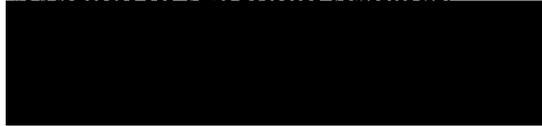


U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

B5

ADMINISTRATIVE APPEALS OFFICE  
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invasion of personal privacy



File: WAC 99 103 52417 Office: California Service Center

Date: MAY 13 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)

IN BEHALF OF PETITIONER:



**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, California 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 an alien of exceptional ability or as a member of the professions holding an advanced degree. At the time of filing, the petitioner was working as the Chief Director and President of a medical clinic specializing in otolaryngology in Yokohama, Japan. 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 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.

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.

The petition was filed on February 10, 1999. In a letter accompanying the petition, the petitioner described how he would serve the national interest:

I am a medical doctor with specialization in ear, nose, and throat ailments. I am also a licensed pharmacist specializing in traditional/herbal therapy. Thus, not only do I diagnose illnesses, but I also create individualized medicines to treat specific illnesses. I create custom medicines for each individual's symptoms.... I will be opening a medical and pharmacy clinic similar to my medical corporation which has been operating in Japan since 1985. The implementation of a medical program which combines traditional herbal medicines and modern medical techniques will benefit the United States and the local community because it will introduce an unique expertise which will improve the health of individuals with new extensive individualized treatment methods. It will provide jobs at the clinic and reduce unemployment in the local community.

Also provided was evidence of the petitioner's foreign medical credentials and documentation confirming the existence of his medical clinic in Japan.

The documentation provided by the petitioner failed to establish that the proposed benefits of his work would be national in scope. *Matter of New York State Dept. of Transportation, supra*, 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 his clinic would directly serve.

On December 20, 1999, 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 addressing the eligibility factors set forth in *Matter of New York State Department of Transportation* and an article appearing in an unidentified Taiwanese newspaper in 2000 describing how a "satellite broadcasting system" provided by the petitioner benefits the Chinese immigrant community in Japan. The article was devoted primarily to the petitioner's satellite system rather than to any of his medical accomplishments. Also submitted were letters (dated February 8, 2000) from Taiwan's Ambassador to Japan and the Chairman of the Tokyo Overseas Chinese Association thanking the petitioner for installing a satellite system in the Taiwanese Embassy. We note here that the petitioner seeks employment in the medical field. The evidence provided by the petitioner is irrelevant to his work as a physician and therefore it fails to demonstrate significant achievement in his field of endeavor. Furthermore, the above evidence provided came into existence subsequent to the petition's filing. *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.

On December 4, 2000, in accordance with the interim regulation at 8 C.F.R. § 204.12, the director requested the petitioner to provide evidence of his eligibility under section 203(b)(2)(B)(ii) of the Act. The director's request for evidence cited Section 212(a)(5)(B) of the Act, which states:

Unqualified physicians. - An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English. For purposes of the previous sentence, an alien who is a graduate of a medical school shall be considered to have passed parts I and II of the National Board of Medical Examiners if the alien was fully and permanently licensed to practice medicine in a State on January 9, 1978, and was practicing medicine in a State on that date.

In response, the petitioner submitted a letter stating:

I am willing to take the necessary steps to obtain medical licenses necessary to practice in the United States of America. I further agree that I am willing to practice in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals or in a facility operated by the Department of Veterans Affairs.

The petitioner, by his own admission, indicates that he has not obtained the necessary licensures to practice medicine in the United States. Further, the record contains no evidence that the petitioner has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services). Thus the petitioner has not shown that he meets the admissibility requirements for alien physicians under Section 212(a)(5)(B) of the Act and as required by the regulations at 8 C.F.R. § 204.12(c)(4).

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 or veterans facility. The petitioner has not met these requirements. He has not shown that he intends to provide full time clinical medical service in a geographical area or areas designated by the Secretary of Health and Human Services 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 in a facility operated by the Veterans Administration. 8 C.F.R. § 204.12(c)(2). Thus, he has not proven his eligibility for the national interest waiver for certain physicians under section 203(b)(2)(B)(ii) of the Act.

