



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



11 DEC 2001

File: EAC 99 106 52661 Office: Vermont Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

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

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

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

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as an alien of exceptional ability in the sciences. On the Form I-140 petition, the petitioner states that he seeks employment as a "homeopathy researcher and developer." 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

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

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue to be decided is whether the petitioner is a member of the professions with an advanced degree, and/or an alien of exceptional ability. The director stated that the petitioner qualifies as a member of the professions holding an advanced degree. The record, however, does not support this contention. The regulation at 8 C.F.R. 204.5(k)(2) states, in pertinent part:

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petitioner has submitted no evidence to show that homeopathy research and development requires at least a U.S. baccalaureate or its foreign equivalent. The fact that the petitioner holds an advanced degree does not establish that his current occupation requires such a degree. Indeed, the petitioner has not specifically claimed to be a member of the professions. Instead, the petitioner claims to be an alien of exceptional ability in the sciences.

The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

We note that the regulation at 8 C.F.R. 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every physician has a college degree and a license or certification; but it defies logic to claim that every physician therefore shows "exceptional" traits.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

The petitioner holds an M.D. degree from the Naval Medicine Academy in what is now St. Petersburg, Russia (during the petitioner's studies, the city was Leningrad, U.S.S.R.). The record contains academic documentation that lists the courses which the petitioner took at the academy. There is no indication that the petitioner took any college courses in homeopathy, let alone obtained a degree in that field. Certificates issued to the petitioner reflect training in "Venereal and Dermatology Diseases."

Counsel states "[o]nly a handful of colleges in the United States provide comprehensive programs for future homeopaths. Thus, the practitioners in the area usually obtain their medical degrees in a different field and then concentrate on the homeopathic practice." The petitioner did not obtain his degrees in the United States, and therefore the relevance of this assertion is questionable.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

Counsel states that the petitioner has 25 years of medical experience. In this instance, the occupation the petitioner seeks is not as a physician, but as a homeopathic researcher. While related in a broad sense, the petitioner's work as a clinical physician and as a hospital administrator is not experience in the occupation of homeopathy research and development. As noted above, much of the petitioner's specialized training pertains to dermatology and venereal diseases.

The petitioner's official military file indicates that he published articles pertaining to homeopathy in 1988 and 1990, but the same file shows that the petitioner had clinical and administrative duties during this time period, indicating that the petitioner was not employed full-time as a homeopathic researcher during the 1980s or early 1990s.

We note that, if the petitioner intends to continue in the field of active medical practice, then he becomes subject to the provisions of section 212(a)(5)(B) of the Act, which requires that an alien graduate of a foreign medical school, seeking to practice medicine in the United States, must pass parts I and II of the National Board of Medical Examiners Examination or a designated equivalent examination.

The occupations of a researcher and a physician are, to a degree, related, but they are not the same occupation. Absent evidence that the petitioner has at least ten years of full-time research experience, we cannot find that the petitioner has satisfied this criterion.

A license to practice the profession or certification for a particular profession or occupation.

The petitioner holds a certificate from the International Council of Medical Acupuncture and Related Techniques. Acupuncture is a Chinese technique which has existed for millennia; homeopathy was devised in central Europe in the 19th century. Acupuncture involves the insertion of fine needles into specified anatomical points, whereas homeopathy is grounded in the use of highly diluted compounds. The petitioner has not established that his certification by the above Latvian/Estonian/Lithuanian body is related directly to his work as a homeopathic researcher.

Evidence of membership in professional associations.

The petitioner documents his membership in several homeopathic associations.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Counsel cites several witness letters to indicate that the petitioner has satisfied this criterion. Such letters, solicited from witnesses chosen by the petitioner for the express purpose of supporting this visa petition, cannot carry the same weight as independent evidence of formal recognition which would have existed whether or not the petition had been filed. We will address the witness letters in the context of the petitioner's request for a national interest waiver.

Counsel notes that the petitioner has received several medals in the course of his work as a military physician. The record does not establish that any of these medals pertain to the petitioner's work in homeopathic research. Some of the petitioner's military awards simply recognize the length of the petitioner's military service. Length of experience is covered by another criterion, above.

The petitioner's invitations to various homeopathic conferences are more clearly relevant to the field of homeopathy, but the petitioner has submitted nothing from the entities which organized the conferences to establish that these invitations represent recognition for achievements and significant contributions to the field.

