READ MY LIPS: No New National Interest Waivers!

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1. INTRODUCTION

All too often it's true - those who wield great power do, at times, make mistaken proclamations. President George Bush's statement of "NO NEW TAXES!" seemed on the surface like a clever campaign slogan. When it came right down to testing the feasibility of his pledge, however, the promise became untenable and ultimately could not be kept. The Immigration and Naturalization Service ("INS") recently began to chip away at another commitment by the Bush Administration - that of bolstering the quality and capabilities of America's human resources by the enactment of The Immigration Act of 1990 ("IMMACT 90"). The recent national interest waiver precedent decision by the INS, In re New York State Dept of Transportation ("*NYSDOT*")[1] seems like a thinly veiled announcement of "NO NEW NATIONAL INTEREST WAIVERS!"

Upon closer scrutiny, however, the decision is highly disturbing in its disregard of legislative history, abdication of agency responsibility, misunderstanding of Department of Labor ("DOL") regulations, and display of specious reasoning. Even more troubling, the case relies on apparently plausible yet highly subjective eligibility requirements that provide a vehicle for unfettered examiner power to deny virtually all national interest waiver requests.

Given these flaws, the authors believe that - just like the "NO NEW TAXES!" pledge - *NYSDOT* is likely to be buried in the cemetery of broken governmental promises. Whether this happens by resort to the Attorney General, the Courts or Congress, until the burial occurs, immigration lawyers must come to grips with this flawed decision, and develop strategies for continued success in their national interest waiver cases.

This article will therefore analyze *NYSDOT* and suggest some approaches that may yet prevail despite the casuistry of this unfortunate decision.

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[1] *In re New York State Dept of Transportation ("NYSDOT")*, Int. Dec. 3363 (Acting Associate Commissioner, Programs).

II. LEGISLATIVE ORIGINS OF THE NATIONAL INTEREST WAIVER

IMMACT 90[2] created the employment-based second preference immigrant visa category for aliens with advanced degrees or those with exceptional ability in the sciences, arts, or business whose services in the sciences, arts, professions, or business are sought by an employer in the United States.[3] This immigrant classification also allows aliens who can demonstrate that their services in the sciences, arts, professions, or business are in the "national interest", to obtain permanent resident status without a job offer[4] or labor certification[5]. The Congressional intent clearly stated in the legislative history of IMMACT 90 was to ease the immigration barriers for professionals and highly skilled workers.[6] As President Bush recognized in his remarks on signing IMMACT 90 "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas."[7]

The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA")[8] added advanced degree professionals to the category of aliens who may be found exempt from labor certification and a job offer upon demonstrating their services are in the "national interest." MTINA is a further indication of Congress' desire to increase the number of persons eligible for a national interest waiver by expanding the category to those who are not necessarily well known or exceptional, but who still perform services in the "national interest" and thus, may be granted exemption from the job offer and labor certification requirement.

When enacting INA §203(b)(2)(B), the national interest waiver, Congress did not define the phrase "national interest," thereby allowing the INS to apply a flexible qualitative test to evaluate the activities

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[2] Pub. L. No. 101-649,104 Stat. 4978.

[3] INA §203(b)(2)(A).

[4] INA §203(b)(2)(B).

[5] 8 CFR §204.5(k)(4)(ii). The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest.

[6] See *Re-Railing The Train: The True Meaning of "National Interest"* by Palma R. Yanni, Immigration and Nationality Law Handbook, Vol. II, Advanced Practice, American Immigration Lawyers Association, p.183-193 (1998-99).

[7] Remarks on signing the Immigration Act of 1990, Public Law No. 101-649, Roosevelt Room, The White House, S.358, November 29, 1990.

