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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

PUBLIC COPY

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

[REDACTED]

File: EAC 01 223 51096 Office: VERMONT SERVICE CENTER

Date: APR 08 2003

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[REDACTED]

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

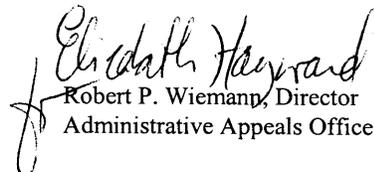
INSTRUCTIONS:

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 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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 I-140 petition form indicates that the petitioner seeks employment as a surgeon. Materials submitted with the petition indicate that the petitioner is employed as a researcher at Brigham and Women's Hospital, a teaching hospital operated by Harvard Medical School. 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 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.

(i) . . . 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.

The director did not dispute that the petitioner qualifies as a 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 the pertinent 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now the Bureau] 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, 22 I&N Dec. 215 (Comm. 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 initial submission consisted almost entirely of documentation of the petitioner’s training and professional credentials. Counsel, in the cover letter accompanying the submission, simply states without elaboration that the petitioner seeks a national interest waiver. The only exhibit in the initial submission that even indirectly addresses the waiver issue is a letter from Dr. Scott D. Solomon, an assistant professor at Harvard Medical School and director of the Noninvasive Cardiac Laboratory at Brigham and Women’s Hospital. Dr. Solomon states:

[The petitioner] is an internationally acclaimed surgeon and medical specialist. [The petitioner] has been working in the Cardiology Department at Brigham and Women’s Hospital for over two years. Last year, [the petitioner], under my guidance, worked on an important Canadian-American project. This year [the petitioner] is involved in an even more global cardiological research project called “Valiant.” This project involves over 14,000 myocardial infarction patients from 29 countries, including the republics of the former Soviet Union. Aside from [the petitioner’s] extraordinary professional knowledge and skills, his familiarity with the Russian language and his professional ties with medical specialists in the former Soviet Union make [the petitioner] an invaluable asset for this particular project. [The petitioner’s] prior experience as a surgeon is also crucial to this

project. His tasks currently include performing surgical procedures on laboratory animals in our Cardiological Laboratory.

The director requested further evidence regarding the petitioner's past achievements and his prospective benefit to the United States. In response, the petitioner has submitted additional letters and a list of published articles and presentations. Counsel, referring to the list of publications, states "[i]n order for a doctor to be honored by the opportunity to publish his or her work in such journals, the doctor had to demonstrate truly outstanding qualities on the national level." Counsel cites no evidence to show that publication requires "outstanding qualities on the national level." The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Indeed, the record contains no actual evidence regarding these articles. A list of titles represents a claim rather than supporting evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Apart from a book listed as being published in 1993, all of the listed materials appeared before 1982. Most of the articles, and both of the conference presentations, deal with intestinal surgery. From their titles, many of the articles appear to be reports of individual cases rather than the product of multi-subject research studies.

The first new letter is from Dr. Scott Solomon, who states:

[The petitioner] plays a key and essential role in ongoing research. He has trained for approximately one year in the extremely technically challenging field of quantitative echocardiography. This work requires unique skills and training: a background in cardiac ultrasound, an extensive knowledge of the human anatomy and physiology, and extensive specialized training. With this special training, [the petitioner] has been the principal researcher on a number of major national and international projects of significant public health importance in patients with heart failure and following myocardial infarction. One of the most important aspects of this type of research is that a single individual perform all of the quantitative echocardiographic analyses. If he is not able to complete the work over the next few years, the rate of this research will slow down considerably.

I therefore feel that [the petitioner's] unique skills and expertise in this area, combined with the public health implications to the United States and the world of this research, makes his contribution to the treatment of patients with heart failure and following myocardial infarction extraordinarily important.

Professor Konstantin Tarun, head surgeon at the Ministry of Public Health of the Republic of Belarus, worked with the petitioner at Minsk Regional Hospital for nearly 20 years and is credited as a co-author of many of the articles in the list discussed above. Prof. Tarun states:

I would like to say that [the petitioner] is an excellent surgeon and a very good person. He was very attentive and caring with every one of his patients. He performed over 6,000 difficult operations with positive results. He is a master of an excellent surgical technique. . . .

