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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy

[redacted]

11 DEC 2001

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

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)

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, Texas Service Center. The Associate Commissioner for Examinations remanded the matter to the director, pursuant to newly-issued regulations. At the petitioner's request, the director has returned the appeal to the Associate Commissioner for adjudication. The petition will again be remanded for further action and consideration.

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 a member of the professions holding an advanced degree. The petitioner states that he seeks employment as a primary care physician with Knox County Health Providers. 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 because the petitioner will practice medicine in a designated health care professional shortage area. 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.

The petition in this case was filed on March 4, 1999. The petitioner filed an appeal on September 10, 1999, which was still pending as of November 12, 1999. Pursuant to the interim regulation at 8 C.F.R. 204.12(d)(2), the Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, remanded the matter to the director for consideration under the newly-enacted section 203(b)(2)(B)(ii) of the Act.

The director subsequently informed the petitioner of the new documentary requirements set forth at 8 C.F.R. 204.12(c). The petitioner has submitted the requested documentation, but in the cover letter accompanying this documentation, counsel states "this application was filed under Matter of NYSDOT. . . . The adjudication of the application should also be under NYSDOT."

Counsel refers to Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998). While Matter of New York State Dept. of Transportation still applies to most national interest waiver petitions, some of its provisions have been superseded by the subsequently-enacted section 203(b)(2)(B)(ii) of the Act, and the pertinent regulations at 8 C.F.R. 204.12.

Because counsel's comments appeared to suggest that the petitioner did not wish to be considered under the new statutory and regulatory provisions, the director contacted the petitioner, instructing him to "clarify if the petitioner would like the case adjudicated under NYSDOT or under the new regulations." The

director stated "it has been determined that the case is approvable under the new regulations," and that the previous denial of the petition "is not likely to be overturned by AAO since the original petition is based on a shortage and there are new regulations which specifically address this issue." In response, counsel has requested that the director "return this application to the AAO for a decision, on the merits of the application for a national interest waiver under Matter of NYSDOT."

The director has cited no authority by which the petitioner may choose if he "would like the case adjudicated under NYSDOT" rather than under the new regulations. In Matter of New York State Dept. of Transportation, the AAO had stated:

> A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

Under this standard, a waiver request based entirely or primarily on a worker shortage is not persuasive. Section 203(b)(2)(B)(ii) of the Act was created to respond to, and supersede, Matter of New York State Dept. of Transportation with regard to physicians in shortage areas. Section 203(b)(2)(B)(ii) of the Act also introduces new evidentiary and experience requirements for physicians seeking a national interest waiver based on a shortage. Supplementary information to Service regulations implementing the new amendments to section 203 of the Act, published at 65 Fed. Reg. 53889 (September 6, 2000), states "section 203(b)(2)(B)(ii)(IV) of the Act makes it clear that Congress intended to apply this new provision to all petitions that were actually pending on November 12, 1999."

Given the passage of this new amendment to the Act, tailored specifically and exclusively for physicians in shortage areas (and at VA hospitals), we cannot conclude that Congress intended for these new evidentiary requirements to be optional. Section 203(b)(2)(B)(ii)(IV) of the Act states "[t]he requirements of this subsection do not affect waivers on behalf of alien physicians approved under section 203(b)(2)(B) before the enactment date of this subsection." The petition at hand was not approved before the enactment date, and therefore the requirements do apply in this proceeding. By extension, we cannot conclude that the new regulations at 8 C.F.R. 204.12 are to apply only at the discretion of the alien seeking benefits.

For the above reasons, upon consideration, we find that the director erred in implying that the new statute and regulations

apply only if the petitioner wants them to apply. Neither the petitioner nor the Service can disregard section 203(b)(2)(B)(ii) of the Act, or the regulations at 8 C.F.R. 204.12, even if the petitioner believes that it is in his interest to disregard them.

With regard to counsel's statement that the petition "was filed under NYSDOT" and "[t]he adjudication . . . should also be under NYSDOT," we take note of a previous contention by counsel. In a cover letter dated February 24, 1999, submitted with the petition, counsel stated that the petitioner "takes the position that NYSDOT is not relevant to this case." Counsel does not explain this diametrical shift regarding the claimed applicability of Matter of New York State Dept. of Transportation. In any event, a new statute necessarily supersedes a previous precedent decision, in any area in which the two are in conflict.

We also note that, according to counsel, the petitioner seeks consular processing in Montreal, Canada, rather than adjustment of status within the United States, despite the fact that the petitioner is already in the U.S. in lawful nonimmigrant status. The director has stated that "consular processing is not an option under the new regulations." We cannot definitively resolve this issue, because consular processing is an issue outside of the AAO's appellate jurisdiction. We will simply observe that the statute itself does not preclude consular processing. Section 203(b)(2)(B)(ii)(II) of the Act indicates specific circumstances under which the Secretary of State can and cannot issue an immigrant visa to an alien physician.[1] Similarly, the supplementary information accompanying the new regulation (cited above) indicates that "[a]ny physician living abroad who has met the requirements necessary to practice in the United States . . . may seek a national interest waiver of the job offer requirement, if the physician can meet the requirements of section 203(b)(2)(B)(ii)" of the Act.

For the reasons outlined above, section 203(b)(2)(B)(ii) of the Act, and thus its implementing regulations at 8 C.F.R. 204.12, apply to the petition at hand, which was pending as of November 12, 1999. The director does not have the authority to waive these

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[1]Congress, when it created the new waiver specifically for alien physicians in underserved areas, plainly intended to require those aliens to continue to practice in those underserved areas for an extended period of time. We see no indication in the statute that an alien physician can bypass this requirement simply by obtaining a visa at a consulate instead of adjusting status in the United States. Because eligibility for permanent resident status based on a local physician shortage is contingent on several years of service within the United States, it is not clear why adjustment of status would not be a viable option.

statutory and regulatory provisions, whether or not the petitioner requests it. The director must adjudicate the petition under the relevant and applicable law as it now stands.

Accordingly, this matter is remanded to the director for consideration under the above statutory provision and regulations at 8 C.F.R. 204.12. The director must evaluate the new evidence submitted by the petitioner pursuant to the new regulations at 8 C.F.R. 204.12(c).

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.