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U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 15 2004

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.

Robert P. Wiemann
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 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 or an alien of exceptional ability. The petitioner seeks employment as a 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. 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.

On appeal, counsel asserts that the director denied the petition without issuing a request for evidence relating to the general national interest waiver. Counsel concedes the director issued a request for evidence relating to Section 203(b)(2)(B)(ii) of the Act relating to physicians in an underserved area. The director's first request for evidence, however, dated April 18, 2001, specifically requested evidence relating to the general waiver, citing the precedent decision discussed below. Counsel responded to this request on May 8, 2001. It appears that before correctly denying the general waiver, the director simply offered the petitioner an opportunity to establish eligibility for the physician waiver. We find that providing this opportunity to address the physician waiver did not preclude the director from denying the general waiver without issuing a third request for evidence.

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.

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(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.

(II) No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 204(b), and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 245, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 101(a)(15)(J)), 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.

The petition was filed on October 30, 2000, after the enactment of section 203(b)(2)(B)(ii) of the Act. It is not in dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The only issue before us is whether a waiver of the job offer is warranted in the national interest.

Although counsel stated that the petitioner would be "practicing primary care in a USHHS designated Health Professional Shortage Area," the record contained no specific request for classification pursuant to section 203(b)(2)(B)(ii) of the Act. Rather, in response to the July 5, 2001 request by the director to submit the evidence required under the regulations implementing that section, counsel requested that the petition be considered under the general waiver standards, "not the new MD only national interest statute." Furthermore, counsel's arguments throughout this proceeding relate only to the requirements set forth in *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), a precedent decision which predates the enactment of section 203(b)(2)(B)(ii) of the Act.

In a letter accompanying the initial filing, counsel stated:

This is a national interest petition seeking the exceptional category (EB2) for a former exchange visitor physician, who has obtained a waiver of his two-year foreign residence requirement. The decision to grant his waiver was based upon the conclusion of three different governmental agencies, that the physician's proposed work (practicing primary care in a USHHS designated Health Professional Shortage Area) was in the national interest. Those three agencies were: the U.S. Department of Agriculture, the U.S. Information Agency and finally, the U.S. Immigration Service. The physician/applicant is now in H-1B status, as required by the waiver commitment.

Physician/applicant's work remains the same as when it was previously concluded to be in the national interest. This is the continuation of his application process.

Counsel cites no statute, regulation or case law that indicates that a section 212(e) waiver for a J-1 nonimmigrant implies eligibility for a national interest waiver of the job offer requirement. 8 C.F.R. § 245.18(e)(2), relating to the adjustment of status of aliens qualifying under section 203(b)(2)(B)(ii) of the Act, specifically addresses J-1 immigrants who converted to H-1-B nonimmigrant status, stating, in pertinent part:

If the physician formerly held status as a J-1 nonimmigrant, but obtained a waiver of the foreign residence requirement and a change of status to that of an H-1B nonimmigrant, pursuant to section 214(l) of the Act, as amended by section 220 of Public Law 103-416, and § 212.7(c)(9)

of this chapter, the period begins on the date of the alien's change from J-1 to H-1B status. The Service will include the alien's compliance with the 3-year period of service required under section 214(l) in calculating the alien's compliance with the period of service required under section 203(b)(2)(B)(ii)(II) of the Act and this section.

This regulation contemplates that J-1 nonimmigrants receiving a waiver under section 214(l) of the Act will be adjusting as aliens qualifying for the national interest waiver under section 203(b)(2)(B)(ii) of the Act. Thus, while the 3-year period of service mandated by section 214(l) of the Act can count toward the 5-year service requirement under section 203(b)(2)(B)(ii)(II) of the Act, there is nothing about obtaining the J-1 waiver of the foreign residency requirement under section 214(l) that exempts a physician practicing in an underserved area from complying with the evidentiary requirements under 8 C.F.R. § 204.12, the regulations providing the evidentiary requirements for aliens seeking eligibility under section 203(b)(2)(B)(ii) of the Act. There is nothing in the pertinent statute or regulations to indicate that these evidentiary requirements are optional or discretionary for recipients of J-1 waivers or for any other alien physician.

Nevertheless, the petitioner in this case has declined to provide the evidence mandated under these regulations and, instead, has specifically requested that his petition be adjudicated under the test set forth in *Matter of New York State Dep't. of Transp., supra*. Since Congress has passed a law that specifically provides benefits to physicians who intend to practice in an underserved area, we do not see how it is in the national interest to waive the labor certification requirement for a physician who claims that he will work in an underserved area but is unable or unwilling to meet the requirements of that new law. We do not find that the principles set forth in *Matter of New York State Dep't. of Transp.* provide an alternative analysis for physicians who are unable or unwilling to pursue the waiver under the provisions set forth in 203(b)(2)(B)(ii) of the Act.

