identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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]

B5

DATE: MAY 20 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to 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 to employ the beneficiary as a licensed registered nurse. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the beneficiary does not qualify for classification as an advanced degree professional or an alien of exceptional ability and 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.

On appeal, counsel submits a brief that mostly reiterates prior assertions and contains inconsistencies that may derive from the inclusion of facts pertaining to a different client that counsel names in some parts of the brief. Counsel fails to explain how the beneficiary, who received his baccalaureate in 2007, could possibly have acquired five years of post-baccalaureate experience prior to the date of filing on May 24, 2009, the date as of which the petitioner must establish the beneficiary's eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

Furthermore, counsel's assertions regarding the national interest waiver ignore precedent and are otherwise not persuasive. Counsel is effectively proposing a blanket waiver for all nurses to alleviate a backlog that counsel alleges is responsible for a national nursing shortage. The backlog to which counsel refers, however, is not with the alien employment certification process that the petitioner is asking U.S. Citizenship and Immigration Services (USCIS) to waive. Notably, employers wishing to hire nurses already undergo an expedited process that bypasses the Department of Labor (DOL) pursuant to 20 C.F.R. § 656.5(a)(1). Instead, the delay results from an oversubscription of visas in the third preference classification under which nurses ordinarily fall. Section 203(b)(3) of the Act. Ultimately, counsel cites no legal authority, and the AAO knows of none, that would allow USCIS to use the national interest waiver of the alien employment certification process to redefine the other congressionally mandated requirements for second preference aliens.

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.
>
> > (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.

Eligibility for the Classification

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As defined at section 101(a)(32) of the Act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The first issue is whether the beneficiary is a member of the professions. On November 13, 2009, the director advised the petitioner and counsel that DOL's official Occupational Outlook Handbook (OOH) states that there are three educational paths to becoming a registered nurse, including an associate's degree. Thus, the director concluded that the position of registered nurse does not constitute a profession as defined at 8 C.F.R. § 204.5(k)(2). Counsel's brief in response to the request does not address the job requirements for a registered nurse. Congress did not list nurses as professionals at section 101(a)(32) of the Act. At issue, then is whether a baccalaureate is the minimum requirement for entry into the occupation of registered nurse.

As noted by the director in the request for additional evidence, the "Training, Other Qualifications, and Advancement" section of the OOH's "Registered Nurses" chapter, a Bachelor of Science in Nursing degree is neither required for licensure as a registered nurse nor normally required for the

general range of registered nursing jobs, regardless of their specialty. *See* http://www.bls.gov/oco/ocos083.htm#training, accessed May 19, 2011 and incorporated into the record of proceeding. Moreover, an employer's "token" degree requirement cannot elevate an otherwise non-professional occupation to one that is a profession. *See generally Defensor v. Meissner,* 201 F. 3d 384, 387 (5th Cir. 2000).

The next issue is whether the beneficiary holds an advanced degree or equivalent as defined at 8 C.F.R. § 204.5(k)(2). The beneficiary holds a Bachelor of Science in Nursing from San Pedro College of Davao City in the Philippines. The petitioner, however, failed to submit an evaluation of this foreign degree. Thus, the petitioner has not established that it is a foreign equivalent degree to a U.S. baccalaureate. Even if the petitioner had established that this degree is a foreign equivalent degree to a U.S. baccalaureate, the petitioner must establish that the beneficiary's degree is "followed by" at least five years of progressive experience. Thus, the five years of progressive experience must be post-baccalaureate. Counsel's statements on this issue have been inconsistent.

Counsel initially stated that the beneficiary qualifies for the classification sought "based upon her [*sic*] baccalaureate degree and five (5) years of progressive professional experience." In response to the director's request for additional evidence, counsel stated:

> Please find attached the beneficiary's university qualifications and an evaluation of her [*sic*] equivalence by a recognized and reputable evaluation service. The beneficiary is now a California licensed RN in addition to New Mexico. He is employed in his profession in California. He also holds the [Commission on Graduates of Foreign Nursing Schools (CGFNS)] Visa Screen for admission to the USA for lawful employment in the field of Professional Nursing. For that reason the beneficiary possesses in excess of 5 years of progressive professional experience as she [*sic*] submitted verified and probative evidence of her [*sic*] experience in the Philippines and the USA, and now more recently in the United States.

