the medical industry. . . .

[The petitioner] has unique capabilities and exceptional knowledge of cutting-edge artificial intelligence algorithms, setting him apart from other professionals in his field. He is the first to have successfully developed a health answer engine and implements this disruptive technological application to improve the American healthcare industry, the health and lives of Americans, and the U.S. economy. . . .

His health answer engine prototype already answers thousands of medical questions automatically and accurately every day.

The initial submission also includes a copy of a letter from [REDACTED] assistant dean of the [REDACTED] College of Business. Ms. [REDACTED] called the petitioner “a great asset to this university as a statistics and information technology instructor,” and stated: “[REDACTED] is an internet startup company developing technology that’s [sic] will save doctors and users’ time dramatically lowering healthcare costs in the US. His business will create jobs and innovation at a time when our country needs it the most.”

Many of the letters submitted throughout the course of this proceeding included the assertion that the United States can ill afford to lose the petitioner’s services. The petitioner himself indicated that if he does not receive a national interest waiver, then he would be unable to remain in the United States. USCIS records show that the petitioner subsequently filed another Form I-140 petition (USCIS receipt number [REDACTED] seeking classification as an alien of extraordinary ability under section 203(b)(1)(A) of the Act. The petitioner filed the petition on January 3, 2014, and the director approved the petition on April 6, 2014. The petitioner filed Form I-485, Application to Register Permanent Residence or Adjust Status, on May 14, 2014. That application is currently pending. Therefore, USCIS records show that the petitioner is the beneficiary of an approved immigrant visa petition, in an immigrant classification in which the visa numbers are current. The outcome of the present proceeding would not prejudice any proceeding arising from the already-approved petition, and approval of the national interest waiver would neither expedite nor ensure the approval of the pending adjustment application.

The petitioner submitted copies of articles from the popular press, discussing the possibility of using computers and mobile devices to provide basic medical information. These materials provide background for the service the petitioner seeks to provide, but they do not mention the petitioner’s

company specifically. Thus, the articles establish the existence of a market niche for [REDACTED], but not the company's impact within that market.

The director issued a request for evidence on March 28, 2013. The director stated that "two witness letters submitted are both from individuals who are professionally acquainted with the petitioner, one being his previous instructor and mentor while the other is a representative of an organization awarding the alien petitioner a grant." The director stated that the petitioner had not shown that his work is "known outside the circle of his personal acquaintances," and that unsupported letters cannot, by themselves, establish eligibility for the waiver. The director also stated that the petitioner's award from [REDACTED] "was limited to graduate students" and appeared to be "financial assistance" rather than "an award for achievements in the field."

In response, the petitioner stated that the director "incorrectly classified Dr. [REDACTED] and Ms[.] [REDACTED] . . . as [the petitioner's] personal contacts." The director, in commenting on two of the letters, did not identify the writers by name or use the phrase "personal contacts." The petitioner submitted new letters from Dr. [REDACTED] and Ms. [REDACTED] each of which included the following passage: "It is critical for me to emphasize that my support for his petition is completely based on my professional expertise in the area of information technology. USCIS incorrectly stated that I am a personal contact of the petitioner." Neither writer claimed to have actually read the request for evidence, and the quoted description of that notice does not accurately reflect the notice's contents.

Dr. [REDACTED] stated:

[The petitioner] was never my student or mentee, and I have never been his teacher. Although we were colleagues at [REDACTED] I got to know [the petitioner] mainly through his involvement in various innovative information technology and healthcare IT programs and his development of [REDACTED]. Therefore, the assessments and recommendations I made in the original letter were all based on my professional opinion.

When I compared [the petitioner] with other high-impact individuals that I know through my work in the technology area, his ability, accomplishment, and potential to make contributions clearly stand out. His achievement at [REDACTED] was already recognized independently and professionally by the [REDACTED] Business Plan Competition, where [the petitioner] competed with all other innovators and was judged by serial entrepreneurs and investment professionals, by the venture capitalists that are backing him, and by the companies and institutions that are supporting or collaborating with him.

