

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

File: SRC 99 003 53080 Office: TEXAS SERVICE CENTER

Date: MAY 7 2003

IN RE: Petitioner:  
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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

**PUBLIC COPY**

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) 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 petitioner seeks employment as a physician, specializing in neurology. 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 petitioner submits letters from professors who had overseen the petitioner's medical training. These letters offer praise for the petitioner's skill as a clinician and as a researcher, but they do not significantly distinguish the petitioner from other well-trained physicians in his specialty. These letters amount, essentially, to recommendation letters of the type that is routinely presented to trainees at the successful conclusion of their training period. The petitioner also submits copies of educational documents, licenses, and other materials establishing his credentials as a physician eligible to practice medicine in the United States.

In a statement accompanying the initial filing, the petitioner states that he entered the United States in 1992 under a J-1 nonimmigrant visa. For medical trainees, this visa classification normally requires the alien to return to his or her home country for at least two years following the completion of the training received under the visa. The record shows that the petitioner received a waiver of this requirement, because his daughter (a U.S. citizen) suffers from a chronic health condition.

Regarding his work, the petitioner states:

My training is extensive. I am a proficient Physician, Neurologist and an Epileptologist. Due to my extensive training, I am not only competent to diagnose and treat every day diseases of human organ systems, but also complicated and debilitating diseases of Nervous system like Strokes, Alzheimer's disease, Mental Retardation, Multiple Sclerosis, Lou Gehrig's disease and Epilepsy, to name only a few. Time has come, where doctors like me, are the only answer to prevent and treat diseases where every minute counts. An example is the TPA therapy in

stroke that has to be given within 3 hrs of the [onset of] symptoms. This prevents the disability from strokes. My presence in these areas will help prevent disabilities from these devastating diseases which cost billions of US dollars each year.

The petitioner states that, during his training in Utah and South Carolina, he “was involved in Basic Science Research,” the results of which await publication. The petitioner asserts that he seeks to practice in Kermit, Texas, which is medically underserved. On the Form I-140 petition, the petitioner had indicated that he seeks to divide his practice between two Texas locations, one in Kermit, and the other in Midland. The petitioner, in his accompanying letter, does not even mention the Midland location, let alone specify whether it is in a medically underserved area.

The petitioner submits letters from officials in Texas, indicating that Winkler County is designated as a Health Professional Shortage Area. County Judge [REDACTED] indicates that Winkler County has “two towns, Kermit and Wink, and a total population of approximately 8,000 people.” Midland is separated from Kermit by two counties and approximately 60 miles.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has stated that he is involved with a research project at Midland Hospital, and (for reasons unexplained) he will be unable to continue his participation in a setting consistent with labor certification. The petitioner also cites his unpaid position as a clinical assistant professor at Texas Tech University, and his participation with medical associations such as the National Multiple Sclerosis Society. The petitioner repeats the assertion that Kermit, Texas, is medically underserved.

The petition was filed in October, 1998. Pursuant to *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Expanding on this finding, the precedent decision *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), indicates that a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. Any new developments which took place after the October 1998 filing date cannot retroactively show that the petition was already approvable at the time it was filed.

The petitioner did not become a clinical assistant professor at Texas Tech until February 1999, several months after the petition was filed. The proposal for the research project at Midland Hospital is undated, but it identifies the petitioner as a clinical assistant professor at Texas Tech University and therefore it cannot originate from earlier than February 1999. Even then, the proposal refers to future plans rather than any ongoing study.

The director denied the petition, acknowledging the intrinsic merit of the petitioner’s work but finding that the petitioner’s own contribution lacks national scope and 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 observed that, pursuant to *Matter of New York State Dept. of Transportation*, a worker shortage does not automatically warrant a national interest waiver, because the labor certification process operates by verifying those very shortages.

