



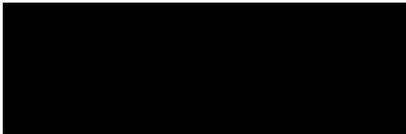
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U.S. Department of Justice

Immigration and Naturalization Service

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

**PUBLIC COPY**



File: [Redacted]

Office: NEBRASKA SERVICE CENTER

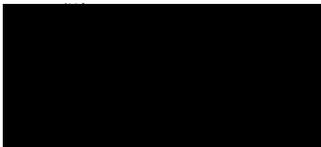
Date: 16 DEC 2002

IN RE: Petitioner:  
Beneficiary:



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:



**identifying data deleted to  
prevent identity theft and  
invasion of personal privacy**

**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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Robert P. Wiemann*  
for 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 to classify the beneficiary under 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 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 beneficiary did not work 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 CFR 204.12(c)(2)(i) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit evidence that the physician will provide full-time clinical medical service 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.

The petitioner seeks to employ the beneficiary as an anesthesiologist, serving the migrant and seasonal farm worker population of Western Skagit County. Documentation submitted with the petition shows that the Secretary of Health and Human Services ("HHS") has designated the area as having a shortage of primary care physicians.

The director instructed the petitioner to submit further evidence to establish that the beneficiary's medical specialty "is within the scope of the [HHS] Secretary's designation for the geographical area(s)." In response, the petitioner, through counsel, submitted a copy of the Nursing Relief Act (the legislation which added section 203(b)(2)(B)(ii) to the Act). Counsel asserts "that Act has no requirement that to qualify for the benefit sought the Medical Doctor must be a primary care medical doctor. The law only requires the doctor to be an M.D. working in an under served area, which [the beneficiary] is doing." The key passage to which counsel refers states "[t]he Attorney General shall grant a national interest waiver . . . on behalf of any alien physician. . . ."

The director concluded that the beneficiary did not work full-time in a medical specialty that is within the scope of the HHS Secretary's designation for the geographical area where the petitioner works. The director acknowledged counsel's citation of the statute, and stated:

Despite counsel's claim, the regulations are quite clear in describing the special requirements of physicians and the services they provide. It is stated in the above quoted regulations that the physician must provide services "in a medical specialty that is within the scope of the Secretary's designation for the geographical area . . . ." In the instant case, the alien physician will be providing services as an Anesthesiologist which is not in a medical specialty that is within the scope of the Secretary's designation for the geographical area.

On appeal, counsel initially stated that a brief would be forthcoming within 30 days. Counsel's subsequent submission, containing one page of substantive text, does not address the regulations at all. Instead, counsel repeats the assertion that the statutory language refers to "any physician" and states "[t]he law does not limit the access of the National Interest Waiver process for Medical Doctors only to primary care physicians."

Counsel fails to acknowledge that the director is bound by regulations through which the Service interprets and implements the Act and related legislation. The director has no discretion to ignore regulations which, in the opinion of counsel, are inconsistent with the statute. In the supplementary information that accompanied the promulgation of the interim regulations at 8 CFR 204.12, published at 65 FR 53889, the Service stated:

Section 203(b)(2)(B)(ii) of the Act states that any physician may petition for a national interest waiver. 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 above language, and the interim rule itself, acknowledges that a local shortage of physicians in a given specialty is alleviated only by the arrival of physicians practicing in that specialty. The area where the beneficiary seeks to practice has an HHS designated shortage of primary care physicians. Because the beneficiary is not a primary care physician, his presence in the area will do nothing to remedy the shortage of primary care physicians. The purpose of the statute is not to reward physicians for working in underserved areas, but rather to reduce such physician shortages as the Secretary of HHS designates.

While various individuals have asserted that a shortage of anesthesiologists exists in the same area, section 203(b)(2)(B)(ii)(I)(aa) of the Act requires that the shortage area must be designated by the Secretary of HHS. A finding by any other agency or entity that a shortage exists is not binding on the Service under the relevant statute or regulations. If it is the petitioner’s position that there is an undesignated shortage of anesthesiologists in the area, that claim can be tested by the Department of Labor through the labor certification process. We note that, in the event that the petitioner obtains a labor certification for the beneficiary, and a petition is subsequently approved, the beneficiary would not be subject to a five-year suspension of his application to adjust status. Such a suspension is required for petitions approved under section 203(b)(2)(B)(ii) of the Act.

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.