In her second letter on the petitioner's behalf, Ms [REDACTED] stated:

When I compared [the petitioner] with other high-impact individuals that I know through my work in the business and entrepreneurship area, his ability, accomplishment, and success in the industry are remarkable. [The petitioner's]

achievement at [REDACTED] was recognized independently and professionally by the [REDACTED] Business Plan Competition, where [the petitioner] competed with all other innovators/entrepreneurs. He was judged by serial entrepreneurs and investment professionals after making it through a rigorous first round of screening of over 175 “other” entrepreneurs.

[REDACTED] award is made to support the winning entrepreneur’s company and business career on the basis of entrepreneurship excellence. Our competition separates the awards for student track and community track based on a university technicality. The technical difference is in the student trac[k] they MUST be registered for classes during the semester the competition is hosted.

. . . . All businesses are scored the same way with the same criteria by judges who fund start-ups.

It is a matter of record that all four of the writers from the initial submission have connections to the petitioner through [REDACTED].

The petitioner submitted other new letters, stating that they are “from top elite members of the field” attesting to his influence. All of the new writers met the petitioner at [REDACTED] where most of them serve on the faculty. One of the writers, [REDACTED], explained the petitioner’s relationship with [REDACTED]

I’m the founder of [REDACTED] an elite organization designed to accelerate the development of high-potential entrepreneurs with [REDACTED] affiliation in the life sciences and medicine through education and collaborative intelligence. . . . The [REDACTED] community is made of the most successful entrepreneurs of [REDACTED] and the U.S. . . .

I met [the petitioner] when he was accepted into [REDACTED] in 2013 for his revolutionary technology with the [REDACTED] company. [REDACTED] is comprised of the top entrepreneurs in the United States and only those who have had high impact in their fields are accepted. . . . [O]nly [REDACTED] affiliated company founders can apply. Our acceptance rate is lower than 8%. [The petitioner] was accepted because of the success he has had with [REDACTED] and his proprietary technology. [The petitioner] has been featured at top healthcare conferences like [REDACTED] newspapers like [REDACTED] and more. [The petitioner’s] impact in the medical field has changed the landscape of natural language and conceptual text in healthcare information technology. . . . His technology has been featured by [REDACTED] as the top free medical app on the app store and [REDACTED] store.

Similar assertions appear in letters from Stanford faculty members, and from Dr. [REDACTED] director of Innovation and Advanced Technology at [REDACTED] who “met [the petitioner] at [REDACTED]

██████████ this year,” *i.e.*, 2013. As a ██████████ official, Ms. ██████████ has standing to attest to ██████████ relationship with the petitioner, but the petitioner did not submit evidence to establish the other claims relating to conferences and media coverage. 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)). 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”).

Regarding ██████████ the petitioner asserted that “██████████ has featured . . . ██████████ technology as a top medical mobile app for ██████████ in front of millions of users.” The petitioner submitted printouts showing that ██████████ featured the ██████████ application (app) on the “██████████” page of ██████████ Store and ██████████ as one of several “██████████” apps, but these printouts do not show that “millions of users” viewed the page while the app was featured in this way, or that the ██████████ designation translates into status as a “top” app. ██████████ Professor ██████████ claimed that “██████████ as the next ██████████ for medical and wellness questions,” but he cited no evidence to support this claim, and did not establish any authority to speak on behalf of ██████████ in this manner.

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). Likewise, evidence submitted in response to a request for evidence must establish eligibility as of the filing date. See 8 C.F.R. § 103.2(b)(12). Events that took place after the petition’s May 8, 2012 filing date, such as the petitioner’s 2013 acceptance into ██████████, cannot retroactively show that the petitioner was eligible for the waiver before those events occurred. USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

The petitioner contended that *Katigbak* does not apply because the beneficiary in *Katigbak* did not yet possess required academic qualifications at the time of filing. The petitioner stated: “my case is not about academic experience, it is about a technology and business that solves real problems right now.” The specifics between *Katigbak* and the present case differ, but the basic principle still applies: the beneficiary of the petition must qualify for the benefit sought at the time of filing.