The petitioner, however, did not submit an evaluation of his degree. The CGFNS certification certifies that the beneficiary "has met all of the requirements of section 212(a)(5)(C) of the Immigration and Nationality Act, as specified in Title 8, Code of Federal Regulations section 212.15(f) for the Profession of: Registered Nurse." Counsel does not explain why this certification has any relevance to the amount of the beneficiary's experience. Section 212(a)(5)(C) of the Act states that an alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents a CGFNS certification verifying that the alien's education training, license and experience "meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application." Nothing on the CGFNS certificate suggests CGFNS was evaluating the petitioner's nursing credentials under section 203(b)(2) of the Act. Regardless, a review of the CGFNS handbook reveals that CGFNS does not review a registered nurse's experience. Specifically, the handbook states:

> The CGFNS/ICHP VisaScreen® Assessment is comprised of an educational analysis, licensure validation, English language proficiency assessment, and, for registered nurses only, an exam of nursing knowledge. Once the applicant successfully completes all elements of the VisaScreen® Assessment, the applicant receives a CGFNS/ICHP VisaScreen® certificate, that can be presented to a consular office or, in the case of adjustment of status, to the attorney general as part of a visa application.

See http://www.cgfns.org/files/pdf/apps/VS_Handbook.pdf?bcsi_scan_0F6519961A220080=0&bcsi_scan_filename=VS_Handbook.pdf (accessed May 12, 2011 and incorporated into the record of proceeding).

Finally, the regulation at 8 C.F.R. § 212.15(f)(1)(iii) states that CGFNS' assessment regarding whether the beneficiary's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States "is not binding on" the Department of Homeland Security under which USCIS falls.

Counsel himself is inconsistent regarding whether the beneficiary has the necessary experience. As stated above, counsel at first affirms that the beneficiary does have the necessary five years of experience. On page three, however, counsel states:

> It is not disputed that this RN does not have 10 years or even 5 years working solely in his profession as a qualified professional nurse. At the same time, she [*sic*] has 10 years of progressive working experience and real life experience to bring with her to the table. Given the blood in the alley, the fact that millions of American lives are now at stake, we think that the Director can read more into their interpretation of the applicable regulations. Five years of working experience should be added to the applicant's two Bachelor's degrees, coupled with experience in post-secondary education as a professor and working experience, to be found equivalent to an Eb2 advanced degree. Such a finding serves our national interest, and permits this applicant to proceed ahead with her [*sic*] claim to eligibility.

First, counsel does not explain how multiple baccalaureate degrees or experience as a professor overcomes the requirement for a degree above a baccalaureate or a baccalaureate plus five years of post-baccalaureate experience. Second, even if a second bachelor's degree or the nature of experience was relevant, the record contains no evidence that the beneficiary has two baccalaureate degrees or that he ever worked as a professor. Third, counsel cites no legal authority, and the AAO knows of none, that allows USCIS to waive the requirement that the beneficiary hold an advanced degree or the equivalent as defined at 8 C.F.R. § 204.5(k)(2) for classification as a member of the professions holding an advanced degree. USCIS lacks the discretion to redefine advanced degree; rather, USCIS is bound by the regulatory definition at 8 C.F.R. § 204.5(k)(2). USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). As discussed below, the national interest waiver waives

the alien employment certification process, not the requirements for classification under section 203(b)(2) of the Act.

The beneficiary received his Bachelor of Science in Nursing on March 28, 2007. The petitioner filed the petition on March 24, 2009, a few days shy of two years after the beneficiary earned his degree. Therefore, it is impossible that the beneficiary could have accumulated five years of post-baccalaureate experience as of the date of filing, the date as of which the petitioner must establish the beneficiary's eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Moreover, the regulation at 8 C.F.R. § 204.5(g)(1) states that evidence of experience "shall" consist of letters from employers. The petitioner failed to submit a single employer letter confirming any work experience and the beneficiary lists no work experience on his curriculum vitae. Thus, the petitioner has not met its burden of establishing, by a preponderance of the evidence, that the beneficiary has five years of post-baccalaureate experience.