[8] Pub. L. No. 102-232, 10S Stat. 1733.

asserted to be in the national interest and the beneficiary's prospective contributions to the United States, and thus to determine whether these factors merit a waiver of labor certification.[9]

Thus, in providing a waiver of the job-offer requirement and yet not defining the phrase "in the national interest", and then in allowing advanced degree holders with no prior experience to qualify for the national interest waiver,[10] Congress gave the INS a broad and flexible alternative to the labor certification procedure that would allow greater numbers of talented aliens to reside permanently in the United States and contribute substantially and immeasurably to our country.

In essence, Congress said to the INS, do not be tripped up by the "minimum-job-qualifications" rule contained in the DOL labor certification regulations. Instead, Congress signaled: Here are abundant new numbers of employment-based green cards; go find the "thousand points of light", i. e., make a *qualitative* determination of which persons (whether experienced or not) and which activities will substantially benefit the nation.

Unfortunately, however, as will be shown, the INS in *NYSDOT* missed the cue from Congress, and did not shoot for the sky but has become mired in the mud puddle that is labor certification.

III. THE "NON-PRECEDENT" AND THE NEW PRECEDENT

The first national interest waiver petition to be decided by the INS Administrative Appeals Unit ("AAU"), Mississippi Phosphate,[11] although never designated as precedent, set forth seven factors that could be considered in determining whether a waiver of a job offer and labor certification was in the national interest. The seven factors include 1) improving the U.S. economy; 2) improving wages and working conditions of U.S. workers; 3) improving education and training programs for U.S. children and underqualified workers; 4) improving health care; 5) providing more affordable housing for young and/or older, poorer U.S. residents; 6) improving the environment of the U.S. and making more productive use of natural resources; or 7) involving a request from an interested U.S. government agency. This decision provided good guidance for the national interest waiver petitioner as well as the adjudicating INS officer and seemed to signal an understanding of congressional intent.

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[9] For an in-depth discussion of the National Interest Waiver, see *They Don't Shoot Elephants. Do They?: The National Interest Waiver for EB-2 Immigrants* by Naomi Schorr; and *A Practitioner's Guide To The National Interest Waiver* by Nathan A. Waxman and Karen L. Dean.

[10] 8 CFR §204.5(k)(2). Advanced degree means any U.S. academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A U.S. baccalaureate or foreign equivalent followed by five years of progressive experience in the specialty is deemed equivalent to a master's degree.

[11] *Matter of* [name not provided], EAC 92 091 50126 (AAU July 21, 1992).

Eight years after Congress enacted the national interest waiver, the INS finally designated a precedent decision. In *NYSDOT*, the N.Y. Department of Transportation[12] applied for a national interest waiver on behalf of a civil engineer whose services in the national interest included the rehabilitation, replacement, maintenance, and inspection of bridges. The INS agreed that the services performed by the beneficiary were in the national interest, but denied that waiver of the job offer was in the national interest. *NYSDOT* provides very little guidance on the types of factors that should be weighed when determining what activities are in the national interest. The decision basically directs the INS to balance the importance of protecting U.S. workers through the labor certification process with the national interest activities described in the petition. Thus, *NYSDOT* attempts to limit the national interest waiver as a potential route to permanent residence by supplanting it in most cases with the labor certification process.

A. *NYSDOT'S THREE-PRONG TEST: INTEREST, NATIONAL, AND WAIVER*

NYSDOT establishes a three-prong test:

- First, the alien must seek employment in an area of substantial intrinsic merit. *NYSDOT* does not provide any analysis regarding the determination whether an area of employment is of substantial intrinsic merit. The decision merely states "[T]he importance of bridges, and their proper maintenance, is immediately apparent." Therefore, the engineering of bridges was held to be an area of substantial intrinsic merit and satisfied the first prong of the *NYSDOT* test.

  NYSDOT adds a caveat to the first prong stating that eligibility for a national interest waiver is not established solely by demonstrating that the beneficiary's field of endeavor has substantial intrinsic merit.

