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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

PUBLIC COPY



File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: **JAN 30 2003**

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petitioner 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:



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.

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 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. At the time he filed the petition on June 29, 2001, the petitioner was a surgical resident at the University of Illinois in Chicago, Illinois. 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 did not dispute that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but found 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 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.

(ii) Physicians working in shortage areas or veterans facilities.

The petitioner obtained a medical degree from the Universidad Nacional de Colombia in 1995. He received a Master of Public Health degree from the University of Miami in 2000. His immigrant visa petition indicates that he seeks employment as a medical research associate pursuing studies in general surgery and trauma/critical care. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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, 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.

In this case, the director found that the petitioner had established that he would be employed in a area of substantial intrinsic merit, and that the proposed benefit of the employment would be national in scope. However, the director did not find that this petitioner had established that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. We concur with the director.

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 qualifications rather than with the position sought. This applies whether the position is publicly or privately funded. It is generally not accepted that a given project is of such importance that any alien qualified to work on it must also qualify for a national interest waiver. The issue is whether this petitioner's contributions in the 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.

Documentation initially submitted with the petition includes a memorandum in support of the petition from the petitioner's counsel,¹ the petitioner's degrees, certificates for continuing medical education, licenses and certifications, "honors and awards," conference presentations, and publications. The petitioner's background and credentials such as work experience, continuing education and degrees, can be presented on an application for a labor certification. A petitioner must show that he will serve the national interest to a greater degree than an available U.S. worker with the same minimum qualifications. Thus, merely presenting credentials is insufficient.

The petitioner's "awards and honors" include an Academic Merit Award from the University of Miami, "highest grade average" from the National University of Colombia Medical School, and the "1999 H. Quillian Jones, Jr., M.D. Resident Paper Competition Award" from the Florida Committee on Trauma/American College of Surgeons. Although commendable, academic achievements are not evidence of a petitioner's professional recognition. Even if such evidence represented recognition for achievements and significant contributions to his field, that is simply one criterion for exceptional ability, a classification that normally requires a labor certification. We cannot conclude that satisfying one, or even the requisite three criteria for a classification that normally requires a labor certification warrants a waiver of the labor certification requirement in the national interest.

The record also contains copies of several published articles which the petitioner co-authored, two published articles in which he was the lead author, and several articles without supporting evidence showing where or when they were published. Simply going on record without supporting documentary evidence is not sufficient to meet the petitioner's burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner also submits evidence that he offered a manuscript to the "Archives of Surgery." Unpublished articles may be an indicator of the petitioner's diligence in his field, but he must establish eligibility at the time of filing the petition. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's counsel contends that because the petitioner's work has appeared in influential journals, and that these journals are frequently cited, then the petitioner's work has had a significant impact upon the medical community. When assessing the influence and impact that the petitioner's work has had, the act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may establish originality, but it cannot be concluded that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Similarly, frequent citation by independent researchers can be viewed as a more accurate indication that the petitioner's work has attracted widespread interest or authoritative recognition. Here, there is no evidence that presentation or publication of one's work is unusual in the petitioner's field. There is also no evidence that any independent researchers have cited any of the petitioner's articles. The test is generally not whether the journal is influential, but whether the individual petitioner's work has influenced his field as a whole.

¹ Counsel does not represent the petitioner on this appeal. As counsel has not withdrawn from representation of the petitioner, however, he will be provided a copy of this decision.

The petitioner submits several witness letters in support of his petition [REDACTED] Professor and Chief of the Division of Trauma and Surgical Critical Care at the University of Miami Ryder Trauma Center and co-investigator at the Trauma Center Research Laboratory, describes the petitioner and his work:

I have been working very closely with [REDACTED] for the last three years in his Near Infrared Spectroscopy projects. This technology has the ability to evaluate gastric oxygen concentration in tissues that could aid the clinician in assessing the adequacy of current resuscitation techniques. . . . I have co-authored several of his original abstracts and manuscripts submitted and presented at different national meetings. Most of these articles are either in press or under review. . . . [The petitioner] is currently working as co-investigator under a research grant by Hutchinson technology and has worked before with grants from Baxter and Bayer Pharmaceuticals.

It is through his work with Near Infrared Spectroscopy that [the petitioner] has attained national reputation in a short period of time. . . . He has been invited to give an oral presentation at the 85th Annual Clinical Congress at the Surgical Forum Critical Care Session in San Francisco this October.

[REDACTED] possesses unique skills and abilities to conduct this type of projects [sic] and he will continue to make significant contributions to the Surgical Critical Care field. Seeking a US Near Infrared Spectroscopy expert with multiple years of laboratory experience would set our research back years.

[REDACTED] of the University of Miami School of Medicine also submits an endorsement of the petitioner, and notes that in addition to his research in the use of the Near Infrared Spectroscopy technology, the petitioner has also evaluated viral-free fibrin glue products for the repair of experimental complex liver injuries, as well as conducted studies contributing to the knowledge of the use of intravenous antibiotics on burn wound infections

Barbara Gallea, RN, and Manager of Clinical Affairs at Hutchinson Technology Inc., submits a letter confirming that her company has been supporting the petitioner's research with its prototype near infrared spectroscopy (NIRS). Ms. Gallea states:

[The petitioner] has acted as a principal investigator and co-investigator for several studies, focusing on tissue oxygenation during different types of injury.