The petitioner has never asserted that the beneficiary is an alien of exceptional ability or explained how he meets the regulatory requirements for that classification set forth at 8 C.F.R. § 204.5(k)(3)(ii). Thus, the AAO concurs with the director that the record does not establish that the beneficiary, who has no documented experience as a nurse, is an alien of exceptional ability.

In light of the above, the petitioner has not established that the beneficiary qualifies for classification as either a member of the professions holding an advanced degree or as an alien of exceptional ability pursuant to section 203(b)(2) of the Act.

Counsel requests "leave to amend this petition at a future date should that become advantageous" and references section 203(b)(3) of the Act. USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition under section 203(b)(2) of the Act, the classification checked on the petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[1] Moreover, an amendment of the classification sought is a material change. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). Finally, Congress did not provide for a national interest waiver of the alien employment certification process for petitions filed under section 203(b)(3) of the Act. The petitioner did not submit an approved alien employment certification or an application for Schedule A Group I designation as required for petitions filed under section 203(b)(3) of the Act.

[1] *See* http://www.whitehouse.gov/omb/circulars_a025/.

Nothing that counsel has submitted regarding the national shortage of nurses, Congressional actions to resolve the shortage or the USCIS Ombudsman's report suggests that USCIS should or even can waive the second preference classification requirements for nurses because of that shortage.

The beneficiary does not qualify for classification under section 203(b)(2) of the Act. For this reason alone the petition must be denied.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

National Interest

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> 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 Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show 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.

It must be noted that, 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 subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The use of the term "prospective" requires 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 AAO concurs with the director that the petitioner works in an area of intrinsic merit, nursing home nursing care. The director then concluded that the impact of a single nurse in a nursing home would not be national in scope. On appeal, counsel states:

> National scope of benefit in this matter: We are now facing a major issue in medical ethics in the United States: Who will receive health and nursing care while facing death from H1N1? Due to the crisis and shortage, will only the wealthy receive adequate nursing care? Will the government be forced to ration nursing care for only the most compelling needs, like what has taken place in the organ transplant area. The growing shortage will mean that every able bodied nurse must be supported, permitted to work and protected to save us from this ongoing crises. In our great nation, we seek to treat all patients and individuals equally, with dignity, and the best medical and rehabilitative care available. This too is now in the national interest.

As noted by the director, *NYSDOT,* 22 I&N Dec. at 217, n.3 provides the following examples of occupations that do not provide benefits that are national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id.

Significantly, Congress is presumed to be aware of existing administrative and judicial interpretation of statute when it reenacts a statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In this instance, Congress' awareness of *NYSDOT* is a matter not of presumption, but of demonstrable fact. As noted by counsel on appeal, in 1999, Congress amended section 203(b)(2) of the Act in direct response to the 1998 precedent decision. Congress, at that time, could have taken any number of actions to limit, modify, or completely reverse the precedent decision, such as by applying the waiver to nurses and exempting them from meeting the professional and degree requirements of section 203(b)(2) of the Act. Instead, Congress let the decision stand, apart from a limited exception for certain physicians working in shortage areas, as described in section 203(b)(2)(B)(ii) of the Act. Counsel cites several recent laws relating to nurses, none of which amend the national interest waiver provisions set forth at section 203(b)(2) of the Act. Because Congress has made no further

statutory changes in the decade since *NYSDOT*, the AAO can presume that Congress has no further objection to the precedent decision.

Consistent with the analysis in *NYSDOT,* 22 I&N Dec. at 217, n.3, the impact of a single nurse at one nursing home would be so attenuated at the national level as to be negligible.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. This final question is "specific to the alien." *Id.* at 217, 222-23.

Despite the clear and unambiguous language that the ultimate question is the beneficiary's individual merits, counsel's sole argument is that the sheer importance of alleviating the nursing shortage justifies a waiver of the alien employment certification process in the national interest.

