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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

JAN 11 2002

File: [Redacted] Office: Texas Service Center Date:

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to 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. The petitioner seeks employment as a special education teacher at Captain Daniel Salinas II Elementary School. 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 with post-baccalaureate experience equivalent to an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement 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 determined that the petitioner qualifies as a member of the professions with education and experience equivalent to an advanced degree. The petitioner originally claimed eligibility as an alien of exceptional ability, but because the director did not contest the petitioner's eligibility for the underlying classification, an additional finding of exceptional ability would be of no further benefit to the petitioner. The remaining issue 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 Service 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 Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service 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.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. 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.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used 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.

The petitioner states that she works with children afflicted by "mental retardation, Down's Syndrome, autism, severe speech impairment, multiple handicaps, severe physical impairment or pervasive deficit disorder," in a school where the vast majority of students "live substantially below poverty levels." The petitioner states "[t]he educational needs of these children have been repeatedly identified as critically important at both state and national levels," and asserts that she "serve[s] on several committees throughout each school year" and "participate[s] in specialized workshops."

The petitioner submits background evidence to establish the general importance of education, especially for children with disabilities, as well as a number of witness letters.

U.S. Representative Silvestre Reyes states that the petitioner seeks "to continue performing a leading role in the field of special education for learning disabled children . . . in a chronically under served geographical area." Rep. Reyes adds "[t]o lose her services at this point would significantly impair efforts to improve educational opportunities for mentally and physically impaired young students in the Rio Grande Valley."

Another U.S. Representative, Rubén Hinojosa, offers a letter which contains passages worded identically to sections of Rep. Reyes' letter. Rep. Hinojosa asserts that "teacher shortages are a recurring challenge" in the Rio Grande Valley.

Several other elected officials at the national, state and local levels attest to a shortage of special education teachers in the petitioner's geographic area. Many witnesses also note that the petitioner's fluency in Spanish is valuable because many local parents do not speak English.

Faculty members of the University of Texas - Pan American, where the petitioner obtained her teaching certification, assert that there is a national shortage of qualified special education teachers, and that the petitioner's "daily work . . . requires extraordinary patience, skill and individual teacher commitment." Officials of the school where the petitioner teaches, and of the school district in which the school is situated, assert that the petitioner is especially well-qualified for the position she occupies. While the officials state that the petitioner's superior qualifications enable her to have a greater impact on students at the school, none of the witnesses attest to the impact of the petitioner's work outside of the Rio Grande Valley.

A number of these letters contain similar language, for instance the statement that the petitioner's departure "would significantly impair efforts to improve educational opportunities for mentally and physically impaired young students in the Rio Grande Valley," or minor variations (differing by one or two words) from that phrase, suggesting common authorship of at least some portions of the letters. In some instances, different witnesses have submitted totally identical letters (for example, letters signed by numerous officials of the Donna Independent School District are entirely the same, including the erroneous use of the word "roll" where the intended word is clearly "role").

The petitioner has submitted letters from officials at several layers of management and government, yet none of these witnesses has explained why the district cannot simply obtain a labor certification on the petitioner's behalf. Given the virtually universal assertion that there is a dire shortage of special

education teachers in the geographic area, it is not clear how the school district would encounter difficulty in getting a labor certification approved. A local shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification. See Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998).

On June 27, 1998, the director instructed the petitioner to submit evidence to show that the petitioner's efforts have had "an impact of national proportions" rather than an impact limited to the physically or mentally impaired students at one elementary school in the Rio Grande Valley. The director observed that the overall importance of one's field of endeavor is not *prima facie* grounds for approval of a waiver, and that a worker shortage would seem to be a favorable factor in obtaining a labor certification.

In response, the petitioner has submitted further evidence which underscores the above-mentioned shortage. District officials state that the district "can not find a fully certified teacher like" the petitioner to fill existing vacancies.

The petitioner has submitted a new letter from Rep. Silvestre Reyes. This letter is identical to Rep. Reyes first letter, except that the phrases "and in the country" and "throughout the country" have been added to what were originally purely local references.

Gene Kirby, personnel director for the Donna Independent School District, states that the petitioner is a mentor teacher who trains other teachers and thus her efforts "will contribute to the relief of the need for special education teachers in the United States." There is no evidence that the petitioner's work in this regard (which presumably occupies only a small fraction of the petitioner's time, otherwise taken up by her own students) will have an appreciable effect on the "projected need for 648,000 special education teachers." Other witnesses, all affiliated with entities where the petitioner has worked or trained, make general references to national problems which the petitioner's work addresses at some level.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work, but finding that the petitioner has not established its national scope, or that she serves the national interest to a significantly greater extent than would a minimally qualified worker in the same position.

On appeal, counsel asserts that Matter of New York State Dept. of Transportation is "a novel [and] legally questionable AAO precedent decision that did not exist at the time the petitioner's I-140 petition was submitted." It remains that Matter of New York State

Dept. of Transportation was published, binding precedent at the time the director rendered the decision. By law, the director does not have the discretion to reject or disregard published precedent. See 8 C.F.R. 103.3(c), which indicates that precedent decisions are binding on all Service officers.