His studies, focusing on endpoints of resuscitation after severe injury, are important to further our understanding of how patient management can be improved. . . . [The petitioner] possesses unique skills and abilities necessary to conduct these studies and he will continue to make significant contributions to the critical care field. Seeking a U.S. expert in NIRS with comparable years of experience would significantly delay our current projects.

The inconvenience of the labor certification process is not grounds for a national interest waiver. Similarly, the shortage of qualified workers in a given field, regardless of the nature of the occupation, is not a valid argument for a waiver of the labor certification procedure. Given that the labor certification process was designed to address the issue of worker shortages, a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

The above letters are all from the petitioner's immediate circle of colleagues and collaborators. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish that the petitioner has influenced his field as a whole.

██████████ Director of Surgical Critical Care of Brigham and Women's Hospital in Boston, asserts that he knows the petitioner through his own work with the near Infrared Spectroscopy technology. Dr. Puyana writes:

██████████ educational background and expertise with Near Infrared Spectroscopy and continued presence in this country will benefit the United States and the Surgical Critical Care field allowing us to further develop this technology and understand its applicability. His future accomplishments will lead us to the use of this technology to monitor tissue oxygenation in critically ill trauma patients, improving intensive care.

██████████, Associate Director of Trauma/Surgical Critical Care at St. Francis Hospital in Hartford, Connecticut, submits a letter stating:

It is through my work in Surgical Critical Care that I first became aware of Dr. ██████████ extraordinary work. This device [NIRS] has the potential to replace current resuscitation tool such as gastric tonometry and will play a leading role in national trauma critical care.

██████████ leads the only research team that studies this type of gastric spectrometer and his experimental work has been astonishing. He analyzed Near Infrared Spectroscopy's accuracy over gastric tonometry and [the petitioner] concluded that this spectrometer gastric probe is more reliable for the detection of gastric low blood flow states after injury.

His work has gained him national recognition by the American College of Surgeons and was invited to the Annual Meeting Critical Care Forum this year. We expect him to present his Near Infrared Spectroscopy clinical trials at different national meetings in the near future.

While ██████████ appear to be outside the petitioner's immediate circle of colleagues, beyond noting the petitioner's accomplishments and asserting that the petitioner has national recognition, neither offers any specific examples of other researchers who have been significantly influenced by the petitioner's work, or of any other significant impact the petitioner

has made on the field of medicine.

Finally, Congressman Lincoln Diaz-Balart submits a letter summarizing the petitioner's background and notes:

██████████ is an integral member of this team, and his absence would delay the progress of the team's work. ██████████ continued participation is essential to the rapid completion of current trials of viral-free fibrin glue products and near Infrared Spectroscopy projects.

[The petitioner] is currently involved in a project that it [sic] funded on an annual basis. Therefore, it is impossible to make an offer of full-time, permanent employment in accordance with the Department of labor guidelines.

While it is true that the labor certification process is unavailable for a temporary position, it is equally correct that nonimmigrant classifications are available for temporary employment. Therefore the petitioner's continued participation in a particular project is not contingent on his obtaining an immigrant visa. While the unavailability of a U.S. employer to apply for a labor certification would be given consideration in appropriate cases, the inapplicability of a labor certification is not sufficient cause for a national interest waiver; the petitioner must still establish that the beneficiary of the immigrant visa petition would serve the national interest to a substantially greater degree than would others in the same field. *Matter of New York State Dept. of Transportation* at 218, n.5.

It is apparent that the petitioner has excelled academically and is engaged in important research. Nevertheless, exceptional ability is not by itself sufficient cause for a national interest waiver. The benefit that the petitioner presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in 8 C.F.R. 204.5(k)(3)(ii)(F) for an alien of exceptional ability. It is not sufficient to state that the alien possesses unique training or is engaged in promising research. The labor certification process exists because protecting jobs and employment opportunities of U.S. workers having the same objective minimum qualifications as an alien seeking employment is in the national interest. The alien seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. In this case, the petitioner's initial witness letters generally discuss the potential implications of the petitioner's work and his individual promise as a medical researcher, but do not persuasively distinguish the petitioner from other competent researchers or delineate how the petitioner's accomplishments have significantly impacted his field of endeavor.

In denying the petition, the director stated that the record indicated that the petitioner is a fully qualified physician who has been involved in numerous medical studies, but that he does not present a prospective benefit that will serve the national interest to a substantially greater degree than would an available U.S. worker with the same minimum qualifications. We concur.

The petitioner's submissions consisting of generalized endorsements as to his accomplishments and projections of future worth may support the argument that the petitioner has exceptional research ability, but do not overcome the intent of the statute that mandates the labor certification process for medical researchers, or show with specificity that the petitioner's work was of such recognized significance at the time of filing that it had already influenced the work undertaken by other researchers.

On appeal, the petitioner submits an internet article about the importance of preparation for bioterrorism attacks. He also submits a personal statement emphasizing his expertise in the fields of general surgery, trauma, critical care and public health. The petitioner asserts that with the current deficiencies of the U.S. health system, his skills would be of substantial benefit. The Service does not dispute the importance of public health preparedness. However, pursuant to published precedent, the overall importance of a given project such as trauma research is insufficient to demonstrate eligibility for the national interest waiver. Current law mandates that 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 intends it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

As is clear from the plain wording of the statute, it is 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. Similarly, 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. Based on 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. In this case, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.