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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: [redacted] Office: Nebraska Service Center Date: FEB 27 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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]

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.

Elizabeth Heyward
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 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 or an alien of exceptional ability. The petitioner seeks employment as a primary care physician (pediatrician) at the medical clinic of Dr. George Skarpathiotis. 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 or as an alien of exceptional ability, but that the petitioner had 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) 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) Physicians working in shortage areas or veterans facilities.-
> > >
> > > > (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.

(II) No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 204(b), and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 245, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 101(a)(15)(J)), 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.

The petition was filed on February 13, 2001. The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree or an alien of exceptional ability. Although counsel stated that the petitioner would be "practicing primary care in a USHHS designated Health Professional Shortage Area," the record contained no specific request for classification pursuant to section 203(b)(2)(B)(ii) of the Act. Rather, counsel requested that the petition be considered as an "[a]pplication for a National Interest Waiver under *Matter of New York State Dept. of Transportation*, not [the] new law Medical Doctor only National Interest Waiver." Furthermore, counsel's arguments throughout this proceeding relate only to the requirements set forth in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), a precedent decision which predates the enactment of section 203(b)(2)(B)(ii) of the Act.

The issue to be determined in this proceeding, therefore, is whether the petitioner, through her employment as a primary care physician (pediatrician), 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, supra, has set forth several factors that 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.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given field is so important that any alien qualified to work in that field must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in her field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at note 6.

In a letter accompanying the petition, counsel stated:

> This is a national interest petition seeking the exceptional category (EB2) for a former exchange visitor physician, who has obtained a waiver of [her] two-year foreign residence requirement. The decision to grant [her] waiver was based upon the conclusion of three different governmental agencies, that the physician's proposed work (practicing primary care in a USHHS designated Health Professional Shortage Area) was in the national interest. Those three agencies were: the U.S. Department of Agriculture, the U.S. Information Agency and finally, the U.S. Immigration Service. The physician/applicant is now in H-1B status, as required by [her] waiver commitment. Physician/applicant's work remains the same as when it was previously concluded to be in the national interest. This is the continuation of [her] application process.

Counsel cites no statute, regulation or case law that indicates that a section 212(e) waiver for a J-1 nonimmigrant implies eligibility for a national interest waiver of the job offer requirement. We note, with regard to section 212(e) waivers of the J-1 foreign residency requirement, that the General Accounting Office (GAO) reported that "USIA and INS officials said that they recommend and approve virtually all waiver requests. USIA officials said that... they almost

always rely on interested government agencies' assertions that the waivers are in the public interest."[1]

The Service regulation at 8 C.F.R. § 245.18(e)(2) relating to the adjustment of status of aliens qualifying under section 203(b)(2)(B)(ii) of the Act specifically addresses J-1 immigrants who converted to H1-B nonimmigrant status, and states, in pertinent part:

> If the physician formerly held status as a J-1 nonimmigrant, but obtained a waiver of the foreign residence requirement and a change of status to that of an H-1B nonimmigrant, pursuant to section 214(l) of the Act, as amended by section 220 of Public Law 103-416, and section 212.7(c)(9) of this chapter, the period begins on the date of the alien's change from J-1 to H-1B status. The Service will include the alien's compliance with the 3-year period of service required under section 214(l) in calculating the alien's compliance with the period of service required under section 203(b)(2)(B)(ii)(II) of the Act and this section.

This regulation contemplates that J-1 nonimmigrants receiving a waiver under section 214(l) of the Act will be adjusting as aliens qualifying for the national interest waiver under section 203(b)(2)(B)(ii) of the Act. Thus, while the 3-year period of service mandated by section 214(l) of the Act can count toward the 5-year service requirement under section 203(b)(2)(B)(ii)(II) of the Act, there is nothing about obtaining the J-1 waiver of the foreign residency requirement under section 214(l) that exempts a physician practicing in an underserved area from complying with the evidentiary requirements under 8 C.F.R. § 204.12. There is nothing in the pertinent statute or regulations to indicate that these evidentiary requirements are optional or discretionary for recipients of J-1 waivers or for any other alien physician. Nevertheless, the petitioner in this case has declined to provide the evidence mandated under these regulations and, instead, has specifically requested that her petition be adjudicated under the test set forth in *Matter of New York State Dept. of Transportation*, *supra*.

In support of the petition, counsel offered a wealth of documentation addressing the importance of making basic healthcare services equally available to all citizens. Other documents and letters discussed the importance of early detection in treating infectious diseases/viruses, disease prevention efforts underway in the U.S., the importance of the primary care physician, general health statistics, and public health spending in the U.S. None of the documents mention the petitioner as having a past record of significant influence on the U.S. healthcare system.

While the Service recognizes the undoubted importance of primary care physicians in our nation's healthcare system, eligibility for the national interest waiver under *Matter of New York Dept. of Transportation* must rest with the petitioner's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given occupation is so important that any alien qualified to perform that occupation must also qualify for a national

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[1] Foreign Physicians: Exchange Visitor Program Becoming Major Route to Practicing in U.S. Underserved Areas (GAO/HEHS-97-26, December 30, 1996), page 15.

interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule.