Examples from counsel's appellate brief follow:

> As the plague of the H1N1 'Swine Flu' virus crosses the United States as a declared pandemic, each home and family will be effected [sic] in the coming days. Casualties are already mounting, among a new and unexpected demographic: Healthy young Americans of college and young adult age.[2] Deporting nurses during such a pandemic is unconscionable, if not something quite scandalous. We ask officers making such hard decisions to come from the behind the curtains and let their faces be known. This is a great American story, that needs to be told to our free press. These actions defy logic.
>
> Thousands of job openings also will result from the need to replace experienced nurses who leave the occupation, especially as the median age of the registered nurse population continues to rise.
>
> * * *
>
> While not specifically addressing the legal issue in question in this matter regarding the impact of RN employment in the national interest, the official position of the [USCIS] Ombudsman is very clear: The nursing shortage in the United States is a matter or [*sic*] grave concern, and federal agencies should implement changes to *facilitate* the processing of immigration applications.
>
> * * *

[2] Counsel does not explain how serving as a nurse in a nursing home would address the need for nurses to address the H1N1 pandemic that is impacting healthy young adults.

> The American healthcare system is broken. We pay the most per capital for care, and yet find adequate services and facilities wanting. Americans are warehoused in skilled nursing facilities, isolated from their homes and families, without improved care. Costs have gone completely out of control, with the nation now looking for new care alternatives including home based health care when reasonable and available. Approval of this petition will help this company move into this important national policy objective while permitting a person that the Ombudsman says should be facilitated in this process to remain here in legal status. This can provide for the long range win/win situation for all involved.
>
> * * *
>
> Nothing in [the attached USCIS Ombudsman report] suggests that USCIS actions to hinder or discourage admission and adjustment of Schedule A nurses will serve our national interests. To the contrary, our express national policy supports the facilitation of the admission of foreign nurses who are qualified and ready to practice their profession in our nation.
>
> * * *
>
> Should the Director deny benefits in all petitions filed for this individual, the petitioner would be barred from the employment of someone who has been statutorily designated as providing a crucial public service to our nation as a nurse.
>
> * * *
>
> Finally, the principal beneficiary in this family is a California Licensed Registered Nurse. The shortage of RNs is a matter of national interest.

NYSDOT, 22 I&N Dec. at 215 et seq. states and then reiterates several times that a shortage is not a basis for the national interest waiver of the process designed to test the labor market. First, the decision states:

> With regard to the unavailability of qualified U.S. workers, the job offer waiver based on the national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages.

Id. at 218.

In response to a claim of a national shortage, the decision explains that this assertion "should be tested through the labor certification process." *Id.* at 220. The decision further states that the issue of a shortage is not even within USCIS' jurisdiction. Specifically, the decision states: "The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor." *Id.* at 221. The decision continues:

> A number of the witnesses in this case assert that engineers with the beneficiary's qualifications are in short supply, yet are desperately needed because of the deterioration of U.S. bridges. The petitioner has never clearly explained why the job offer and thus the labor certification requirement should be waived. Given the asserted shortage of qualified engineers with the requisite training, and the evidence existence of an offer of permanent employment, the situation appears to correspond closely to the very situation that the labor certification process was designed to address.

Id. at 222.

Counsel is essentially proposing a blanket waiver for all nurses in the second preference category (despite the fact that nurses do not qualify as members of a profession) due to the severity of the shortage at the national level and the importance of the occupation. *NYSDOT,* 22 I&N Dec. at 217, 220, 223, rejects such an argument. Specifically, the decision states:

> A petitioner cannot establish qualification for a national interest waiver based solely on the importance of the alien's occupation. It is the position of the Service to grant national interest waivers on a case by case basis, rather than to establish blanket waivers for entire fields of specialization.

Id. at 217. The decision continues:

> The employer's assertions regarding the overall importance of an alien's area of expertise cannot suffice, however, to establish eligibility for a national interest waiver. The issue in this case is not whether proper bridge maintenance is in the national interest, but rather whether this particular beneficiary, to a greater extent than U.S. workers having the same minimum qualifications, plays a significant role in the preservation and construction of bridges.

Id. at 220. The decision concludes:

> 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 as they relate to the job to be performed.

Counsel notes repeatedly that the beneficiary is a qualified nurse. Objective qualifications that are necessary for the performance of the occupation can be articulated in an application for alien employment certification; the fact that the alien is qualified for the job does not warrant a waiver of the alien employment certification requirement. *Id.* at 220-21.