- The second prong of *NYSDOT* requires the petitioner to demonstrate that the proposed benefit will be national in scope. This second-prong discussion begins to show the muddled thinking evident in *NYSDOT*. The benefit conferred by a N.Y. civil engineer to the alien's employer, a governmental petitioner, the N. Y. Department of Transportation, was held to be a national benefit because the employer was part of a national system of roads and bridges. The decision then suggests, however, that the benefit conferred by an attorney, teacher, or cook would be so attenuated at the national level that the benefit would not suffice for purposes of a national interest waiver petition. Could not the benefit conferred by a teacher to his or her employer, the local school system, and to students bestow a substantial benefit, albeit indirect, to the national education system? The INS' subjective determination employs very little analysis in its decision that specific employment serves a national benefit.

[12] It is unfortunate that the unsuccessful petitioner in *NYSDOT* was an agency of the State of New York. If the INS is confident in denying an interested government organization's national interest waiver petition, then what hope is there for lesser petitioners?

Furthermore, *NYSDOT*'s discussion of the first prong (area of intrinsic merit) states that decisions are to be made on a case-by-case basis, rather than establishing entire fields of specialization. Is the dictum that an attorney, teacher, or cook might not bestow a national benefit contrary to the INS espoused case-by-case determination of a national interest waiver?

The decision further acknowledges that a local benefit may harm the national interest, such as construction of a dam that cuts off water to another area. This point also addresses previous denials of a national interest waiver where the benefit conferred upon the petitioner could be detrimental to a competing U.S. business.

- Third, *NYSDOT* requires the petitioner to demonstrate persuasively that the national interest would be adversely affected if a labor certification were required for the beneficiary, i.e., that the national benefit offered outweighs the inherent national interest in the labor certification process. The third prong of *NYSDOT* is the crux of the decision and a testament to murky analysis.

  As "clarification", the INS suggests that the third prong of *NYSDOT* requires a showing "that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making the position sought available to U.S. workers." Elsewhere in *NYSDOT* the INS seems to erect an even higher barrier by requiring the petitioner to 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." The INS in *NYSDOT* employed circuitous logic to discount and disregard the beneficiary's important role in bridge safety, ample satisfaction of objective qualifications to perform the job, the shortage of qualified engineers with the requisite training, and the overall importance of the profession to find that the beneficiary did not warrant a waiver of the labor certification process. Ironically, the third prong seems to require a demonstration that the beneficiary is virtually unique, which only the DOL may conclusively determine through a finding that similarly qualified workers are not available in the U.S.

B. NATIONAL INTEREST BENEFIT VS. LABOR CERTIFICATION

Although labor certification is necessary to protect U.S. workers and jobs, it should not be used as a loophole for the INS to avoid making national interest waiver decisions and a stumbling block to prevent those who perform work in the national interest from being admitted to the United States. *NYSDOT* acknowledges (by incredible understatement) the "inconvenience" of the labor certification process, yet insists that the national benefit offered by the national interest waiver beneficiary must demonstrably outweigh the inherent national interest in the labor certification process.

Labor certification, i.e., a DOL determination, is not merely inconvenient, but has become virtually impossible to attain or so slow to process as to be nearly impossible. The process requires employers to submit a job description and documentation about the foreign worker's qualifications to the State Employment Security Agency, a representative of the DOL. After labor recruitment evidence has been submitted and evaluated, the DOL must then certify whether: (1) there are insufficient U.S. workers able,

qualified and available to perform the work desired by the prospective employer; and (2) the employment of the sponsored foreign national will not adversely affect the wages and working conditions of similarly employed U.S. workers. The DOL in many cases currently takes two or more years to complete this process. Once the DOL approves labor certification for a position, the INS is required to approve an I-140 petition (Immigrant Petition for Alien Worker) if the evidence shows that the alien meets the minimum acceptable objective job qualifications.

