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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 09 2015 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
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:

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 pathologist. At the time he filed the petition, the petitioner was on the cytopathology house staff of the , Maryland. He later began a fellowship in genitourinary pathology at the 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 statement asserting that the director did not give sufficient consideration to the evidence of record.

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, P.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.

I. Analysis

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on August 20, 2013. The initial submission included copies of the petitioner's journal articles and conference presentations. These materials establish the existence of his research work, but not its importance.

The petitioner submitted several letters with the petition. Dr. associate professor at the (where the petitioner claims past experience as a researcher), stated:

> I am aware of [the petitioner's] clinical feats as they have been disseminated as educational tools via publication and presentation in forums read and attended by practicing pathologists throughout the country. Furthermore . . . his scientific research . . . has provided novel insight into issues that have plagued the pathology field for years. For example, [the petitioner's] first-authored study " showed atypical manifestation of thereby allowing physicians who come across similar cases to make proper diagnoses.

Dr. added: "There is a well-documented shortage of pathologists in the United States." The petitioner submitted background evidence to support this assertion, but not to support Dr. claims about the importance of the petitioner's work. A shortage of qualified workers is not grounds for waiving the job offer requirement, because the labor certification process takes the unavailability of U.S. workers into account. *See NYSDOT* at 218. Section 203(b)(2)(B)(ii) of the Act makes special waiver provisions available to physicians in designated shortage areas, but only under certain conditions specified in the statute and in the regulations at 8 C.F.R. § 204.12. The petitioner has not submitted the evidence required under those provisions, and has not claimed eligibility for the shortage-based waiver. Therefore, the general assertion of a shortage in his specialty is not grounds for waiving the job offer requirement under *NYSDOT*.

Dr. , associate professor at asserted that the petitioner "is regarded as a top pathologist as evidenced by his track record of esteemed employment positions throughout his career." Dr. himself claimed no training, experience, or background in pathology.

Dr. an instructor at and a physician at likewise claimed no expertise in pathology. Rather, Dr. is a radiologist, who studied at at the same time as the petitioner. Dr. listed several positions the petitioner has held in the past, including several house staff positions, and asserted: "It is a rare occurrence for a physician to be selected for such a variety of leading roles from such esteemed and highly-coveted institutions." The petitioner did not submit documentary evidence to support any facet of this claim. 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)). House staff positions (residencies and fellowships) are, by nature, temporary training positions rather than "leading roles."

Like Dr. Dr. medical registrar at attended at the same time as the petitioner. He earned a "

while a medical student, but his medical practice has been in oncology. Dr. asserted that the petitioner's "work . . . has had widespread impact not only on the pathology field, but other medical subspecialties as well." Dr. did not elaborate on the latter claim. Dr. praised one of the petitioner's published articles, asserting that it has "[n]o doubt . . . allowed for many accurate diagnoses" of angioimmunoblastic T-cell lymphoma, although the petitioner submitted no evidence showing that his article led to a higher or more accurate diagnosis rate for the disease.

Dr. a project scientist in the , claimed that the petitioner is "one of the finest pathologist[s] in the country today," having "mastered the most advanced medical technologies in pathology, matched only by a handful of his peers." The only procedure that Dr. identified was the "frozen-section test." Dr. who is not a pathologist, cited no source to support the claim that only a "rare few pathologists" possess the "extraordinary expertise" to perform the procedure.

Dr. , head of the indicated that the petitioner "has distinguished himself among" "several bright pathologists" that Dr. has "had the opportunity . . . to educate." Dr. asserted that the petitioner "has developed superior knowledge on the application of advanced techniques for clinical research and diagnosis in cytopathology," such as "the microdissection of cells from cytology material using a specialized microscope," which Dr. claimed has been "mastered by only a few cytopathologists in the country." Dr. cited no source for this information, and even then, there is no indication that the petitioner invented the technique. Special or unusual knowledge or training does not inherently meet the national interest threshold. *See NYSDOT*, 22 I&N Dec. at 221. 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. *Id.* at 221 n.7.

The director issued a request for evidence (RFE) on October 28, 2013, stating that the petitioner had not established "demonstrable prior achievements" to establish the "influence or impact [the petitioner's] work has had in the field." In response, the petitioner submitted a statement indicating that his "track-record of clinical and research success is indicative of his ability to influence his field more than his colleagues and his unique combination of expertise provides a major benefit to the nation." The statement identified three of the petitioner's published works, specifically two journal articles and a textbook entry. The statement indicated that one of the petitioner's articles "was downloaded 113 [times] since October and was cited by researchers from across the world," and another "was downloaded times in ' and "is currently referenced on the Wikipedia page of Halicephalobus gingivalis."

The petitioner submitted "article usage statistics" to support the download figures quoted above, but he provided no context to show that these numbers are unusual in the field. Similarly, the petitioner documented a request for a copy of one of his articles, but did not establish that such requests are infrequent and limited to articles of special significance.

The petitioner documented two citations of his published work, again without context to show that this rate of citation demonstrates uncommon influence.

