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U.S. Department of Justice
Immigration and Naturalization Service

Administrative Review Board
Immigration and Naturalization Service

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



File: [Redacted] Office: Nebraska Service Center

Date: MAY 14 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:



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, 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 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 is a hospital that seeks to employ the beneficiary as a clinical research associate. 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 beneficiary qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has 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 director did not dispute that the beneficiary qualifies as member of the professions holding an advanced degree. 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.

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.

Along with documentation pertaining to the beneficiary’s field of research and copies of the beneficiary’s published articles, the petitioner submits several witness letters. [redacted] assistant professor and director of Pediatric Movement Disorders at the petitioning hospital, states:

I had the pleasure of working and knowing [the beneficiary] for the last 3 years as he worked with us as Extern and Clinical Research Assistant. [The beneficiary] conducted his medical research on Intrathecal Baclofen therapy; a dramatically effective medical therapy for severe muscle spasticity. . . .

Severe muscle spasticity is a disabling complication of Cerebral Palsy, Multiple Sclerosis, Spinal and Brain injuries. Cerebral spasticity is a chronic, often severe, muscle stiffness, that affects approximately 75 percent of the 500,000 Americans with cerebral palsy and many of the 100,000 people who suffer brain injuries each year. The new therapy may be useful in approximately two-thirds of patients with cerebral spasticity associated with a marked increase in muscle stiffness interfering with function and/or care.

I’ve worked closely with [the beneficiary] as the principal investigator for this study. As a scientific investigator and a physician, [the beneficiary] has made a

substantial contribution to medical knowledge specifically in the treatment of cerebral palsy.

Another physician at the petitioning hospital, states that the beneficiary “is currently involved in a project that is testing the efficacy of modalities such as Botulinum Toxin A and the Intrathecal Baclofen Pump. These are important new means of reducing spasticity.” Several other individuals at the petitioning hospital confirm that the beneficiary is “involved” in the research project, but none of them offer any information about the nature or extent of that involvement. The beneficiary is clearly not the principal investigator, because acts in that capacity. There is no indication that the beneficiary is the one who first proposed the use of intrathecal baclofen or botulinum toxin to control spasticity.

The only initial witness from outside of the petitioning center is clinical outcomes manager of Medtronic Neurological, the company that commissioned the project in which the petitioner has employed the beneficiary. indicates that the beneficiary is the research coordinator for the intrathecal baclofen therapy project, which Medtronic is conducting along with the petitioning entity. She does not describe the duties of the research coordinator. We note that notations on the Form ETA-750B Statement of Qualifications instruct the beneficiary to “describe in detail the duties performed.” On that form, the beneficiary states only that the “research involves new therapies in the treatment of spasticity”; he describes the overall project while offering no details at all about his own role therein.

The background documentation submitted with the petition establishes the intrinsic merit and national scope of research pertaining to spasticity. It does not follow, however, that every alien involved with such research automatically qualifies for a national interest waiver. Apart from a limited exception that does not apply in this instance, Congress has created no blanket national interest waivers based on occupation or specialty. General arguments about the importance of spasticity research apply equally to alien researchers and U.S. researchers conducting such research.

The director denied the petition, acknowledging the intrinsic merit and national scope of the beneficiary’s work but finding that the beneficiary’s own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director observed that the documents submitted with the petition do not establish the significance of the beneficiary’s role in the research, or that anyone outside of the petitioning entity and the beneficiary’s circle of collaborators has recognized the beneficiary’s work as being particularly significant. The director noted, for instance, the lack of evidence that outside researchers have cited the beneficiary’s published work. The director also observed that the background information says nothing about the beneficiary and therefore it cannot serve to distinguish the beneficiary from others in the same field.

In the notice of decision, the director inadvertently referred to “the alien petitioner,” although the alien did not self-petition, and the cover page of the decision does not identify either the petitioner or the beneficiary. The only name listed is that of counsel. These errors, however, are

not substantive with regard to the outcome of the decision, and they do not serve to change the identity of the recognized petitioner. On appeal, counsel, like the director, repeatedly refers to the alien beneficiary as the petitioner. The Form I-140 petition identifies the hospital, rather than the alien, as the petitioner, and that form was signed not by the alien but by an official of that hospital. Therefore, the alien beneficiary is not the petitioner, and he has no standing in this proceeding pursuant to 8 C.F.R. 103.3(a)(1)(iii)(B).

Counsel states:

The petitioner submits that his work is well known outside his immediate circle of colleagues. Furthermore, he contends that he has presented his research at 15 national and international conferences. His abstracts were published in 11 national and international journals. He has provided reference letters from experts in the field of medicine, academia and business professionals. He is submitting letters from experts explaining why the research project and the health of children may be impacted if the employer is required to go through a labor certification process.

In a letter accompanying the initial filing of the petition, counsel identified only three articles by the beneficiary, two of which were said to still be in press, with only one already published. Counsel's initial letter made no mention of published abstracts or conference presentations, and therefore the director could not have erred in failing to take those abstracts and presentations into consideration.

