



U.S. Citizenship
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FILE: LIN 02 229 50884 Office: NEBRASKA SERVICE CENTER Date:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson
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 to classify the beneficiary 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 is a hospital that seeks to employ the beneficiary as a medical physicist. 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 beneficiary qualifies for the classification sought, 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 Citizenship and Immigration Services] 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.

In a letter accompanying the initial filing, Vicki Morley, the petitioner's vice president of Human Resources, states that the petitioner "conducted a national search . . . to fill the position to conduct diagnostic radiology research. We discovered that there is a severe national shortage of physicists qualified to conduct research of this type." Pursuant to *Matter of New York State Dept. of Transportation, supra*, a shortage of qualified workers in a given field does not constitute grounds for a national interest waiver. The labor certification process was designed to address the issue of worker shortages, and therefore a shortage of qualified workers is an argument for obtaining rather than waiving a labor certification.

Ms. Morley indicates that the petitioner "determines the radiation dosage administered to patients as well as the exact placement of that dosage." Ms. Morley adds that the petitioner "participates in clinical trials research" and various forms of radiation therapy for cancer patients. The petitioner submits evidence attesting to the beneficiary's education and training, as well as copies of scholarly articles written or co-written by the beneficiary. The most recent articles appeared in early 1997. There is no evidence that the beneficiary's work for the petitioner is national in scope, rather than having a strictly local effect, limited to the patients whom the beneficiary is involved in treating. The beneficiary's duties for the petitioner do not appear to involve "research" *per se*; rather, they predominantly involve clinical treatment of individual patients.

The director instructed the petitioner to submit evidence that the beneficiary's work is national in scope, and the director observed that a worker shortage is generally not a strong argument in favor of granting a national interest waiver. The director requested evidence to satisfy the guidelines published in *Matter of New York State Dept. of Transportation*.

In response, counsel asserts that the petitioner "is affiliated with the University of Michigan which provides care and shares research with not only the United States but also the world." The fact that the beneficiary's publication record appears to have ceased more than five years before the filing date raises the question of how much of the beneficiary's work has been "shared" since that time.

Counsel argues that the beneficiary's "work is [at] the cutting edge of cancer research and treatment." The petitioner has submitted a joint letter from Dr. Jacek Wierzbicki, chief medical physicist, and Andrew Newman, administrative director for the petitioning entity. These individuals state that the petitioner has carried out various "clinical responsibilities." Clinical treatment of patients is not research, and Congress

created no blanket exemption for every professional who is somehow involved in the treatment of cancer patients. Dr. Wierzbicki and Mr. Newman state:

[The beneficiary] has carried clinical and research responsibilities in radiation therapy treatment planning and treatment delivery, driven largely by advances in computer software. These advances have inspired the development of sophisticated three dimensional conformal radiation therapy or intensity modulated radiation therapy (IMRT). . . .

In addition, [the beneficiary] is involved in the IMRT research project in collaboration with [an]other physicist [at] Medical College of Ohio . . . , which related to Dose calculations and implementation of some optimization techniques. For clinical studies, he is also in collaboration with other physicists from Rush Hospital in Chicago . . . for advice and consults. In addition, [the beneficiary] has also carried out other clinical duties such as Xknife Stereotactic Radiosurgery for central nervous malignancies.

The record amply demonstrates that the beneficiary, like any qualified therapeutic medical physicist, participates in patient treatment. The record, however, contains nothing from Rush Hospital or the Medical College of Ohio to show that the beneficiary is actively conducting research (as opposed to collecting data during the normal course of patient treatment, and providing that information to researchers). There is no evidence that the beneficiary designed the clinical trials in which he has participated, and it is not entirely clear what those clinical trials were intended to study (e.g., drugs, dosage levels, treatment modalities, etc.).

The beneficiary is named as a co-author on an undated manuscript submitted with the petitioner's response to the notice. None of the cited references in the manuscript are dated after 1996. The manuscript indicates that the beneficiary is affiliated not with the petitioner, but with McMaster University, where the beneficiary worked as a research assistant from 1996 to 1998. This evidence does nothing to show that the beneficiary, who now works as a therapeutic medical physicist rather than as a research assistant, is currently, or will be in the future, involved in research to any significant extent.

The director denied the petition, stating that the petitioner has established that the beneficiary is a highly qualified medical physicist, but that the petitioner has not shown that the beneficiary stands out to such an extent that he merits the special benefit of a national interest waiver. The director also noted the petitioner's failure to submit Form ETA-750B, Statement of Qualifications of Alien, as required by 8 C.F.R. § 204.5(k)(4)(ii).

On appeal, the petitioner submits the missing Form ETA-750B, and counsel asserts that the beneficiary's "exceptional qualifications, merit and on-going work in the area of cancer research definitely meet the 'national interest standard' required to qualify as 'exceptional' and, therefore, eligible for the waiver of labor certification." Exceptional ability in one's field does not automatically entitle an alien to a waiver of the job offer requirement. Section 203(b)(2)(A) of the Act clearly states that the job offer requirement applies to aliens of exceptional ability, as well as to members of the professions holding advanced degrees.

The statute and regulations contain no blanket waiver for all cancer researchers. Furthermore, as stated above, the petitioner has not shown that it employs the beneficiary as a cancer researcher. Occasional involvement with a research project does not make the beneficiary a cancer researcher. We note that, with the required Form ETA-750B, the petitioner has also submitted Form ETA-750A, which describes the petitioner's offer of employment. The form instructs the employer to "Describe Fully the job to be Performed." The petitioner has listed various "clinical responsibilities," "clinical duties," and equipment

maintenance duties, but there is no mention of research. The petitioner previously performed research as a graduate student and postdoctoral trainee, but the petitioner has not shown that it is unusual for doctoral candidates to conduct research.

The beneficiary's duties as a therapeutic medical physicist are primarily clinical in nature, involving the direct treatment of individual patients. While we do not dispute the overall importance of this profession, the scope of any one medical physicist's work is local rather than national. The beneficiary's direct impact is largely limited to those particular patients whom he treats. The director had concluded that the beneficiary's work as a cancer researcher has national scope, but for the reasons discussed above, we cannot concur with the director's finding that the beneficiary is, or will be, a cancer researcher in his current capacity as a medical physicist.

Counsel asserts that several other facilities have attempted to recruit the beneficiary, and these efforts underscore "Beneficiary's superior credentials and abilities." This paragraph, however, immediately follows a paragraph in which counsel asserts that there is a serious shortage of medical physicists, and thus there is significant demand for qualified workers in that field. The petitioner has not shown that the recruitment efforts directed toward the beneficiary are significantly different than those aimed at other qualified workers in the field.

In short, there is no persuasive evidence that the beneficiary's impact as a medical physicist has exceeded or will exceed that of other qualified workers in the same field, in terms of either scope or importance. A general shortage of medical physicists does not imply that the petitioner, by virtue of his choice of profession, should be exempt from the labor certification requirement. Generally, worker shortages are determined by the Department of Labor, and the petitioner's declaration that a worker shortage exists does not and cannot supersede or replace the Department of Labor's role. General complaints regarding the nature of the labor certification process do not establish that any one given alien should be excused from that process.

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. 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.