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U.S. Department of Justice

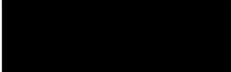
Immigration and Naturalization Service

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



NOV 26 2001

File:



Office: Texas Service Center

Date:

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)

IN BEHALF OF PETITIONER:

Self-represented

Public Copy

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, 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 a member of the professions holding an advanced degree. The petitioner seeks employment in the medical practice of Dr. Oscar Hernandez. 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 petitioner holds medical degrees from universities in his native France, and the director concluded that the petitioner thus qualifies as a member of the professions holding an advanced degree.¹ 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.

¹We note that, if the petitioner seeks to enter the U.S. in order to practice medicine as a physician, then section 212(a)(5)(B) of the Act applies. This section of law indicates that alien graduates of foreign medical schools, who intend to practice medicine in the U.S., are inadmissible unless they pass certain examinations.

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.

The petitioner states that specialists in occupational medicine, such as himself, are often able to make diagnoses that might not occur to general practitioners, because certain occupations expose workers to unique risk factors. The petitioner's general statements establish the substantial intrinsic merit of

occupational medicine, but they do not distinguish the petitioner from other physicians in the same specialty.²

Furthermore, while the petitioner has documented substantial experience as a physician, the petitioner has not demonstrated that his work would have national scope, rather than affecting only the patients he treats.

Dr. Oscar Hernandez states:

[W]e have been trying to recruit [the petitioner] to work [in] our office laboratory and assist me in doing occupational therapy evaluations. . . .

In this regard [the petitioner] would be indispensable in the review of charts and integration of quality of care issues. I would also encourage him to seek a limited medical license . . . upon passing the first and second parts of the USMLE. [The petitioner] would also be an asset in setting up our research program as a research coordinator as we are in tremendous need for this type of assistance. Finding trained personnel to perform all of these functions has been very hard for us and we have yet to find anyone able to do these duties in our community.

Dr. Hernandez's statements indicate that he seeks to employ the petitioner not as a physician, but as an assistant. Dr. Hernandez's assertion that he has been unable to locate qualified workers suggests that he would encounter little difficulty in securing a labor certification for the beneficiary. 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. See Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998).³

²The only evidence that distinguishes the petitioner from others in his field is a letter showing that the University of Paris awarded him a bronze medal in 1964 for his graduate thesis. The significance of this award is not clear. We note that the letter informs the petitioner that he must purchase the medal himself because the university is "unable to bear the cost."

³Section 203(b)(2)(B)(ii) of the Act, created by Public Law 106-95 in 1999, includes a provision for blanket waivers for certain physicians in designated shortage areas. This provision, however, does not appear to apply to the petitioner for a variety of reasons. First, as noted above, Dr. Hernandez appears to seek to employ the petitioner as an assistant rather than as a

The record offers some indication that Dr. Hernandez applied for a labor certification on the petitioner's behalf in December 2000; but any such labor certification can be considered only in the context of a newly filed petition; it cannot be retroactively applied to this petition, which was first filed in May 1998. For immigrant visa petitions involving a labor certification, the petition's filing date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The director denied the petition, stating that the petitioner has not established that his contributions exceed those of other occupational medicine specialists to an extent that would merit a national interest waiver. The director also stated that the petition does not fall under Section 203(b)(2)(B)(ii) of the Act, which pertains to physicians in shortage areas. The director also informed the petitioner that, because the petitioner had already filed the petition on his own behalf with no labor certification at the time of filing, Dr. Hernandez's subsequent efforts to obtain a labor certification are without consequence to the petition at hand. The director observed, furthermore, that Dr. Hernandez's letter suggests that the petitioner would be working in a supporting capacity rather than as a physician in his own right.

On appeal, the petitioner states that his training "will effectively substantially benefit prospectively the national interests and welfare of the [United] States" because occupational medicine specialists possess expertise that general practitioners lack. This observation, however, holds true for all competent occupational medicine specialists, including those already in the U.S. who warrant the protection afforded by labor certification. We cannot conclude that the very nature of the petitioner's specialty qualifies him (and all other specialists in the area) for a blanket exemption from the labor certification.

The petitioner reiterates Dr. Hernandez's assertion that there are no local qualified workers. Dr. Hernandez's comments, however, appear to describe circumstances under which a labor certification could most readily be obtained.

The petitioner submits documentation pertaining to his filing of a Form I-360 immigrant visa petition. Any such petition is part of a separate proceeding which has no bearing on the petitioner's eligibility for a national interest waiver as a member of the professions holding an advanced degree.

physician. Also, there is no indication that Dr. Hernandez practices in a designated shortage area, or that the Department of Health and Human Services has declared any shortage of occupational medicine specialists. Service regulations at 8 C.F.R. 204.12 spell out other requirements which the petitioner has not met.

The petitioner has since submitted documentation regarding business ventures undertaken by himself and his wife since December 2000. There is no regulation which allows the petitioner an open-ended or indefinite period in which to supplement the appeal. Indeed, the existence of 8 C.F.R. 103.3(a)(2)(vii), which requires a petitioner to request, in writing and in advance, additional time to submit a brief, demonstrates that the late submission of supplements to the appeal is a privilege rather than a right. Any consideration at all given to such untimely submissions, which are not preceded by timely requests for an extension, is discretionary.

In any event, the petitioner's new business venture does not appear to have anything to do with the employment that the petitioner had previously sought, and it does not establish that the petition should have been approved at the time it was filed. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

In a recent letter, the petitioner contends that physicians do not need to obtain labor certifications. This inaccurate assertion oversimplifies the provisions of section 203(b)(2)(B)(ii) of the Act and the regulations at 8 C.F.R. 204.12, which establish a blanket waiver only for certain physicians under circumstances which have not been shown to apply here.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession 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.

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.