On appeal, the petitioner asserts that *Matter of New York State Dept. of Transportation* was published after he filed his "original petition" and therefore should not apply. By this logic, the precedent decision does not apply to the petition filed by the New York State Department of Transportation, because that decision was fully rendered before it could be published as a precedent decision. In any event, the petition now at hand was filed on October 15, 1998, two months after the publication of the precedent decision. The petitioner refers to an "original petition," filed on March 17, 1998, but any earlier petition would be a separate matter, and it certainly would not act as a permanent shield against any changes in procedure or policy that took place after March 17, 1998. We note that, on his Form I-140 petition, signed under penalty of perjury and dated September 30, 1998, the petitioner answered "no" to the question "[h]as an immigrant visa ever been filed by or on behalf of this person." Thus, if the petitioner is correct in his assertion that he filed an earlier petition on March 17, 1998, then we must unavoidably conclude that he made a false statement on his later petition, by claiming that no earlier petition had been filed.

The petitioner states "your department agreed that I have to stay in this country so that my US citizen daughter can get her treatment (hardship waiver). How can I stay, if I am not allowed to work?" While the AAO is not unsympathetic to the petitioner's family's medical needs, the national interest waiver is not a humanitarian program. The Immigration and Naturalization Service (now the Bureau) supported the waiver of the two year foreign residency requirement relating to the petitioner's J-1 nonimmigrant status, but assent to this waiver does not amount to a promise of permanent resident status, nor does it, as the petitioner claims, mean that we "have already decided that I have to stay." The waiver of the two-year foreign residency requirement does not automatically entitle the petitioner to whatever immigrant classification he chooses. The present matter relates to an employment-based immigrant classification, for which the petitioner must establish that he is eligible. There is no provision to waive or ignore the fundamental eligibility requirements based on medical difficulties in the alien's family. With regard to the petitioner's question "[h]ow can I stay, if I am not allowed to work," relies on the unproven presumption that the petitioner is "not allowed to work" unless he obtains a national interest waiver. Even then, this quandary, however distressing for the petitioner, is not a national interest issue.

The petitioner asserts "I have proved in several ways that I am involved with numerous activities that are of 'National Interest.' [By itself,] my stroke project should be sufficient for that. I have to stay and work on this project to provide results. Scientific studies, like I am starting, takes [sic] several years before final conclusion can be achieved." As noted above, the petitioner did not propose this project until after he had filed the petition. Indeed, the petitioner's initial filing did not contain any indication that the petitioner sought to pursue research in the United States; he had identified his occupation as "medical doctor." Furthermore, members of the professions, including scientific researchers, are generally subject to the job offer/labor certification requirement. Medical researchers are not, as a class, exempt from this requirement. The petitioner has not even established that he is conducting such research; only that he intends to begin a research project in the future. In the absence of persuasive evidence that the petitioner has a history of significant research in the same specialty, the petitioner's argument is a weak one.

The petitioner asserts that, in his position at Texas Tech University, he teaches students and treats “indigent and poor patients . . . who cannot afford to see a Neurologist.” The petitioner does not explain how this distinguishes him from countless other physicians in the United States. The impact from such activities is predominantly local.

We note the passage, subsequent to the filing of this appeal, of the Nursing Relief for Disadvantaged Areas Act of 1999. This legislation, signed into law on November 12, 1999, created a new section 203(b)(2)(B)(ii) of the Act, making the national interest waiver available to certain physicians practicing in medically underserved areas. The petitioner does not appear to fall among the class of physicians affected by this new statute. Regulations at 8 C.F.R. § 204.12(c)(2) require that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit evidence that the physician will practice full-time in a designated underserved area. The petitioner has attested that his time will be divided between a clinic in Kermit and Texas Tech University in Midland. The petitioner’s research activities and teaching duties reduce the amount of time available to practice clinical medicine. 8 C.F.R. § 204.12(c)(2)(i) requires the physician to practice in a medical specialty that is within the scope of the Secretary of Health and Human Services (HHS)’s designation for the geographical area or areas. At present, there is no indication that the Secretary of HHS designates shortage areas in the specialty of neurology. The petitioner’s practice in the specialty of neurology does not alleviate a shortage in any other medical specialty. The statute and regulations both specify that the shortage must be designated by the Secretary of HHS. An attestation from any other agency, public or private, that Winkler County has a shortage of neurologists, cannot suffice.

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. There is no statutory or regulatory provision to allow national interest waivers for humanitarian reasons, arising from family circumstances. 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.