A printout of the *Wikipedia* entry for Halicephalobus gingivalis cites five references, including an article by the petitioner. *Wikipedia* is an open, user-edited site, and as a result, the evidentiary value of a *Wikipedia* entry in this proceeding is extremely limited. *See Lamilem Badasa v. Michael Mukasey,* 540 F.3d 909 (8th Cir. 2008). The printout shows that the "page was last modified on 5 December 2013," after the issuance of the RFE. *Wikipedia* publicly posts the origin date and editing history of its articles, but the petitioner did not submit this information. Given the nature of *Wikipedia,* we cannot presume that the page, and the citation, existed before the director issued the RFE.

A September 10, 2011 handout from the listed several study resources, each ranked by survey results. *Differential Diagnosis in Surgical Pathology*, 2nd Ed., received a survey score of 3.05, corresponding to "Neutral" on a scale of 1 ("Not helpful at all") to 5 ("Extremely helpful"). The petitioner showed that he co-wrote a chapter in the Third Edition of the book. There is no evidence that used the book's Third Edition as a resource as it had previously done with the Second Edition in 2011.

The RFE response statement asked the director to "take into consideration the improvements [the petitioner] has made to the including playing a key role in the interdisciplinary meetings where [the petitioner] advises other specialists on appropriate plans of action on certain cases." The petitioner's work in did not begin until after he filed the petition. 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). 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).

Furthermore, the petitioner did not show that his work in had a significant impact on his field. Two professors at the provided letters. Dr. praised the petitioner's role in teaching and consultation on difficult cases, but made no claims about the significance of the petitioner's work outside the institution. Dr. stated that the petitioner had "many accomplishments to his credit" during his career "[p]rior to joining [the] ," stating, as an example, that the petitioner's "work on round worms is well known in the medical community." With respect to his subsequent work in Dr. like Dr. focused on the petitioner's teaching duties and "many administrative roles." She also cited a projected decline in the number of practicing pathologists, which, if true, would tend to be a favorable factor in granting labor certification rather than waiving that requirement.

The petitioner submitted a copy of a letter from (no title specified), stating:

> Please note that she [*sic*] produced original and groundbreaking research that was published as an article in the prestigious titled " " Since the article also explains in depth how to diagnose rare neuro-helminthic infections, the article is extremely useful in making [the] best possible diagnosis on a wide range of parasitic infections of [the] brain. Indeed, I have utilized this important research numerous times in my own practice, and I am certain that others have as well.

is a co-author of the identified article, rather than an independent researcher influenced by the petitioner's work.

The RFE response statement indicated that the labor certification process would likely entail "lengthy adjudication" because the petitioner intends to combine research and clinical practice. The petitioner cited no support for this assertion. Furthermore, the petitioner's past work combining research and clinical practice has been in the context of ongoing training at academic institutions such as teaching hospitals. The petitioner has not established any prospects of career-level employment (as opposed to house staff-level training) that would entail a combination of research and clinical medical practice.

The director denied the petition on March 31, 2014, stating that the petitioner had met only the first two prongs of the *NYSDOT* national interest test, relating to intrinsic merit and national scope. The director quoted from the submitted letters and acknowledged the petitioner's participation in research, but found that "not . . . every researcher who adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement." The director also noted that the petitioner's published work had earned "minimal citations," lending no support to claims regarding the petitioner's influence on his field.

On appeal, the petitioner submits a statement asserting that he established eligibility by submitting "evidence . . . in the form of expert support testimonials, the publications [the petitioner] is credited with authoring, as well as documents related to the contributions [the petitioner] is credited with making to the pathology field."

The appellate statement includes the following passage:

> [The petitioner] has demonstrated his remarkable abilities as a medical researcher through his influential publications that have been instrumental in educating other clinicians including authoring a book chapter in a popular reference book used by pathologists preparing for Board examination. [The petitioner's] important work has been featured in prominent forums: Only the foremost members of his field have had their work presented at such influential forums, which draw nation- and world-wide audiences of their peers. [The petitioner] remains active in performing landmark

> research. Based on his rich history of successes, the medical community eagerly anticipates the results of these studies as the multiple letters of support demonstrate.

The record establishes that the petitioner has published some of his research findings, but it does not demonstrate a "rich history of successes" or show that the petitioner's publications have been "influential" as counsel claims on appeal. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding the claim that the petitioner co-wrote "a book chapter in a popular reference book used by pathologists preparing for Board examination," the petitioner has not shown that his work appeared in the Second Edition of the textbook (the edition cited in the handout), or that cited the Third Edition as a resource as it had previously done with the Second Edition.

The appellate statement also indicates that the petitioner has earned an "outstanding clinical reputation within the field as an expert pathologist" who "has improved the pathology field" through his teaching work and by playing "critical roles at each and every hospital in which he has worked." The petitioner's own résumé describes most of his past positions as "house staff" training positions.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 165. In this instance, many of the letters are from individuals who demonstrated no expertise in the petitioner's medical specialty of pathology, and the objective evidence in the record does not support many of the claims in the letters concerning the petitioner's reputation and the impact of his work.

II. Conclusion

The petitioner was still undergoing fellowship training at the time he filed the petition. He has participated in research that has led to published articles and conference presentations over the course of this training, but he has not established the impact of this research, or shown that it will continue after he completes his training. The petitioner has submitted letters claiming that he has significantly influenced his field and earned a widespread reputation as a researcher and as a clinician, but the documentary evidence in the record does not support those claims.

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.