For the reasons outlined above, we cannot conclude that the petitioner meets the regulatory definition of exceptional ability.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's field and the petitioner's work therein:

[The petitioner] is a renowned medical researcher in the area of homeopathy and military medicine. . . . He has had over twenty years of practical experience in treating a variety of diseases using homeopathic methods. He developed and patented twelve methodologies related to the treatment of diseases associated with military service. . . .

The use of alternative medicine methods in the United States has experienced a tremendous increase in popularity due to the availability of remedies, their inexpensiveness and ease of application. These three components of success are products of the methods and techniques developed by the leading specialists in homeopathy, and [the petitioner] is one of them.

Dr. Olga N. Chernyshev, research professor of Physiology at Georgetown University, credits the petitioner with "revolutionary applications of homeopathic methods in military medicine." Dr. Chernyshev states:

[The petitioner] developed and implemented several more sophisticated particular methods, such as using small doses of neuroleptic remedies in the treatment of psoriasis, developing a formula for treating chronic streptococcal skin infections with a combination of organic acids diluted in alcohol, using ASD-3 preparation for chronic skin eczema, using

hexametilentetramin water solutions for treatment of skin fungal diseases among submarine crews, etc.

Dr. Chernyshev also asserts that the petitioner's skills may be useful in the event of bioterrorism (an area which has obviously taken on new urgency in recent weeks). Dr. Chernyshev refers to "parcels containing Anthrax. If such an event happens, an inexpensive and easily accessible homeopathic remedy may save the victim's life." Dr. Chernyshev does not specify whether there have been any recorded cases where homeopathic remedies cured an otherwise life-threatening case of inhalation anthrax. If the petitioner is not in possession of such a remedy, then the assertion that he "may" one day develop one is speculative and carries no weight as evidence.

Dr. Chernyshev notes that the recently founded National Center for Complementary and Alternative Medicine is conducting research into homeopathy and other "alternative" medical paradigms. The stated purpose of this research is not unreservedly to promote such methods, but rather to test their effectiveness. The fact that a federal office has been created to test the claims of alternative medicine would appear to be a sign that those claims had not previously been validated.

Dr. Eric Shiraev, a psychologist at the George Washington University, states that the petitioner's "profound knowledge of homeopathic methods makes him a tremendous asset for the national health care." Dr. Shiraev credits the petitioner with "ingenious application of homeopathic remedies for treating psychological disorders," and strongly implies that the petitioner has produced permanent cures or at least long remissions in patients with, for example, learning disorders and attention deficit/hyperactivity disorder.

Various witnesses with no evident medical training attest to their treatment by the petitioner. We note that clinical practice (i.e. treatment of patients) has no national impact, because any health care practitioner is necessarily limited in the number of patients that he or she can personally treat. Also, as noted above, the petitioner claims that he seeks to work as a researcher. If the petitioner intends to work as a clinical practitioner, treating patients such as these witnesses, then section 212(a)(5)(B) of the Act would seem to apply. This provision of law strongly suggests that Congress considers it to be in the national interest to prevent the entry of physicians whose qualifications are untested by a competent U.S. entity.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Dept. of Transportation. In response, the petitioner has submitted arguments from counsel and several additional documents. Many of

counsel's arguments are general comments about homeopathy, alternative medicine overall, or the risks of conventional medicine.

In discussing homeopathy, counsel has stated "[u]nlike traditional medicine, homeopathic methods . . . can be used by the average person to successfully treat various illnesses and injuries. Several books are available on self-care using homeopathy." Encouraging a patient to self-diagnose and self-treat in this manner would appear to discourage the patient from seeking expert medical treatment when a professional diagnosis may be vital for the health of the patient.

Counsel states that the petitioner's "presence in the United States will contribute to achieving the goal of affordable health care, expanding the scope of available remedies and educating the people how to live longer and better." Counsel has not, however, provided even one example of a remedy developed by the petitioner that has been confirmed to be effective by the U.S. Food and Drug Administration.