[The petitioner] is a specialist of international qualification. He worked outside the USSR – in Angola, Africa and Peru, South America, performing a lot of operations there. He was tutoring dozens of young students from different countries, practicing to become surgeons.

He came back to Minsk after the Chernobyl catastrophe, when the number of thyroid gland cancer patients increased dramatically and kept going up steadily. He was one of the first who performed hundreds of operations on [the] thyroid gland and showed himself an irreplaceable specialist.

In 1992, based on our broad and detailed experience, [the petitioner] and [I] wrote our scientific work – a book we called *Proctology for Surgeons*. It was published in Minsk in 1993. For more than 10 years, [the petitioner] was the head of the Surgical Department at Minsk Regional Hospital.

Professor Igor Grishin of Minsk Medical School states:

We worked together from 1974 to 1993 in Minsk Regional Hospital, Minsk, Belarus where [the petitioner] worked as a head surgeon for more than 10 years. He performed a few thousand difficult operations with excellent results. [The petitioner] tutored many Russian and international students. He had written a lot of scientific articles, taken part in many international conferences as well as working as a surgeon in other countries.

Prof. Tarun's and Prof. Grishin's letters are limited to discussing the petitioner's work as a surgeon, rather than as a researcher. It bears mentioning here that section 212(a)(5)(B) of the Act states that a graduate of a foreign medical school, who seeks principally to perform services as a member of the medical profession, is inadmissible unless he has passed parts I and II of the National Board of Medical Examiners Examination or an equivalent examination, and is competent in oral and written English. Given that the petitioner has spent the majority of his career as a surgeon, and that he indicated on his petition form (signed under penalty of perjury) that he seeks employment as a surgeon, this ground of inadmissibility appears to be relevant. Congress clearly found it to be in the national interest to prevent the admission of "unqualified physicians" (the term used in the statutory language). If the petitioner seeks to continue working as a researcher, rather than resume his long career as a surgeon, it is unclear why the petitioner listed his occupation as "surgeon" on the petition form.

The director denied the petition, acknowledging the intrinsic merit of the petitioner's work but finding that the petitioner has not established its national scope. The director stated that the

evidence provided is insufficient to show that the petitioner is responsible for “major advances that have enjoyed widespread implementation in the field or that they are beyond the capabilities of the majority of [the petitioner’s] colleagues.”

On appeal, counsel states that the director “completely disregarded the submitted List of Publications/Reports and Presentations, which clearly shows the magnitude of [the petitioner’s] scientific talent.” The list does not clearly show any such thing, unless one presumes as a given the significance of the petitioner’s published work (which, apart from one book, ceased in 1981).

Counsel adds that the director “also chose to ignore the fact that [the petitioner] had been the leading surgeon in several countries of the world, including the former Soviet Union, countries in Africa and South America, and has now performed over 6,000 challenging operations with positive results.” The record contains nothing to show that the petitioner “had been the leading surgeon in . . . the former Soviet Union.” Rather, he was the head surgeon at one hospital in that country. The two letters that address his work as a surgeon neither state nor remotely imply that the petitioner was “the leading surgeon” in the entire country. Regarding his work in Peru and Angola, the record shows only that the petitioner worked and taught there. Again, there is no support at all for the assertion that he was “the leading surgeon” in either country. Counsel’s unsubstantiated claim is not a “fact.” Because the evidence presented contains no indication that the petitioner was the leading surgeon in any country, the director did not err in failing to infer that the petitioner had such standing.

The assertion that the petitioner “performed over 6,000 challenging operations with positive results” is not persuasive, because 6,000 operations, over the course of the petitioner’s 20-year career as a surgeon, averages out to less than one operation per day. Counsel has not shown that this record is in any way unusual for a surgeon with decades of experience.

Noting that Dr. Scott Solomon has stated that the research project “will be greatly undermined” without the petitioner’s continued involvement, counsel states “[i]f the evidence submitted cannot convince INS that [the petitioner’s] approval will be in the national interest, it is unclear what can.” Counsel also suggests, facetiously, that “the national interest waiver should be abolished altogether, not to give people false hope.” Counsel thus takes the position that the petitioner has presented the strongest possible evidence, and that if this petitioner does not qualify for the waiver, then no one qualifies, and the continued existence of the waiver merely gives “false hope.” This position relies on the demonstrably false presumption that the Bureau has simply ceased approving national interest waivers. The insufficiency of one petitioner’s evidence does not prove that the Bureau will always find every petitioner’s evidence to be insufficient.

