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

**BS**

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass., 3/F  
Washington, D.C. 20536

**JUL 03 2003**

File: [REDACTED] Office: Nebraska Service Center Date:

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:

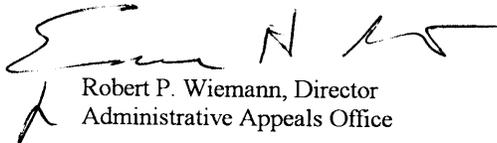
INSTRUCTIONS:

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, 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. At the time of filing, the petitioner was working as a Radiation Oncology Physicist for the Cleveland Clinic Foundation's Meridia Cancer Institute. 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 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.

The petitioner holds a Master of Science degree in Medical Physics from Wayne State University ("WSU"). 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 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 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.

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 project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At 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.

Along with documentation pertaining to his field of research, the petitioner submitted several witness letters. Dr. [REDACTED] Chief of the Medical Physics Section, Department of Radiation Oncology, Cleveland Clinic Foundation ("CCF"), states:

During his career [the petitioner] has engaged in translational research projects whose end result has been improved treatment for a patient or for a class of patients suffering from similar afflictions. Examples include microdosimetry for Boron Neutron Capture Therapy (BNCT) by using a tissue equivalent proportional counter -- helping to assure that patients receive the prescribed dose; the use of on-line portal imaging for confirming patient positioning before and during treatment; patient dose conformation using portal films;

determination of the off-axis characteristics of therapy beams shaped by asymmetric collimators; and also tests of the accuracy and efficacy of a new radiation therapy treatment planning system.

Dr. [REDACTED] notes that the petitioner has engaged in translational research projects, but the petitioner has offered no evidence showing that this work has consistently attracted significant attention from independent researchers. The petitioner must show not only that his findings are important to his own research institution, but throughout the medical physics field as a whole.

Dr. [REDACTED] further states:

With those tasks behind him, [the petitioner] is now becoming more active in our research programs. He has begun what I expect to be a significant involvement in our Image-Directed Radiation Therapy/Intensity-Modulated Radiation Therapy Research and Development program at the Clinic. His physics, mathematics and engineering skills make him well suited to that task.

Statements pertaining to the expectation of future results rather than a past record of demonstrable achievement fail to demonstrate eligibility for a national interest waiver. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Bureau held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. An alien seeking a national interest waiver must demonstrate that his work has already significantly influenced the field.

Dr. [REDACTED] emphasizes the petitioner's job experience and professional certifications, stating:

[The petitioner] was given the task of establishing our New Radiation Department at the Meridia Cancer Institute. He accomplished this task expeditiously and efficiently.... While establishing that department, he also worked toward his board certification and passed all his exams becoming quickly certified by the American Board of Medical Physicists in April 1997.... [H]e has also very effectively taught physics to Radiation Oncology Medical Residents as one of the instructors in our Residents' Physics course.

We note here that any objective qualifications that are necessary for the performance of a particular position 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 that could be articulated on an application for a labor certification.

Dr. [REDACTED] states that he has known many medical physicists professionally and that the petitioner "is indeed an alien of exceptional ability." As has been observed in *Matter of New York State Dept. of Transportation*, a plain reading of the statute and regulations shows that aliens of exceptional ability are generally required to present a job offer with a labor certification at the

time the petition is filed, and only for due cause is the job offer requirement to be waived. Clearly, exceptional ability in one's field of endeavor does not, by itself, compel the Bureau to grant a national interest waiver of the job offer requirement.

Dr. [REDACTED] letter discusses the difficulty in recruiting qualified Medical Physicists, stating that there are "simply too few available." A letter from [REDACTED] Director of the Meridia Cancer Institute, offers a similar opinion. He states: "I believe the lack of adequately trained and credentialed medical physicists has negatively impacted the quality of healthcare." A shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. 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. See *Matter of New York State Dept. of Transportation, supra*. Similarly, arguments about the overall importance of a given occupation may establish the intrinsic merit of that occupation, but such general arguments would not suffice to show that an individual worker in that field qualifies for a waiver of the job offer requirement.

Dr. [REDACTED] Professor of Radiation Oncology and Director of Medical Physics at Harper Hospital and Wayne State University, was the petitioner's research supervisor during his graduate studies at WSU. Dr. [REDACTED] states:

As far as research is concerned, [the petitioner] worked on several projects in our department. He was given the responsibility of testing some new treatment planning software which has now been put into routine clinical use in the planning of our cancer treatments. He also spearheaded our studies on the feasibility of using a new imaging device used in conjunction with our treatment machines in order to measure the dose received by patients. In addition, he worked on the design of a device to measure dose for a specialized neutron therapy treatment technique (boron neutron capture therapy) that a few cancer treatment centers in the United States are developing. This will be an invaluable quality assurance technique for all these centers and, because this therapy could well result in a significant breakthrough in cancer treatment, Ray's preliminary work is likely to lead to some important outcomes.

[The petitioner's] M.S. essay research on the use of exit film dosimetry to determine the dose received by patients undergoing radiation therapy showed great research potential, as also did his work on the use of some new treatment machine technology (asymmetric collimation).

The record establishes that the petitioner has authored a master's essay and co-written a scientific abstract, but the record contains no objective evidence (such as citations) to establish the extent to which this research has affected the work of other medical physicists. With regard to the witnesses of record, many of them discuss what may, might, or could one day result from the petitioner's work at WSU, rather than how the petitioner's past efforts have already had a discernable impact beyond the original contributions that are expected of every graduate student at a respected university.