NYSDOT insists that labor certification is the appropriate process for qualified workers in a field of demonstrated shortage.[13] Although reduction in recruitment labor certification was made available for occupations widely acknowledged to involve a shortage of qualified workers,[14] employment in a shortage occupation (despite *NYSDOT*) should not automatically preclude a successful national interest waiver route to an immigrant visa. As the Assistant to the President for Economics and Domestic Policy confirmed, the enactment of IMMACT 90 was intended to "help relieve labor shortages in key technical areas, allow more professional services in rural areas, and improve the competitiveness of our workforce."[15]

Delegating national interest waiver analysis to the labor certification process will only serve to increase the incredible backlog of the process, and create additional stumbling blocks for both the INS and DOL, two agencies already saddled with monumental and widely publicized problems.[16] IMMACT 90 required the DOL to address severe labor shortages by conducting a Labor Market Information Study and designating a list of shortage occupations for which a labor certification will be deemed to have been issued, similar to the current Schedule A.[17] Perhaps because of a reluctance to endure political controversy, a lack of resources, or other reasons, the DOL has been unable to compile and publish in final form a list of demonstrated shortage occupations.

The objective labor certification standard is fundamentally inconsistent with the subjective national interest test envisioned by Congress. Simply because the INS is apparently not comfortable making qualitative determinations in document intensive cases, the agency should not abdicate its authority to

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[13] *NYSDOT*, supra.

[14] General Administration Letter ("GAL") No. 1-97, October 1, 1996.

[15] Congressional Record, October 27, 1990, H. 12321.

[16] *NYSDOT* represents yet another example of the disturbing INS trend to "pass the buck" or rely on DOL regulations without fully exploring the consequences. As noted in the June 4, 1998 INS Proposed Rules, Fed. Reg. Vol. 63, No. 107, regarding H-IB petitions, 8 CFR §214.2(h)(2)(i)(E)(2) would require an amended H-1B petition when the "petitioner is required, under 20 CFR §655, to obtain a new certification of filing of a labor condition application." However, the DOL regulations at 20 CFR §655 are silent regarding the circumstances in which the filing of a new labor condition application is required.

[17] 20 CFR §656.10.

decide whether a person contributing skills in the national interest merits a waiver of the job offer and labor certification requirement.

IV. TIPS AND TACTICS THAT MAY PREVAIL DESPITE *NYSDOT*

Although there is no clear route to satisfy or overcome *NYSDOT*, creative lawyering techniques may help fulfill the three-prong test established in *NYSDOT*:

- First – demonstrating that the employment is in an area of substantial intrinsic merit;
- Second – demonstrating that the proposed benefit will be national in scope; and
- Third – demonstrating that the national interest would be adversely affected if a labor certification were required for the beneficiary. Also stated as:
    - demonstrating that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making the position sought available to U.S. workers; or
    - establishing 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.

Theoretically, if the INS is made aware that labor certification is inappropriate or simply unavailable for a national interest waiver beneficiary, then the burden to demonstrate that the national interest benefit overrides the labor certification interest is seemingly lessened, i.e., the third prong of *NYSDOT* is more easily satisfied.[18] Administrative decisions of the Board of Alien Labor Certification Appeals ("BALCA"), the appellate body consisting of all administrative law judges assigned to labor certification matters, offer useful insight on the circumstances when labor certification may not be feasible in a given situation. Furthermore, the DOL Technical Assistance Guide ("TAG") clearly states that in given situations, labor certification is not appropriate.[19] The following situations are inappropriate for labor certification and thus, may help to lower the burden to satisfy the third prong of *NYSDOT*.

[18] Practitioners should exercise caution in introducing the INS examiners to the complexities of labor market testing envisioned by DOL regulations, policies, and case law. Depending on the facts in a given case, an inartfully drawn argument of counsel might lead the INS to conclude that the national interest in protecting job opportunities for U.S. workers is enhanced when a labor certification is unavailable.

[19] Technical Assistance Guide ("TAG"), No. 656, Labor Certifications, pp. 136-l37, published by the U.S. Dept. of Labor (1981).

