



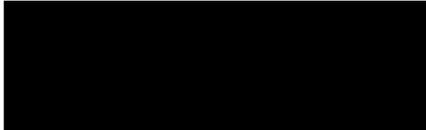
U.S. Department of Justice

Immigration and Naturalization Service

B5

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536

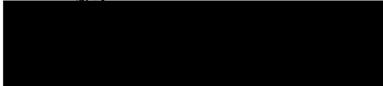


File: [Redacted] Office: Nebraska Service Center

Date:

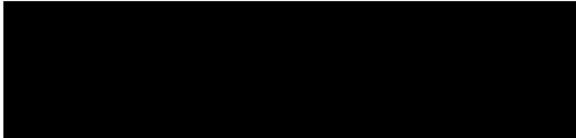
FEB 25 2003

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 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 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.

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 Administrative Appeals Office 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 he 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 had not established that a state public health agency has determined that the petitioner's work is in the public interest.

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.

On September 6, 2000, the Service published interim regulations that went into effect October 6, 2000. The petitioner filed the instant petition on November 15, 2000. The interim regulations at 8 C.F.R. 204.12(c) provide 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.

Initially, the petitioner submitted evidence that Bates County has been designated by the Secretary of HHS, the petitioner's medical credentials, 1998 letters from the U.S. Department of Agriculture and the United States Information Agency recommending a waiver of the petitioner's two-year foreign residence requirement, and the petitioner's personal declaration that he would work full-time as a physician in an area or areas designated by the Secretary of HHS or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs for not less than three years.

On January 9, 2001, the director requested an employment contract and a letter from a state or federal agency pursuant to 8 C.F.R. 204.12(c)(3). In response, the petitioner submitted a letter from the State of Missouri asserting that the state was still considering whether and how to issue letters for doctors seeking national interest waivers, the petitioner's employment contract with Dr. Jeffrey VanBiber dated June 21, 1998, and an amendment dated April 3, 2001 reflecting that the employment was expected to last five years.

The director denied the petition based on the petitioner's failure to submit a letter from a state or federal agency pursuant to 8 C.F.R. 204.12(c)(3).

On appeal, counsel asserts that the director found that the petitioner met the requirements for national interest waivers set forth in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998) and, by acknowledging that the petitioner had an advanced degree or exceptional ability, the director accepted that the petitioner "meets the basic requirements for a National Interest Waiver." Counsel further argues that the director should not have denied the petition based on the requirements at 8 C.F.R. 204.12(c) because such requirements are "impossible to meet." Counsel concedes later on in the brief, however, that the State of Missouri has now issued guidelines for evaluating requests for national interest waiver letters for doctors but that the requirements are labor intensive and cannot be completed within the appellate time frame. While counsel requests the ability to submit additional materials during the pendency of the appeal, the record contains no additional documentation.

First, counsel mischaracterizes the director's conclusion. At no point in the director's decision did he address the requirements of *Matter of New York State Dept. of Transportation*. Regardless, such a determination would have been in error as that decision includes a footnote strongly suggesting that merely working as a doctor in an underserved area, while having intrinsic merit, does not provide benefits that are national in scope. *Id.* at 217, note 3. Further, counsel is legally wrong in stating that merely possessing an advanced degree or exceptional ability "meets the basic requirements for a National Interest Waiver." The classification requiring an advanced degree or exceptional ability normally requires a labor certification. Only when it is determined that a waiver

of that requirement is in the national interest can that requirement be waived. *Matter of New York State Dept. of Transportation* discusses three factors to be used in determining whether waiving the labor certification is in the national interest for a specific alien. As this decision is not applicable to physicians working in an underserved area, further discussion of it is unnecessary.

Given that Congress has passed a law that specifically provides benefits to physicians who intend to practice in an underserved area, we do not see how it is in the national interest to waive the labor certification requirement for a physician who claims that he will work in an underserved area but is unable or unwilling to meet the requirements of that new law. Thus, the petitioner in this case must meet those requirements in order to establish eligibility for a national interest waiver as a doctor working in an underserved area.

In this case, the petitioner filed the petition two months after the regulations were published and one month after they went into effect. Thus, the petitioner had ample notice of the requirements for this program. In addition, the petitioner obtained a waiver of the two-year foreign residence requirement in 1999 and, according to the Form I-140, subsequently changed status from a J-1 nonimmigrant to an H-1B nonimmigrant. The commentary to the interim regulations published at 64 Fed. Reg. 53,889 (September 6, 2000) provides:

The interim rule does include a special provision for former J-1 nonimmigrant physicians who have obtained foreign residence requirement waivers. Section 214(l) of the Act, as previously amended by section 220 of Public Law 103-416, provides a special waiver of the foreign residence requirement for alien physicians who are willing to work at VA facilities or in HHS-designated underserved areas. Under section 214(l), 3 years' service as an H-1B nonimmigrant is sufficient. The interim rule makes clear that for aliens who already have a waiver under section 214(l) of the Act, the Service will calculate the 5-year or 3-year period of services of the national interest waiver under section 203(b)(2)(B)(ii) of the Act beginning on the date the alien changed from J-1 to H-1B status. That is, an alien who is subject to the foreign residence requirement will not be required to first serve for 3 years to obtain that waiver and then to serve an additional 5 years to obtain adjustment of status based on the national interest waiver.

In light of the above, the petitioner's work in an underserved area while in status as a nonimmigrant H-1B can count towards the five years required under section 203(b)(2)(ii) of the Act. Thus, the petitioner did not accelerate the time at which he is eligible to adjust status by filing the instant petition when he did. Nevertheless, despite being on notice of the requirements set forth in 8 C.F.R. 204.12(c), he chose to file his petition prior to being able to submit the necessary documentation. Counsel's request that the director's decision be overturned despite the petitioner's failure to submit a piece of evidence required by the regulations is not persuasive. An inability to meet a regulatory evidentiary requirement is not a reason to waive that requirement. Nor can we indefinitely leave the petition pending until such time as the petitioner might be able to obtain the necessary documentation.

Moreover, the petitioner's inability to meet the requirements is not beyond his control as suggested by counsel. As stated above, the petitioner was on notice of the requirements in the regulations, which were published two months before the petition was filed. The petitioner is only unable to meet the requirements, which include that the government agency letter and the employment contract be dated within six months prior to the filing of the petition, because he filed the petition prematurely. Even if the State of Missouri had determined not to issue national interest waiver request letters under any circumstances, the petitioner's failure to obtain support from a relevant federal or state agency would raise concerns regarding whether a waiver would really be in the national interest in his case.

In light of the above, we do not find that the director erred.

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.

ORDER: The appeal is dismissed.