The petitioner submits copies of graphics from a computer “slide show” presentation about preliminary baseline data gathered by the VALIANT Echo Core Lab at Brigham and Women’s Hospital. This presentation indicates that, while the VALIANT project includes 14,808 patients (confirming Dr. Solomon’s assertion that the project includes “over 14,000 . . . patients), only 598 of those patients are enrolled in the VALIANT Echo section where the petitioner is working. Counsel states that this documentation shows that the petitioner “is a leading specialist in this

global cardiological project.” Counsel does not explain how the documentation shows the petitioner to be “a leading specialist.” The presentation names five researchers in the VALIANT Echo Core Lab; the petitioner’s name is third on the non-alphabetical list. While the Echo Core Lab is located at Brigham and Women’s Hospital in Boston, the VALIANT Steering Committee is based in Atlanta, indicating that the Echo Core Lab is not in charge of the VALIANT project as a whole. Apart from this presentation, the only other document submitted on appeal is a letter to the petitioner, from Dr. Scott Solomon and Professor Marc Pfeffer, the body of which states in its entirety “[y]our efforts are greatly appreciated. All best regards for the New Year.” The record does not even reveal the petitioner’s job title. There is, in short, no evidence that the petitioner is generally regarded as a leader in his field in general, or of this project specifically. Counsel has repeatedly referred to the petitioner as a “leader” at the national or international level, but the record offers no evidentiary support at all for any of these claims. These many unsubstantiated exaggerations of the petitioner’s record necessarily have some impact on the overall credibility of the claims presented.

With regard to Dr. Solomon’s assertion that the petitioner’s efforts are indispensable to the project because of his “unique skills and training,” the petitioner received much of this specialized training at Brigham and Women’s Hospital, presumably to prepare him for involvement in this project. The sparse documentation of record relating to the petitioner’s past work shows him to have specialized in intestinal surgery, rather than echocardiography. While the project requires specific skills (which Brigham and Women’s Hospital is demonstrably capable of providing), the petitioner has not credibly established that it is in the national interest that he, rather than another trained worker, should be the one performing these duties. The petitioner has also not established that his temporary involvement in a short-term project warrants permanent immigration benefits. The record portrays the petitioner as a successful surgeon who, unable to work as a surgeon in the United States, instead works in an unnamed capacity at research facilities conducting work that seems to have little immediate connection to his past career.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) requires a petitioner to request, in writing, additional time to submit a brief and to show good cause for such an extension. The regulations do not allow an indefinite or open-ended period in which a petitioner may supplement an already-filed petition. Because 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 this instance, the petitioner has submitted materials in November 2002, seven months after filing the appeal. The appeal itself contained no indication that any further material would be forthcoming.

The new submission is an abstract from a 2002 scientific session, reporting the results of “the OVERTURE echo study.” The record contains no prior mention of the OVERTURE study, nor anything to indicate that the VALIANT study was later renamed OVERTURE. The petitioner states that his task in this project “consisted of taking that data [collected from cardiologists in several countries] and entering it into a computer by tracing it onto a diagram of the heart.” The petitioner asserts that this “very slow and painstaking process . . . takes the skills of an

experienced medical practitioner/surgeon to ensure [the] accuracy” required to produce reliable results.

The petitioner submits no evidence that this work took place before the July 2001 filing of the petition. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which requires that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Furthermore, the petitioner’s own assurance that this work requires “the skills of an experienced medical practitioner/surgeon” is not substantiated by any outside evidence. Even if there were evidence that entering this data is beyond the capacity of, for instance, a post-doctoral research associate with no experience as a medical practitioner, it would not follow that the petitioner merits a national interest waiver simply because he, like thousands of others, is “an experienced medical practitioner/surgeon.” Simply being well suited for a given position is not inherently grounds for a national interest waiver.

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, 8 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.