The petitioner’s activity at ██████████ took place after the May 8, 2012 filing date. The printouts from ██████████ Store refer to a May 30, 2013 update of the ██████████ app. Letters indicate that the ██████████ conference took place in October 2012, several months after the filing date. The petitioner did not submit copies of any of the publications identified in the letters. Therefore, the petitioner did not establish that he appeared in these publications at all, or if he did, that the coverage occurred before the filing date. The petitioner did not mention the publications in the initial submission. USCIS can consider these developments in relation to a newly-filed petition (such as the approved petition that the petitioner filed in 2014), but developments that occurred in 2013 or later cannot show that the petitioner qualifies for a May 2012 priority date.

The director denied the petition on November 18, 2013, stating that the petitioner had established the intrinsic merit and national scope of his intended occupation, but that he had not shown “a history of achievement with some degree of influence on the field as a whole” at the time of filing. The director found that the letters submitted with the petition did not “describe[] how the petitioner’s work has influenced or impacted the beneficiary’s field,” and that “statements pertaining to the expectation of future results rather than a past record of achievement fail to demonstrate eligibility for a national interest waiver.” The director acknowledged the evidence regarding [REDACTED] sale of [REDACTED] but found: “[n]o evidence was provided to show how this application was selected for this placement. In addition this application’s release and the placement on the New and Noteworthy page happened after the filing of this petition.”

The legal brief submitted on appeal contends that “the factors cited by the Service Center for the basis of its denial do not comply with the immigration laws and regulations and misclassify the facts supporting the EB-2 Petition.” The brief states:

Contrary to the Service Center’s statement, the evidence submitted in support of the petition not only demonstrated the petitioner’s substantial impact in the Information Technology field for the healthcare technology industry but also the substantial impact the petitioner’s work will continue to have on the field, the healthcare industry and the nation as a whole. In addition, as evidenced in the initial EB-2 Petition, [the petitioner] and his information technology work and discovery, and creation for the healthcare information technology industry have been recognized by researchers and professionals in the industry as a contribution of major significance to the information technology field. The USCIS should note that the third prong regulatory requirement for the classification can be satisfied by numerous expert opinions from researchers and professionals (both academic and corporate) in the field.

In support of the claim in the last quoted sentence, the brief cites an unpublished AAO appellate decision from 2009. The petitioner submitted no evidence to show that the facts of the approved petition closely match those of the present proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In the cited decision (which the petitioner did not submit, but did identify), the AAO stated:

The AAO acknowledges that the petitioner has not established widespread citation of his published work. At the same time, as an engineer, the petitioner’s specialty is very much an applied science rather than a theoretical one, and therefore it is appropriate to judge the extent to which other engineers have applied the petitioner’s findings in their work. By submitting a number of statements from independent experts around the world, the petitioner has established that, while his work may not be widely cited, it is widely implemented.

In the present case, the petitioner has not submitted “statements from independent experts around the world.” He began with statements from his *alma mater*, [REDACTED] after becoming involved with [REDACTED] he submitted statements from [REDACTED]. The petitioner’s letters did not establish widespread implementation of [REDACTED]. Rather, the letters established the writers’ own opinions about [REDACTED] while offering unsubstantiated claims of fact, many of which concerned developments that occurred after the petition’s filing date. Therefore, even if the cited appellate decision were a published, binding precedent decision, it would not have established that the director erred in denying the present petition.

The remainder of the brief is a discussion of three newly submitted letters, all from writers who had provided letters earlier in the proceeding. [REDACTED] letter, dated December 3, 2013, is virtually identical to his earlier letter, dated March 7, 2012, except for added references to “extraordinary ability.” Likewise, the new letters from Prof. [REDACTED] and Dr. [REDACTED] consist mostly of passages repeated, or slightly adapted, from their earlier letters. The letters, therefore, introduce no new information into the record. The director had previously discussed the writers’ earlier, similar letters, and the petitioner, on appeal, does not show that the director’s discussion was deficient.

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 his influence be national in scope. *NYSDOT*, 22 I&N Dec. 217, n.3. More specifically, the petitioner “must clearly present a significant benefit to the field of endeavor.” *Id.* at 218. *See also id.* at 219, n.6 (the alien must have “a past history of demonstrable achievement with some degree of influence on the field as a whole”).

As is clear from 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.