A. SELF -SPONSORED PETITIONS

Given that labor certification is not possible for a self-sponsored petitioner, it ought to follow that the third *NYSDOT* prong is not applicable to a self-sponsored national interest waiver beneficiary. A sole-proprietor employer, who is also the alien named in the labor certification application as the employee, does not have a valid job opportunity for a U.S. worker and is thus inappropriate for labor certification.[20] The same result should follow where the employer is a corporation or other entity that is owned, entirely or in substantial part, by the alien beneficiary or a close relative.[21] *NYSDOT* footnote 5 addresses the situation of a self-sponsored petition by stating the petitioner still must demonstrate that he/she will serve the national interest to a substantially greater degree than others in the same field. Testimonial letters from recognized experts in the field and other evidence that verifies substantially better service may therefore satisfy the third prong of *NYSDOT* in this situation.

B. ALMOST INVESTORS

Persons who may not qualify for an immigrant visa as an investor, may still be able to obtain permanent residence through a national interest waiver. The Ninth Circuit has clearly stated that operation of one's own enterprise may be more akin to an investor who competes with other entrepreneurs and creates jobs, but does not compete in the job market or reduce the number of jobs available.[22] Therefore, an owner of a business who satisfies the first two prongs of *NYSDOT*, and proves his or her business investment does not adversely affect employment opportunities but rather creates jobs, may have a lower burden of proof in satisfying the third prong of *NYSDOT*.

C. UNUSUAL COMBINATION OF DUTIES

Job offers that demand an unusual combination of skills, knowledge, abilities, and conditions of employment, which are not normally required to satisfactorily perform the job (as the occupation may by woodenly defined in the Dictionary of Occupational Titles ("DOT")[23]) are inappropriate for labor certification.[24] Any requirement beyond what is included in a single DOT definition, unless required by demonstrated business necessity, will likely fail the labor certification process. A national interest waiver

[20] Id.

[21] *Matter of Modular Container Systems. Inc.*, 89-INA-228 (BALCA July 16, 1991) (en banc); *Hall v. McLaughlin*, F.2d. 868, 875 (D.C. Cir. 1989).

[22] *Bhakta v. INS*, 667 F.2d 771 (9th Cir. 1981); *Lauvik v. INS*, 910 F.2d 658.

[23] U.S. Department of Labor, Dictionary of Occupational Titles ("DOT") (4th ed. 1991). For a discussion of the use and occasional agency misuse of job definition procedures in the DOT, see *Panning for Gold in the Dictionary of Occupational Titles* by Angelo A. Paparelli and Catherine L. Haight, Immigration & Nationality Law Handbook, Vol. II, pp. 360 - 371 (AILA, 1992-1993).

[24] 20 CFR §656.21(b)(2); TAG p. 46.

beneficiary possessing a worthy but unusual combination of duties and abilities would also seem to satisfy the theory that the third prong of *NYSDOT* can be satisfied by a "unique" beneficiary.[25] Therefore national interest waiver petitions emphasizing the unique combination of duties required and skills performed by the beneficiary should seemingly satisfy the third *NYSDOT* threshold.

D. PART-TIME EMPLOYMENT IN THE U.S.

Part-time employment is inappropriate for labor certification.[26] The national interest waiver beneficiary whose services satisfy the first two *NYSDOT* prongs and whose proposed employment is only part-time in the United States and part-time abroad should more easily satisfy the third prong of *NYSDOT*.

E. INAPPLICABLE EXPERIENCE

BALCA firmly holds that labor certification is not possible when the applicant gained experience in the specific U.S. job offered while working for the petitioning employer or a foreign parent corporation.[27] An employer submitting a national interest waiver petition on behalf of an employee/beneficiary who did not have experience in the job prior to being employed by the petitioner could conceivably demonstrate that labor certification is inappropriate, and thus may satisfy the third prong of *NYSDOT*. The likelihood of overcoming the third prong of *NYSDOT* may substantially increase when the beneficiary has also acquired closely-held proprietary company information, i.e., has gained experience providing unique services or possesses unique talents while employed by the petitioner.