Counsel cites the Nursing Relief for Disadvantaged Areas Act of 1999, P.L. 105-95, 113 Stat. 1312 (Nov. 12, 1999) as an example of a Congressional mandate that the admission of nurses is in the national interest. The Act of 1999 only created a nonimmigrant classification for nurses. Notably, this act also created the national interest waiver for physicians serving in underserved areas. The act did not, however, mention nurses in the context of the national interest waiver despite expressly amending that provision only for physicians. Counsel also references *Visas for Nurses*, Title V, sec. 502 of the Emergency Supplemental Appropriations Act for Defense, The Global War On Terror, and Tsunami Relief Act of 2005, P.L. 109-13, 119 Stat. 231 (May 11, 2005). This appropriations act, however, reallocates visas for employment based immigrants and their family members "whose petitions were approved *based on schedule A*, as defined in section 656.5 of title 20, Code of Federal Regulations." (Emphasis added.) The petitioner does not seek approval pursuant to Schedule A, Group I designation. Nothing in this appropriations act addresses section 203(b)(2) of the Act or waivers of the job offer requirement.

Counsel cites *Francis v. Reno,* 269 F. 3d 162, 170-71 (3rd Cir. 2001), for the proposition that USCIS must interpret the above statutes in favor of the beneficiary. That case involved interpretation of the phrase "aggravated felony" and cited *INS v. St. Cyr*, 533 U.S. 289 (2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)) for "a rule of lenity embodied in 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" The instant petition does not involve a deportation statute.

Ultimately, the petitioner is not attempting to acquire a nonimmigrant visa or an immigrant visa pursuant to Schedule A, Group I designation. Thus, these statutes, and any lenient interpretation thereof, are not relevant to the adjudication at issue. The statute at issue is section 203(b)(2) of the Act. This statute simply cannot be interpreted in any logical way as supporting an approval of the petition, most significantly because the beneficiary does not qualify as a member of the professions, does not posses an advanced degree or the equivalent as defined at 8 C.F.R. § 204.5(k)(2) and is not an alien of exceptional ability. As stated above, Congress permits USCIS to waive the alien employment certification process in the national interest, not the other requirements for eligibility for the classification. Section 203(b)(2)(B)(i) of the Act.

A waiver of the alien employment certification process would serve no purpose in this matter. Counsel acknowledges that DOL has already designated nurses as an occupation in which "there are not sufficient United States workers who are able, willing, qualified, and available," defined as Schedule A Group I. 20 C.F.R. § 656.5(a)(2). An employer seeking an alien employment certification for a Schedule A occupation may already apply for alien employment certification directly with USCIS rather than DOL pursuant to 20 C.F.R. § 656.15. Moreover, as noted by

counsel, the USCIS Ombudsman has already recommended that USCIS prioritize Schedule A adjustment applications for nurses.

Despite the existence of the expedited blanket waiver under Schedule A, Group I, counsel asserts that this existing process is insufficient to alleviate the national shortage of nurses because the visa numbers are oversubscribed. The problem, however, is not that the Schedule A designation process itself causes any delay or otherwise takes longer to adjudicate than a request for a waiver of that process, both filed with USCIS. Rather, the delay to which counsel must refer is the oversubscription of third preference visas, especially in the country in which the beneficiary was born. The national interest waiver, however, only waives the alien employment certification process. Section 203(b)(2)(B)(i) of the Act. In this case the alien employment certification process for which the petitioner seeks a waiver is the already expedited Schedule A, Group I process. Counsel has not demonstrated how waiving that process is in the national interest. Specifically, waiving the process can only benefit the beneficiary if USCIS also waives the other requirements set forth in section 203(b)(2), that the beneficiary be a member of a profession, possess an advanced degree or qualify as an alien of exceptional ability. USCIS does not have the authority to redefine the classifications that Congress mandated, even if alleged to be in the national interest. The oversubscription of third preference visas and its impact on any occupational shortage, assuming that an impact exists, is a problem that only Congress can address beyond what the USCIS Ombudsman has recommended.

Ultimately, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, USCIS generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. The record lacks evidence that the beneficiary, as of the date of filing, has ever even worked as a nurse. Thus, the petitioner has not documented that the beneficiary has a past history of achievement with some degree of influence on the field as a whole.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession, or in this case an occupation that does not qualify as 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 alien employment 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, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.