Counsel contends that the director had no authority to apply the standards published in Matter of New York State Dept. of Transportation to a petition which had been filed before the precedent was issued. That precedent decision, however, does not represent a fundamental change in the underlying law, but rather an interpretation of already-existing regulations.

To date, neither Congress¹ nor any other competent authority has overturned the precedent decision, and counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error. Counsel cites unpublished appellate decisions, and private communications from Service officials without national jurisdiction, neither of which carry the weight of published precedents.

Counsel states that the director's decision "subjects an advanced-degree professional to an exceptional-ability evidentiary standard." We note here that the petitioner herself, upon filing the petition, specifically and repeatedly stated that she sought classification as an alien of exceptional ability. Having plainly stated "I have reviewed carefully the regulatory criteria for the . . . exceptional ability immigrant classification . . . and I strongly believe that I meet the qualifying criteria," the petitioner cannot now credibly claim that the "exceptional-ability evidentiary standard" was unfairly applied. Nevertheless, this contention forms the basis for many of counsel's arguments on appeal.

Even then, the director did not impose "an exceptional-ability standard." Rather, the director correctly observed: (1) an alien of exceptional ability must demonstrate prospective national benefit; (2) an alien of exceptional ability must normally have a job offer, and therefore (3) exceptional ability alone, and the accompanying prospective benefit, are not sufficient to secure a national interest waiver. Therefore, the waiver inherently requires a degree of prospective benefit above and beyond that which is required for a showing of exceptional ability.

¹Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to Matter of New York State Dept. of Transportation; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

Because aliens of exceptional ability and advanced-degree professionals fall into the same visa classification, the above standard applies to both subdivisions. Counsel cites no statute, regulation, or case law to show that a member of the professions holding an advanced degree is entitled to a lower national interest burden of proof than an alien of exceptional ability. At issue is not whether the petitioner has met the specific evidentiary requirements for exceptional ability, but rather whether the benefit arising from her work substantially exceeds the benefit expected of all aliens of exceptional ability.

Several paragraphs of counsel's appeal brief are taken directly from the petitioner's cover letter that accompanied the initial filing. These statements, deriving as they do from before the petition was even filed, much less denied, clearly do not address specific findings by the director.

Counsel asserts:

[I]t makes little or no sense for the [director] to conclude that [the petitioner's] efforts will have a 'significant impact in the Rio Grande Valley' (page 3 of opinion) and yet fail to consider the cumulative national impact her outstanding, locally focused work involves.

We note that the director's decision does not contain the phrase "significant impact in the Rio Grande Valley," either on page 3 or at any other point. The record contains no evidence to show the "cumulative national impact" of the petitioner's work. The record consists almost entirely of letters from the petitioner's professors, the petitioner's employers, and elected officials representing the Rio Grande Valley area. The petitioner's work is "cumulative" in the sense that it contributes toward a greater national goal, but the same can be said of any competent teacher in her field. It does not follow that every alien special education teacher qualifies for a waiver, or that U.S. special education teachers are exempted as a class from the protection of the labor certification process.

Counsel asserts that "the increasingly acute underfunding of the labor certification program . . . has rendered labor certification ineffective as a means of securing the permanent employment of personnel." That may be (although counsel neither cites nor submits any evidence to prove it), but any needed reforms in the labor certification process need to occur in the Department of Labor. The general argument that labor certification has become redundant or untenable does not address the specific merits of this petition, and we reject the contention that, because of flaws in the system, the labor certification requirement should simply be overlooked or bypassed as a matter of course. We also reject the implied argument that labor certification is nothing more than an option to be exercised at the discretion of a given petitioner. Counsel discusses "the underlying purpose" of the waiver, relying

not on the legislative history but on commentary written by private attorneys.²

Counsel states "over-reliance on the NIW [national interest waiver] does not justify the AAO's functional elimination of it."³ This argument presumes that Matter of New York State Dept. of Transportation has "functionally eliminated" the waiver, but counsel cites no evidence to support this presumption apart from an opinion piece written by private immigration attorneys very shortly after the precedent's publication (and before its full effect could possibly have been felt). Indeed, the primary intent behind the precedent decision was not the "functional elimination" of the waiver, but rather to provide much-needed guidance to adjudicators. Service records confirm that the national interest waiver has not been "eliminated" as many feared at the time of its publication in 1998; the Service (including the Administrative Appeals Office) continues to approve meritorious requests for such waivers.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

²We note here, again, that subsequent to the publication of Matter of New York State Dept. of Transportation, Congress could have responded in any number of ways to that precedent decision. Congress' response was to create a limited blanket waiver for certain physicians, leaving the precedent decision otherwise untouched.

³We could add that perceived flaws in the labor certification process do not justify the functional elimination of that process.