F. PREVAILING WAGE

The labor certification process requires that the prevailing wage for persons similarly employed in the local area, not a national average or a median wage, be paid.[28] Persons who are constantly traveling, whether within the United States or elsewhere, cannot readily establish a local prevailing wage and may be ineligible for labor certification. Thus, national interest waiver petitions on behalf of oft-traveling persons would seem to satisfy the third prong of *NYSDOT*.

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[25] A senior California Service Center, Business Product Line officer at the September 17, 1998 AILA Liaison Meeting stated that a national interest waiver beneficiary could conceivably be approved if shown to be "unique."

[26] 20 CFR § 656.50.

[27] *Matter of Inmos Corp.*, 88-INA-326 (BALCA 1990) (en banc).

[28] 20 CFR § 656.40; *Matter of Heritage Bindery*, 89-INA-35I (BALCA 1990); *Matter of Seibel and Stern*, 90-INA-86 (BALCA 1990).

G. UNSTABLE U.S. BASE

Labor certification is inappropriate when the employer (a) is temporarily in the United States, i.e., A or G foreign diplomats, L-l intracompany transferees, F-l students, J-l exchange visitors, and representatives of foreign information media holding I-visas, or (b) has no location in the United States.[29] The national interest waiver beneficiary who satisfies the first two *NYSDOT* thresholds and whose employer is not located or is only temporarily located in the United States should arguably satisfy the third *NYSDOT* threshold.

H. NO TIME

The most important and obvious argument establishing that labor certification is inappropriate is the insufferable length of time required for the labor certification process. Currently labor certification takes up to two or more years throughout much of the United States, yet the INS in *NYSDOT* (much like the blithely oblivious Marie Antoinette in her famous "Let them eat cake" statement) suggests that the labor certification process is merely an "inconvenience." The substantial harm resulting from cessation or interruption of unique contributions to areas of intrinsic merit benefiting the nation should be reason enough to grant a national interest waiver petition. Time will tell whether this type of argument prevails.

V. DESTROYING *NYSDOT*

Lawyers must be prepared to litigate poorly reasoned decisions by the INS and the Administrative Appeals Unit ("AAU") resulting from reliance on *NYSDOT*. In accordance with the Administrative Procedure Act, courts should hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[30] Case law has established that the abuse of discretion standard should be used in a national interest waiver petition to review the factual determination whether waiver of the labor certification requirement would be in the national interest.[31]

A. ABUSE OF DISCRETION

In *Mnayer*, a national interest waiver petition, the AAU was found to have abused its discretion by failing to consider the facts in the record, which adequately established that waiver of the labor certification requirement would be in the national interest.[32] Although there is no exact measure of what constitutes

[29] TAG, supra. See also *Matter of A. Dow Steam Specialties, Ltd.*, Int. Dec. 3013, 19 I&N Dec. 389 (BIA 1986).

[30] Administrative Procedure Act, 5 USC @ 706 et seq.

[31] *Laila Mnayer v. INS*, U.S. Dist., S. Dist. Fl., LEXIS 21932 (1995).

[32] Id.

abuse of discretion, case law indicates that the INS has been found to have abused its discretion when it fails to consider all of the relevant evidence submitted.[33] It is also an abuse of discretion when the INS fails to explain adequately why the facts it did consider were insufficient to establish a required element for an immigration benefit.[34] An abuse of discretion may also be found where the INS decision (a) was made without rational explanation, (b) inexplicably departed from established policies, or (c) rested on an impermissible basis such as race discrimination.[35] In addition, a court may find that the INS abused its discretion when a decision was based on an improper understanding of the law.[36]

The beneficiary in *Mnayer*, a clinical laboratory technologist in cytogenetics, proffered evidence including letters and articles in support of her national interest waiver petition. The Court grouped the letters into three general categories (a) letters of recommendation acknowledging general qualities; (b) recommendations recognizing academic achievements; (c) recommendations establishing the beneficiary played a "key role" in the field. The AAU's failure to address the third group of letters required reversal of its determination.