With regard to the petitioner as an individual, counsel asserts that the petitioner "has achieved the results that not only U.S. homeopaths could not accomplish, but that much more advanced European homeopathy cannot beat." Counsel states that the petitioner has had major success treating multiple sclerosis, epilepsy, tumors, psychosis, and a variety of other ailments; several exhibits submitted at this time are testimonials from patients and summaries of other cases. Counsel acknowledges that the petitioner has not written a significant number of scholarly papers in peer-reviewed journals, but counsel asserts that the petitioner "sometimes does not have time to write about his success - he is too busy bringing people back to normal life."

If, as counsel suggests, the petitioner "does not have time to write" because he is treating patients, then by all appearances he would seem to be a practicing physician rather than a researcher and developer of homeopathic remedies, and thus subject to all applicable restrictions and requirements regarding the admission of graduates of foreign medical schools. Also, it is far from clear how the petitioner's work can have a national impact if his findings are not published in national journals so that others can replicate his methods and treat patients nationwide.

Some of the documents submitted in response to the director's request are general documents about homeopathy or alternative medicine, such as a Washington Post article about how "some" alternative therapies prove effective. The article discusses a special issue of the Journal of the American Medical Association, devoted to scientific examination of various claims made by alternative medicine practitioners. The Washington Post article

makes no specific mention of homeopathy. Also submitted are photographs of a monument to Samuel Hahnemann, the German researcher who invented homeopathy in the early 1800s.

The petitioner submits documentation from the National Center for Complementary and Alternative Medicine. This documentation confirms that the center's purpose is to "facilitate the evaluation of alternative medical treatment modalities," rather than to endorse outright those modalities.

The director concluded that the petitioner's field has substantial intrinsic merit¹ and national scope, but denied the petition on the grounds that general arguments regarding the growing use of homeopathic medicines do not establish that the petitioner, in particular, qualifies for a national interest waiver.

Counsel states that the director, in denying the petition, failed to consider that "two basic elements for a labor certification - worker shortage and prospective employer - are absent and the labor certification requirement is simply not applicable." While the inapplicability of labor certification is a factor to consider, it is only one of many. The petitioner's desire to be self-employed does not intrinsically create a national interest issue.

Counsel asserts:

[The petitioner has] submitted numerous documents that sufficiently establish his specific prior achievements as an exceptional homeopathist. . . . He has been able to cure or to bring to the point of indefinite remission various conditions where both the conventional and alternative medicine were helpless: epilepsy, otitis, chronic ulcer, chronic joint pains, postoperational problems, cardiac arrhythmia, paralysis, manic depression, uterine fibroma, to name just a few.

If the petitioner were truly responsible for highly significant, even revolutionary, innovations in medical treatment of previously intractable problems, it would be reasonable to expect the

¹This finding is suspect, because the medical and scientific communities are far from unanimous endorsement of the effectiveness of homeopathy, or of the validity of its basic tenets. In a position paper issued in 1994, the National Council Against Health Fraud ("NCAHF") has branded homeopathy "scientifically indefensible," stating "[h]omeopathy's principles have been refuted by the basic sciences of chemistry, physics, pharmacology, and pathology. . . . The NCAHF advises consumers not to buy homeopathic products or to patronize homeopathic practitioners." The full text of the "NCAHF Position Paper on Homeopathy" can be found at www.ncahf.org/pp/homeop.html.

petitioner's work to have attracted some degree of attention from the medical community. The argument that the petitioner is too busy to write about his own work would not preclude an outside party from studying the petitioner's results and publishing them. The petitioner, however, seems to have attracted little notice outside of his own patients and a small number of academics in Washington, D.C., where the petitioner states he intends to work. Counsel implies on appeal that the petitioner is "able to cure multiple sclerosis." An actual cure for multiple sclerosis would immediately make international news and earn major accolades for its discoverer. Because of the profound implications of such a claim, we cannot accept it without a significant quantity of incontrovertible evidence. The documentation submitted with the petition, most of it highly general or anecdotal, simply does not rise to this level.

The record does not persuasively establish that the petitioner is unusually accomplished as a researcher, or that his work with individual patients has had or will have any national impact. Furthermore, as stated above, the petitioner has not persuasively established that the occupation of "homeopathy researcher and developer" is a profession (i.e., an occupation requiring a baccalaureate) or that the petitioner qualifies as an alien of exceptional ability. This finding is due in part to the petitioner's failure to explain exactly what it is that he intends to do in the United States - e.g. conduct laboratory research or engage in a clinical medical practice. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

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

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

ORDER: The appeal is dismissed.