Even if we were to consider counsel's arguments relating to *Matter of New York State Dep't. of Transp.*, they are not persuasive. Neither the statute nor 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 the 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 Dep't. of Transp., supra, has set forth several factors that 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 support of the petition, counsel offered a wealth of documentation addressing the importance of making basic healthcare services equally available to all citizens. Other documents and letters discussed the importance of early detection in treating infectious diseases/viruses, disease prevention efforts underway in the U.S., the importance of the primary care physician, general health statistics, and public health spending in the U.S. Central to counsel's argument is a letter from Dr. ██████████ Assistant Secretary for Health and Surgeon General. Dr. ██████████ in a letter responding to an inquiry from counsel, states that primary care physicians are "an integral link in the control of infectious disease."

We concur with the director that the petitioner works in an area of intrinsic merit. Regarding the national scope of the petitioner's work, counsel acknowledged the following language from *Matter of New York State Dep't. of Transp.*:

For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, note 3. Counsel differentiated physicians from teachers and pro bono attorneys, arguing that by treating infectious diseases and, thereby preventing their spread nationally, the petitioner's work will be national in scope. The director rejected this argument. On appeal, counsel once again references the letter from Dr. Satcher, asserting that the "Surgeon General *is* the voice of the U.S. Government on the infectious disease issue."

Counsel is not persuasive. One could equally argue that well educated students of a single teacher will be successful and contribute to our nation, thus demonstrating the indirect national impact of the teacher. Yet, by excluding a teacher who has not impacted the field of education as a whole, *Matter of New York State Dep't. of Transp.* unambiguously rejects arguments that rely on such an indirect impact. Thus, counsel's argument is clearly inconsistent with that precedent decision, which is binding on us. In response to counsel's assertion on appeal that the need for primary care physicians in underserved areas is "urgent," as discussed above, Congress has already provided a process whereby primary care physicians in underserved areas can obtain a waiver of the job offer requirement. Thus, Congress has already provided a means by which to address this issue.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Counsel initially characterized this prong as

whether the national interest would be adversely affected if the petitioner were required to obtain a labor certification. Counsel acknowledged that the decision immediately continues:

Stated another way, the petitioner, whether the U.S. employer or the alien, 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 is not sufficient for the petitioner simply to enumerate the alien's qualifications, since the labor certification process might reveal that an available U.S. worker has the qualifications as well. Likewise, it cannot be argued that an alien qualifies for a national interest waiver simply by virtue of playing an important role in a given project, if such a role could be filled by a competent and available U.S. worker. The alien must clearly present a significant benefit to the field of endeavor.

(Emphasis added.) *Id.* at 218. Counsel concluded that the use of the phrase “stated another way” implies that the remainder of the decision, an additional five and a half pages, is merely an alternative to establishing, in some undefined way, that the labor certification process for this particular alien would be adverse to the national interest.

The director concluded that the record did not establish that the petitioner “offers a substantially greater prospective national benefit than would U.S. physicians in the same position.” Previously, in response to the director's question regarding whether a U.S. worker with the same minimum qualifications would be able to perform the same occupation and serve the national interest to a similar degree, counsel asserted:

In theory, an U.S. worker with the same minimum qualifications should be able to perform the same occupation and serve the national interest to a similar degree, but that is not the test. Matter of NYSDOT does not even pose this as the consideration to be weighed. Here, [the director is] taking artistic license with the decision. With that said, I know where [the director] believe[s] [she] read this question. It is on page four of the actual decision where the AAO talks about a “substantially greater degree.” [The director's] question is not the same issue. [The director has] twisted the burden of proof to now question “minimum qualifications.” It is irrelevant that an U.S. worker with the same minimum qualifications might be able to perform the same occupation and serve the national interest to a similar degree.

Counsel's argument is not supported by *Matter of New York State Dep't. of Transp.*, and, in fact, is clearly undermined by the first full paragraph on page 218 of that decision quoted above. The first full paragraph of page 218 does not begin with “in the alternative.” Rather, the phrase “stated another way” is used. The common use of that phrase is to explain or expand on the previous proposition. Thus, the remainder of the decision does not provide a separate alternative test, but rather expands on how a petitioner may demonstrate that the national interest inherent in the labor certification process is outweighed by the benefits presented by the alien's work in the United States. Thus, the director was correct in implying that the petitioner must demonstrate that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. This requirement is supported by the language quoted above on page 218 of *Matter of New York State Dep't. of Transp.* As counsel has previously conceded that the petitioner cannot meet this test, we concur with the director's conclusion that the waiver under the test set forth in *Matter of New York State Dep't. of Transp.* is not warranted in this matter.