The petitioner's response to the director also included evidence showing that he established a corporation called Summit Vastar Telecom, Inc. on April 3, 2000 in Huntington Beach, California. The documentation provided refers to the company as an "internet and computer" business rather than a medical clinic. The petitioner states: "[The company] is a subsidiary of the Japanese Telecom Corporation where I am the 100% stock-holder for a long time." The relevance of this evidence to the petitioner's national interest waiver claim as a physician is not apparent. If the petition was deficient at the time of filing, subsequent material changes cannot

establish eligibility where it did not already exist. See *Matter of Katigbak*, *supra*, and *Matter of Izummi*, 22 I&N 169 (Comm. 1998).

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 petitioner had not shown that his work as a physician at a medical clinic would be national in scope or that he would serve the national interest to a greater degree than would an available U.S. worker having the same qualifications. The director's decision also stated that the petitioner's evidence was insufficient to demonstrate that he qualifies for classification as an alien of exceptional ability. The director did not address whether the petitioner qualifies as a member of the professions holding an advanced degree.

We concur with the director's determination that the petitioner has failed to establish that he meets the regulatory criteria for exceptional ability set forth at 8 C.F.R. § 204.5(k)(3)(ii). We further note that the petitioner has not shown that he holds the foreign equivalent of a United States advanced degree. Thus, the petitioner has failed to establish that he qualifies for classification as an alien of exceptional ability or as a member of the professions holding an advanced degree. Because the petitioner does not meet the guidelines published in *Matter of New York State Department of Transportation* or the regulatory criteria for certain alien physicians at 8 C.F.R. § 204.12, the issue of whether he qualifies for the underlying visa classification need not be further addressed.

On appeal, counsel states that the petitioner's physician's license is from Japan rather than China (as stated by the director) and therefore the director's decision contains a factual error. While this may be true, there is no indication that the director would have rendered a substantially different decision without this error.

Counsel emphasizes the petitioner's educational background, medical credentials, and work experience as evidence of his ability to serve the national interest. As noted in the director's decision, objective qualifications such as these are amenable to the labor certification process. 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.

Counsel further states:

As a medical doctor specializing in the ailments of the ear, nose, and throat, [the petitioner] has a large number of patients with allergy related problems. Orange County, California is one of the places where patients have a significant amount of allergies, skin diseases, and respiratory problems including asthma, and disorders of the immune systems compared to other states primarily because of the mild climate year round and the large variety of flowers, plants as well as pollutants.

Counsel cites no medical source to support his claim that Orange County, California has a higher incidence of allergies, skin diseases, respiratory problems, and immune system disorders "when

compared to other states.” The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, the petitioner owns no medical practice in Orange County and is not licensed to practice there. Therefore, any assertions as to the petitioner’s potential to benefit residents of that county or the State of California would be entirely speculative.

Counsel offers a discussion regarding the benefits associated with traditional Chinese Medicine. However, pursuant to *Matter of New York State Department of Transportation*, 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. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a labor certification. In order to establish eligibility for a waiver of the job offer requirement, the petitioner must demonstrate a past history of significant accomplishment having some degree of measurable influence on the medical field.

Whatever the tradition from which the petitioner’s treatment methods derive, their effect on the human body can be objectively observed and measured and must be held to the same objective, scientific standards as “Western” medicine. In this case, the petitioner has provided no objective scientific data to establish that he is responsible for any significant breakthroughs in the treatment of disease or medical afflictions of the ear, nose, and throat.

The petitioner provides several letters from his patients in Japan crediting him with healing their ailments. Such evidence is inherently anecdotal, and does not significantly distinguish the petitioner from other competent physicians, nor does it demonstrate the national scope of his work. For example, the petitioner has not shown that public health officials throughout the medical community have acknowledged or recognized any of his treatment methods as particularly significant advancements.

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.

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 seeking to practice in the United States may obtain a national interest waiver. As discussed above, the petitioner has not established that he qualifies as an alien physician eligible for the national interest waiver under this section of the Act.

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.