With regard to Congressional intent, the statute that created the national interest waiver originally limited the waiver to aliens of exceptional ability. The technical amendment that made the waiver available to advanced degree professionals did not single out physicians or members of any other profession for special consideration. Given this legislative history, there is no support for the claim that Congress all along had intended the national interest waiver as a means of providing immigration benefits for physicians in underserved areas. The only relevant statutory language that allows for special consideration for physicians in underserved areas is the provision repudiated by counsel and with which petitioner has made plain her refusal to comply.

Congress has clearly stated the terms under which the national interest waiver is to be made available to physicians who intend to practice in an underserved area. The petitioner has not shown how it is in the national interest to waive the labor certification requirement for a physician who claims that she will work in an underserved area, but is unable or unwilling to meet the requirements that Congress mandated for such physicians.

Along with her educational and professional credentials, the petitioner submitted three brief witness letters in support of the petition. The three letters, submitted by the petitioner's immediate colleagues, describe the petitioner as a "fine physician" with "strong qualifications." We note here that any objective qualifications necessary for the petitioner's employment as a primary care physician can be articulated in an application for alien labor certification. Pursuant to *Matter of New York State Dept. of Transportation*, an alien cannot demonstrate eligibility for the national interest waiver simply by establishing a certain level of training or education which could be articulated on an application for a labor certification. In order to establish eligibility under this classification, the petitioner must demonstrate a past history of significant accomplishment having some degree of measurable influence on the medical field. An alien does not qualify for a waiver under *Matter of New York State Dept. of Transportation* simply by virtue of the alien's choice of occupation. If the petitioner seeks a blanket waiver merely because she is a physician, she must follow the procedures set forth by Congress and implemented in the accompanying regulations.

The evidence submitted failed to demonstrate a past record of significant accomplishment on the part of the petitioner. None of the witness letters indicated that the petitioner's contributions were especially important to her field, nor did the letters even devote much space to the petitioner's specific activities. The evidence submitted in support of the petition was insufficient to persuasively distinguish the petitioner from other similarly qualified physicians.

Matter of New York State Dept. of Transportation indicates that while education and pro bono legal services are in the national interest, the impact of an individual teacher or lawyer would be so

attenuated at the national level as to be negligible. *Id.* at 217, note 3. We find such reasoning applicable to the petitioner's profession as well. In this case, the petitioner's impact would generally be limited to the patients that she directly serves.

Counsel's argument that the shortage language in *Matter of New York State Dept. of Transportation* is not applicable because there is not a "shortage" but a "maldistribution" of doctors is not persuasive. The issue of whether similarly-trained workers are available in the U.S., even at the local level, is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dept. of Transportation*, *supra* at 221. Section 203(b)(2)(B)(ii) of the Act and 8 C.F.R. § 204.12 provide the only relevant exception to the Department of Labor's jurisdiction, granting such jurisdiction in the case of doctors in an underserved area to HHS.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director stated that the services provided by the petitioner "would be so attenuated at the national level as to be negligible." The director further stated: "While the alien petitioner is a qualified physician, her accomplishments fail to persuasively demonstrate that she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same qualifications."

The director's decision also mentioned the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, which was signed by the President on November 12, 1999. The director stated:

> Section 5 of the Nursing Relief Act amends section 203(b)(2) of the Act by adding a new subparagraph (B)(ii). The amendment establishes special rules for requests for a national interest waiver that are filed by or on behalf of physicians who are willing to work in an area or areas in the United States designated by the Secretary of Health and Human Services as having a shortage of healthcare professionals... However, counsel has clearly indicated that he does not wish this petition to be adjudicated under [section 203(b)(2)(B)(ii) of the Act].

On appeal, counsel argues that the petitioner serves the national interest simply by virtue of being a primary care physician working in the U.S. healthcare system. Counsel cites the U.S. Surgeon General who stated that primary care physicians are "an essential link in the control of infectious disease." These statements, however, apply to all primary care physicians and do not single out the petitioner for the special benefit of a national interest waiver under 203(b)(2)(B)(i) of the Act. By law, advance degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. Absent evidence showing a past record of significant influence on the medical field, section 203(b)(2)(B)(ii) of the Act is the only means through which a physician working in a shortage area or veterans facility may obtain a national interest waiver. With regard to Congressional intent, a statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, *supra*; *Sutton v. United States*, *supra*. To hold otherwise would be to render the blanket waiver under section 203(b)(2)(B)(ii) Act superfluous.

In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement is at a level that would justify a waiver of the job offer requirement that, by law, normally attaches to the visa classification sought by the petitioner. Furthermore, counsel has offered no evidence or argument to show that the provisions of section 203(b)(2)(B)(ii) of the Act, pertaining to physicians in underserved areas, may be waived or disregarded at the petitioner's option, or that the evidentiary requirements at 8 C.F.R. 204.12(c) are simply suggestions, to be followed or ignored at the petitioner's discretion.

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 the 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.

ORDER: The appeal is dismissed.