Review of these abstracts and publications reveals that nearly all of these published materials appeared after the petition's November 1998 filing date; only one article and three abstracts had appeared in print prior to that date. If the beneficiary's reputation rests on these materials, then the beneficiary could not possibly have had such a reputation at the time of filing, and if the beneficiary was ineligible as of the filing date, his subsequent publication history cannot establish eligibility. 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.

Counsel asserts that the petitioner has, in fact, submitted letters from "disinterested parties," in that the careers of the witnesses will be unaffected by the outcome of the petition. Nevertheless, the letters submitted with the initial filing of the petition were all written by employees of the petitioning entity, with the single exception of the letters from [REDACTED] an official of Medtronic Neurological, which in turn had commissioned the project on which the beneficiary has been working. When all of the witnesses are either employees of the petitioner, or have an obvious business interest in the beneficiary's work for the petitioner, it is not credible to deem those witnesses "disinterested." This is not to suggest that these witnesses are committing

perjury or are otherwise lacking in credibility, but merely to reinforce the director's finding that the petitioner had not shown that the beneficiary's work has attracted significant outside interest.

We note that, in asserting that the witness' "opinions may [not] be discounted," counsel observes that [REDACTED] know[s] the petitioner only professionally. [REDACTED] who had signed the Form I-140 petition, has offered no testimony at all regarding the value of the beneficiary's work. The body of [REDACTED] letter is one sentence long, and it serves only to confirm that the beneficiary "is Employed as a Clinical Research Assistant since March 5, 1998."

Counsel cites unpublished appellate decisions in which the Administrative Appeals Office approved waivers for researchers who were "key players" in medical research. Counsel states that these petitions were "[s]imilar to the case at hand," but in the present instance, the majority of witnesses have stated only that the beneficiary has been "involved" in such research. The decisions that counsel cites are unpublished and have no force as precedents, and counsel has submitted no documentation to establish that the cited petitions are as similar to the matter at hand as counsel claims.

With regard to the beneficiary's research work, counsel states:

The research project originated and was sponsored by the [petitioning institution]. . . . More recently, The [REDACTED] (another large hospital in the Detroit Metropolitan area) has initiated a research project involving research on the treatment for Spasticity. The petitioner [actually the beneficiary] has been retained as a consultant on the research project to use his expertise in this field at Oakwood.

These comments suggest that the beneficiary no longer works for the petitioner, although there appears to be some link between the petitioner and Oakwood via their common connection with Wayne State University. Another piece of evidence suggesting that the petitioner no longer employs the beneficiary is a new letter from [REDACTED] who states that he and the beneficiary "worked together at [the petitioning entity] (1996-1999). . . . Now at Oakwood Hospital and Healthcare Center we are running another study." As in his initial letter, [REDACTED] states that the beneficiary "has made a substantial contribution" but does not indicate how the beneficiary is contributing; [REDACTED] states only that the beneficiary is acting as a "consultant." Much of his new letter is taken verbatim from the first letter.

[REDACTED] director of Oakwood's Program for Exceptional Families, discusses the overall value of "[t]he research that [the beneficiary] has been involved with" but does not discuss the beneficiary's role. [REDACTED] objection to the job offer requirement is a logistical one; she states that training a replacement for the beneficiary will delay the research project. While this consideration may provide Oakwood with an incentive to seek alternatives to labor certification, hiring new employees routinely involves training and an employer's desire to avoid related delays is not a national interest issue. [REDACTED] has not shown that the beneficiary's work has had, and is therefore likely to continue to have, a greater impact on spasticity research

than have others conducting similar research regarding the same disorder. The opinions of Oakwood employees regarding the importance of their own project cannot establish that those opinions are shared outside of Oakwood and its corporate clients.

A third Oakwood employee offering a letter on appeal is [REDACTED] a clinical nurse specialist who works with [REDACTED]. She, like other witnesses, describes the overall project, but her only reference to the beneficiary's role in the project is her statement that she and [REDACTED] have applied the research data performed by [the beneficiary] in our own practice." Given that one does not "perform" research data, it is not entirely clear what [REDACTED] means. She appears to indicate that the beneficiary collected the data.

The final letter submitted on appeal is from [REDACTED] clinical study coordinator for Medtronic Neurological. Her letter is virtually identical to [REDACTED] earlier letter, although this new letter mentions Oakwood whereas the earlier letter did not.

The new letters add little to the record except to suggest that the beneficiary no longer works at the facility that filed the petition. As explained above, the beneficiary's abstracts and publications, for the most part, did not exist at the time of filing and therefore cannot establish eligibility. Even then, the petitioner has not shown that the beneficiary's published and presented work has had a greater impact on the field than other published or presented work. Publication disseminates a researcher's work to a wider audience, but does not inherently or automatically qualify the researcher for a national interest waiver. The petitioner has not shown that the research project, let alone the beneficiary's vaguely described contribution to the project, has attracted attention or had any significant impact outside of Detroit-area medical facilities affiliated with Wayne State University.

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 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.