In addition, we note that 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 his educational and professional credentials, the petitioner submitted three brief witness letters in support of the petition. Pursuant to *Matter of New York State Dep't. of Transp.*, 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. In order to establish eligibility under this classification, the petitioner must demonstrate a past history of significant accomplishment having some degree of measurable influence on the medical field. An alien does not qualify for a waiver under *Matter of New York State Dep't. of Transp.* simply by virtue of the alien's choice of occupation. If the petitioner seeks a blanket waiver merely because he is a physician, he must follow the procedures set forth by Congress and implemented in the accompanying regulations.¹

With regard to Congressional intent, the statute that created the national interest waiver originally limited the waiver to aliens of exceptional ability. The technical amendment that made the waiver available to advanced degree professionals did not single out physicians or members of any other profession for special consideration. Given this legislative history, there is no support for the claim that Congress had, all along, intended the national interest waiver as a means of providing immigration benefits for physicians in underserved areas. The only relevant statutory language that allows for special consideration for physicians in underserved areas is the provision repudiated by counsel and with which petitioner has made plain his refusal to comply.

The evidence submitted failed to demonstrate a past record of significant accomplishment on the part of the petitioner. None of the witness letters indicated that the petitioner's contributions were especially important to his field, nor did the letters even devote much space to the petitioner's specific activities. The evidence submitted in support of the petition was insufficient to persuasively distinguish the petitioner from other similarly qualified physicians.

While we recognize the undoubted importance of primary care physicians in our nation's healthcare system, eligibility for the national interest waiver under *Matter of New York Dep't. of Transp.* must rest with the petitioner's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given occupation is so important that any alien qualified to perform that occupation 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. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Congress plainly intends the national interest waiver to be the exception rather than the rule.

Counsel's argument on appeal that the shortage language in *Matter of New York State Dep't. of Transp.* is not applicable because there is not a "shortage" but a "maldistribution" of doctors is not persuasive. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't. of Transp.*, *supra* at 221.

¹ On appeal, counsel asserts that the petitioner does not seek a blanket waiver for the entire field, but acknowledges that if the AAO were to sustain this appeal, a blanket waiver would be established. Thus, counsel suggests that the AAO remand the matter to the director "for a challenge to the merits of the NYSDOT argument or a well-reasoned decision." We fail to see how remanding the matter for what counsel presumably hopes will be an approval establishes a blanket waiver any less than a sustain at this level.

Section 203(b)(2)(B)(ii) of the Act and the implementing regulations at 8 C.F.R. § 204.12 provide the only relevant exception to the Department of Labor's jurisdiction, granting such jurisdiction in the case of doctors in an underserved area to HHS. In order to qualify for this exception, however, an alien physician must comply with the evidentiary requirements of 8 C.F.R. § 204.12(c), which this petitioner, in this matter, has declined to do.

Counsel is not persuasive that by discussing shortages in an alien's "field" instead of "area," *Matter of New York State Dep't. of Transp.* was only rejecting arguments based on a *national* shortage in the alien's field. We note that counsel is quoting head note three, and not the body of the decision itself. The decision itself states: "With regard to the unavailability of qualified U.S. workers, the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a *local* labor shortage, because the labor certification process is already in place to address such shortages." (Emphasis added.) *Id.* at 218. The labor certification process can address local shortages whether that shortage is created by few practitioners in the field or by an unwillingness to work in a specific area.

Even if counsel's argument were supported by the body of the precedent decision, we note that *Matter of New York State Dep't. of Transp.* further states, "the inapplicability or unavailability of a labor certification cannot be viewed as sufficient cause for a national interest waiver; the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field." Thus, regardless of whether a "maldistribution" of doctors can be addressed by the labor certification process, the petitioner must demonstrate that he will serve the national interest to a greater degree than other internists.

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 that, by law, normally attaches to the visa classification sought by the petitioner. Also, counsel has offered no evidence or argument to show that the provisions of section 203(b)(2)(B)(ii) of the Act, pertaining to physicians in underserved areas, may be waived or disregarded at the petitioner's option, or that the evidentiary requirements at 8 C.F.R. § 204.12(c) are simply suggestions, to be followed or ignored at the petitioner's discretion.

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, U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.