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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

BS

[Redacted]

FILE: [Redacted]

Office: TEXAS SERVICE CENTER

Date: APR 08 2005

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)

ON BEHALF OF PETITIONER:

[Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification under section 203(b)(2)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(B)(ii), as an alien physician. 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 because she will practice medicine in a designated health care professional shortage area. The director found that the beneficiary did not submit the required documentation regarding her employment arrangements.

Section 203(b) of the Act, as amended, provides:

(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)(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)(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.

Citizenship and Immigration Services regulations at 8 C.F.R. § 204.12(c)(1) require the following evidence:

(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.

(ii) If the physician will establish his or her own practice, the physician's sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.

The petitioner seeks employment as a psychiatrist with Dallas MetroCare Services, and therefore the regulation at 8 C.F.R. § 204.12(c)(1)(i) applies. The petition's filing date is October 2, 2002, and therefore the regulation requires the petitioner to submit a contract dated no earlier than April 2002. The record contains no contract from Dallas MetroCare Services. A job description provided by Dallas MetroCare Services, dated September 1998, indicates that the petitioner "[p]rovides psychiatric evaluation, diagnostic and treatment services to individuals with severe mental illness." The job description makes no reference to the duration of employment, nor does it identify the petitioner by name. The record contains a copy of a cover letter from Dr. Gregory K. Graves, medical director of Dallas MetroCare Services, which states in part "I have included . . . a copy of your job description." Dr. Graves' comment that the petitioner's "starting salary would be \$110,000 per year" suggests, by its wording, that the petitioner did not yet work at the clinic as of the date of the letter (June 30, 2000). The letter contains no mention of contracts or any lack thereof.

In a letter accompanying the initial filing, counsel states:

Since July 2001, [the petitioner] has worked with Dallas Metrocare Services Westmoreland Clinic and intends to continue to work in that facility for the requisite five-year period. However, the clinic does not enter into fixed term contracts. If Dallas Metrocare terminates [the petitioner's] services, [the petitioner] plans to continue providing medical services in the underserved area as a private psychiatrist.

The record contains nothing from any Dallas MetroCare Services official to explain the absence of the required contract. With respect to counsel's explanation, the assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director instructed the petitioner to submit "a copy of a full-time employment contract which has been issued and dated within 6 months prior to the filing of this petition." In response, the petitioner did not submit any further documentation from her employer. Indeed, her response contains no mention of Dallas MetroCare Services at all. Instead, the petitioner submits a copy of a sworn statement, dated April 25, 2003, in which the petitioner states her intent to "locate and lease an office space in the West Dallas mental health shortage area" and establish a private practice after her petition is approved. The petitioner submitted this sworn statement in an effort to satisfy the requirement set forth at 8 C.F.R. § 204.12(c)(1)(ii).

The director denied the petition, noting that the petitioner had not submitted the required contract, and that the petitioner's original submission indicated that "the petitioner intended to work at Dallas Metrocare and only intended to establish her own practice if she was terminated. Only after a contract was requested did the petitioner submitted [sic] a sworn statement expressing her desire to establish a private practice."

On appeal, counsel argues that the petitioner was eligible for the benefit sought at the time she filed the petition, and that she has at all times demonstrated "evidence of intent that meets the letter and spirit of the Act." At the time the petitioner filed the petition, however, the initial submission did not contain all of the required initial evidence. The regulations at 8 C.F.R. § 204.12(c)(1) require either a contract from the employer, or a sworn statement from the alien. Neither of these was submitted, and therefore the petition was not immediately approvable.

The director, in denying the petition, cited *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which requires that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Also applicable here is *Matter of Izummi*, 22 I&N Dec.

169 (Comm. 1998), which 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. In this case, the petitioner has made a material change by declaring a firm intention to establish her own private practice, when her initial filing was plainly predicated on her employment with Dallas MetroCare Services.

Review of the record reveals another issue deserving of attention. 8 C.F.R. § 204.12(c)(2)(i) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit evidence that the physician will provide full-time clinical medical service in a geographical area or areas designated by the Secretary of Health and Human Services (HHS) 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.

The initial documentation establishes that Dallas MetroCare Services Westmoreland Clinic is located in Census Tract 69, city of Dallas, county of Dallas, county subdivision Southwest CCD. HHS documentation also shows that Census Tract 69 is designated as a Medically Underserved Area for Primary Care. This same HHS documentation, however, indicates that underserved area designations are divided into three "disciplines," specifically "Primary Medical Care," "Dental," and "Mental Health." As a psychiatrist, the petitioner falls under the "Mental Health" heading.

The director instructed the petitioner to "submit a designation list for the area of mental health." In response, counsel states that the petitioner has submitted a "Mental HPSA [Health Professional Shortage Area] designation for West Dallas; note that the entire West Dallas [sic] is a designated Mental Health Professional Shortage Area, HPSA ID 748999480A. The facility is located in West Dallas (see enclosed map) and the State of Texas has submitted its letter in support of this national interest waiver application for this location." The letter from the Texas Department of Health, submitted with the initial filing, indicates only that Dallas MetroCare Services "is in a Medically Underserved Area"; the letter makes no specific reference to mental health.

HHS documentation submitted with the petitioner's response shows that "West Dallas" is a "designated area" with regard to mental health. Within "West Dallas," the HHS documentation lists five Census Tracts, none of which is Census Tract 69. Maps submitted with the petitioner's response show Census Tract 69 and the adjacent Census Tract 107.01, but there is no evidence that either tract falls within an area formally designated "West Dallas." The term "West Dallas" does not, in fact, appear on either map. The petitioner has also failed to show that every address west of the geographic center of the city of Dallas is considered, by HHS, to constitute "West Dallas." The fact that the HHS documentation singles out specific census tracts for designation raises the question of why Census Tract 69 is not among those so designated.

Given the above information, the record is ambiguous at best as to whether the petitioner's intended area of practice falls within a geographical area designated by the Secretary of HHS as being medically underserved with respect to mental health professionals.

The petitioner's initial filing was contingent on employment at Dallas MetroCare Services Westmoreland Clinic. When asked for the required documentation regarding this employment, the petitioner abandoned that claim and, impermissibly, materially changed the terms of her petition. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.