Dr. [REDACTED] Associate Staff in the Department of Radiation Oncology at CCF, states:

As a result of his expertise, [the petitioner] was given responsibility for testing a new treatment planning system which we purchased. We found his experience with this system allowed him to commission it for patient treatments at Hillcrest rapidly. His in depth understanding of the inner workings of this system helped him create an exceptionally accurate data base that is now used daily for creating optimum plans for each patient's treatment, thereby saving time while ensuring outstanding patient care.

[The petitioner] also participated in commissioning the new linear accelerator at Hillcrest, which means that he worked with the other physicists to make measurements of the radiation fields produced by this linac. These measurements are used in treating every patient at Hillcrest.

As chief physicist at Hillcrest, [the petitioner] is responsible for ongoing quality assurance. He oversees the daily testing of this equipment by the therapists, teaching them the medical physics aspects of their job as needed. He checks every patient chart and treatment plan before treatment begins, every week during treatment, and after treatment is finished. He checks his radiation sources, including the linear accelerator, every month for proper operation. Each year the output of his linear accelerator has been independently verified through M.D. Anderson Cancer Center in Houston, Texas. These checks assure us that [the petitioner's] quality assurance procedures are accurate.

[REDACTED] Section Leader of Brachytherapy Physics, Cleveland Clinic Foundation, states:

[The petitioner's] abilities enabled him to be placed as the sole physicist of one the Cleveland Clinic's new outposts at Hillcrest Hospital Cleveland. Here he performs all of the duties associated with a medical physicist in a Radiation Oncology Department including calibrating radiation therapy machines, advising physicians on the technical matters associated with delivering radiation to tumors, checking patient's charts, performing physic calculations as well as many other duties to ensure the patients receiving radiation treatments, receive them accurately. He is well liked by all members of the staff there, as well as the patients, he is involved in treating.

The letters from Dr. [REDACTED] and [REDACTED] suggest that medical physics research is not among the petitioner's primary duties at CCF. *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 work as well. In this case, the petitioner's impact would generally be limited to the patients of the clinic that he directly serves.

The director requested further evidence that the petitioner had met the guidelines published in *Matter of New York State Department of Transportation*. In response, the petitioner submitted a

statement from counsel citing the witness letters, but no further documentary evidence.

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 acknowledged the intrinsic merit and national scope of the petitioner's work, but found that the petitioner'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 indicated that the petitioner had failed to establish that he would serve the national interest to a substantially greater degree than other qualified medical physicists.

On appeal, counsel argues that the petitioner's academic achievements distinguish him from others in his field. University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's scholastic achievement may place him among the top students at a particular educational institution, but it offers no meaningful comparison between the petitioner and experienced professionals medical physics field who have long since completed their educational training.

Counsel again cites the witness letters attesting to the petitioner's contributions at CCF. We note here that the petitioner's witnesses consist entirely of individuals with direct ties to the petitioner. Their letters describe the petitioner's job duties and expertise as a medical physicist, but they do not demonstrate the petitioner's influence on the field beyond the institutions where he has studied or worked. While letters from those close to the petitioner certainly have value, the letters do not show, first-hand, that the petitioner's work is attracting attention on its own merits, as we might expect with technological innovations or research findings that are especially significant. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of one's published findings, would be more persuasive than the subjective statements from individuals selected by the petitioner. In this case, the petitioner's efforts may have added to the general pool of knowledge, but it has not been shown that researchers throughout the field have viewed the petitioner's work as particularly significant.

The petitioner submits evidence of a research proposal and his co-authorship of a conference abstract from the annual meeting of the American Association of Physicists in Medicine (1999). The record, however, contains no evidence that the presentation or publication of one's work is a rarity in the petitioner's field, nor does the record contain citation records or other evidence to establish that medical physicists (outside of WSU or CCF) regard his published or presented findings as especially significant. While heavy citation of the petitioner's published articles would carry considerable weight, the petitioner has not presented such citations here.

The petitioner also submits general information about the American Board of Medical Physics and the American Association of Physicists in Medicine. Such evidence may establish the intrinsic merit of the petitioner's occupation, but it would not suffice to show that an individual worker in that field qualifies for a waiver of the job offer requirement. We note Congress' creation of a blanket national interest waiver for certain physicians. The creation of Section 203(b)(2)(B)(ii) of the Act demonstrates Congress' willingness to grant such blanket waivers. We cannot ignore, the

absence, to date, of such a blanket waiver for Radiation Oncology Physicists. Furthermore, the creation of the blanket waiver for certain physicians demonstrates that no such blanket waiver for any given occupation is implied in the statute. Otherwise, the blanket waiver for certain physicians would be superfluous.

Bureau records now indicate that the petitioner in this matter is the beneficiary of both an approved labor certification and an approved employment based immigrant visa petition filed in his behalf by the Detroit Medical Center. (LIN 01 248 53544). Therefore, arguments in this matter pertaining to the necessity for an exemption from the requirement of a job offer, and thus of a labor certification, are now moot.

Clearly, the petitioner's immediate colleagues from the Cleveland Clinic Foundation have a high opinion of the petitioner and his work, as does his research supervisor from WSU. The petitioner's work, however, does not appear to have yet had a measurable influence in the larger field. While some witnesses have discussed the potential applications of his research findings at WSU, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's studies may eventually have practical applications does not persuasively distinguish the petitioner from other competent medical physicist researchers.

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 which, by law, normally attaches to the visa classification sought by the petitioner.

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.