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U.S. Department of Justice
Immigration and Naturalization Service

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

[REDACTED]

File: EAC 00 009 53404 Office: Vermont Service Center Date: DEC 09 2002

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)

IN BEHALF OF PETITIONER:

[REDACTED]

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

Elizabeth Hayward
for Robert P. Wiemann, Director
Administrative Appeals Office

DEC0902-07B5203



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U.S. Department of Justice
Immigration and Naturalization Service

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



File: [Redacted]

Office: Nebraska Service Center

Date: DEC 10 2002

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

Petition: Immigrant Petition for Alien Physician Pursuant to Section 203(b)(2)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)(B)(ii)

IN BEHALF OF PETITIONER:



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.

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FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Elizabeth Heyward
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska 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)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2)(B)(ii), as an alien physician. The petitioner asserts that the beneficiary is an alien physician who has agreed to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals.

The director found that the petitioner did not work full-time in a medical specialty that is within the scope of the Secretary's designation for the geographical area.

Section 203(b) of the Act, as amended, provides:

(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)(i) Subject to clause (ii), 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.

(ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

8 C.F.R. 204.12(c) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit the following evidence:

(1)(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.

(ii) If the physician will establish his or her own practice, the physician's sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.

(2) Evidence that the physician will provide full-time clinical medical service:

(i) In a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals and in a medical specialty that is within the scope of the Secretary's designation for the geographical area or areas; or

(ii) In a facility under the jurisdiction of the Secretary of VA.

(3) A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.

(i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.

(ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.

(4) Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

(5) Evidence of the Service-issued waivers, if applicable, of the requirements of sections 212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.

8 C.F.R. 204.12 further provides:

(d)(2) *Petitions pending on November 12, 1999.* Section 203(b)(2)(B)(ii) of the Act applies to all petitions that were pending adjudication as of November 12, 1999 before a Service Center, before the associate Commissioner for Examinations, or before a Federal court. Petitioners whose petitions were pending on November 12, 1999, will not be required to submit a new petition, but may be required to submit supplemental evidence noted in paragraph (c) of this section. The requirement that supplemental evidence be issued and dated within 6 months prior to the date on which the petition is filed is not applicable to petitions that were pending as of November 12, 1999. If the case was pending before the Associate Commissioner for Examinations or a Federal court on November 12, 1999, the petitioner should ask for a remand to the proper Service Center for consideration of this new evidence.

The job description on the Form I-140 petition is “internist/nephrologist.” In a letter accompanying the petition, the petitioner asserted that the beneficiary’s duties would include both internal medicine and nephrology. Since the petition was pending as of November 12, 1999 and was clearly based on the beneficiary’s intent to work as a physician in an underserved area, the director issued a request for additional documentation on October 23, 2000, listing the evidence required under 8 C.F.R. 204.12(c) quoted above. In response, the petitioner submitted evidence that Franklin County, Washington, has been designated as an underserved area by the Secretary of Health and Human Services, an employment contract, and two letters from the Washington State Department of Health. The employment contract indicates that 50 percent of the petitioner’s work is internal medicine and the remaining 50 percent is in nephrology. In addition, counsel argued that the law does not require that a doctor be a primary care physician to be eligible, only that he be a physician.

The director concluded that the petitioner did not work full-time in a medical specialty that is within the scope of the Secretary’s designation for the geographical area where the petitioner works.

On appeal, the petitioner asserts that it intends to hire the petitioner in the job specified on the Form I-140 petition and submits a January 14, 2000 letter to the Service confirming a job offer to the petitioner as a nephrologist. These statements do not address the director’s concerns.

8 C.F.R. 204.12(c)(1) and (2) unambiguously require that in order to establish eligibility under Section 203(b)(2)(B)(ii), the alien physician must work at least 40 hours in a medical specialty designated by HHS. The commentary to the relevant interim regulations at 65 Fed. Reg. 53889 (2000) provides:

While the statutory language says “any physician,” the Service notes that HHS currently limits physicians in designated shortage areas to the practice of family or

general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. Unless HHS establishes shortage areas for other fields of medicine, only these fields of medicine are covered by this rule.

The petitioner has not established that HHS has designated other shortage areas in the field of medicine. Without evidence that HHS has designated nephrologists or that the beneficiary works at least 40 hours as an internist, the petitioner cannot establish the beneficiary's eligibility under Section 203(b)(2)(B)(ii). Regardless of counsel's interpretation of the law, the Service is bound by its own regulations.

Finally, regarding the claimed shortage of nephrologists in the petitioner's geographic area, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. Matter of New York State Dept. of Transportation, 22 I&N Dec. 215, 220-221 (Comm. 1998). Section 203(b)(2)(B)(ii) of the Act and 8 C.F.R. 204.12 provide the only exception to the Department of Labor's jurisdiction, granting such jurisdiction in the case of doctors in an underserved area to HHS. As stated above, the petitioner has not established that the Secretary of HHS has designated a shortage of nephrologists. Thus, the claimed shortage of available U.S. nephrologists in the petitioner's geographic area would need to be tested through the labor certification process.

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.