The third group of letters described the beneficiary as "one of the leading researchers" in the field; a "leading technologist with extensive knowledge and experience in the use of highly sophisticated techniques"; a scientist who "possesses unique skills in the field and will be engaged in a critical role in vital investigation"; a professional whose "levels of skill and knowledge (that] she brings to her work are well beyond those of the average researcher in her field"; a researcher with "specific abilities and accomplishments (that] are significantly higher than that encountered in the average researcher"; and a person whose "contributions are uniquely valuable as they signify a knowledge base and mastery of sophisticated analytical methods which are in exceedingly short supply in the United States." With regard to the beneficiary's work, the letters state "the work performed is of utmost importance"; there is a "serious shortage of individuals with specific academic training and unique experience and skills in this highly specialized area." With regard to the beneficiary's position, the letters state "holds a key position"; holds a "key role in the international effort"; and "specific continuing contributions to this project represent a key element in our future success and achievement." The Court held that the letters adequately established that waiver of the job offer requirement, and thus of labor certification, would be in the national interest.

The Court in *Mnayer* held that the AAU abused its discretion by ignoring the evidence submitted in support of the petition and that the evidence more than adequately established that waiver of the labor

[33] *Dragon v. INS*, 748 F.2d 1304, 1306 (9th Cir. 1984); *Grimson v. INS*, 934 F. Supp. 965 (D. Illinois 1996); *Mnayer*, supra.

[34] *Muni v. INS*, 891 F. Supp. 440 (D. Illinois 1995).

[35] *Bal V. Moyer*, 883 F.2d 45, 46 (7th Cir. 1989); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985).

[36] *Occidental Engineering Co. v. INS*, 753 F.2d. 766, 767 (9th Cir. 1985).

certification requirement would be in the national interest – charges that likewise might be fairly leveled at the INS in *NYSDOT*, which contains only a cursory and summary analysis of the evidence.

B. MNAYER AND NYSDOT

In *Mnayer*, the AAU applied the following interpretation to the national interest requirement for waiver of labor certification:

> Eligibility for exemption from the requirement of a job offer based on national interest is limited to those whose demonstrated abilities can be reasonably expected to have a substantial prospective benefit to the national interest significantly greater than that ordinarily expected of persons in that field of endeavor.

The Court in *Mnayer* held that the test of eligibility for waiver of labor certification was a reasonable and permissible interpretation of the phrase, "in the national interest." *NYSDOT*'s third prong includes a similar if more stringently phrased test of eligibility for waiver of labor certification.

CONCLUSION

NYSDOT seems to be clearly nothing more than an opportunity for the INS to deny national interest waiver petitions subjectively, using boilerplate language, without articulation or evaluation of the evidence. Recent commentary from the California Service Center Adjudicating Officers states that *NYSDOT* "helps to define what is meant by "national interest" – and – it helps to define it *in favor of the Service*!" [Emphasis in the original.][37] This gleeful exclamation by Service Center officers implies that national interest waiver petitions are viewed by the INS in a hostile, adversarial manner, i.e., a battle pitting the INS against the petitioner and/or beneficiary. As Edward Skerrett, head of the AAU, recently predicted after the agency had designated *NYSDOT* as precedent, the national interest waiver "will be used less than it is now."[38] The INS and the AAU must be made to realize, however, that the admission of immigrants and the protection of American workers are neither competing nor mutually exclusive goals.

Given that human resources constitute the most precious wealth of the nation, immigration lawyers must fight for the procedures that allow the best and the brightest to contribute to our country's vital national interests. Lawyers should not give up on the national interest waiver route to an immigrant visa, but should instead devote their energies to eliminating the ominous effects of *NYSDOT*, and giving it a proper and early burial in the graveyard of broken governmental promises.

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[37] A copy of the meeting notes are attached as Appendix A [or, are available as an AILA reprint or, are available via AILA Infonet.]

[38] The Wall Street Journal, *The 'National Interest' Causes INS to Wander Down Peculiar Paths*, by Barry Newman, August 20, 1998.