



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]

Office: VERMONT SERVICE CENTER

DEB 17 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]

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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, Vermont Service Center. The Administrative Appeals Office (AAO) remanded a subsequent appeal for consideration under the newly enacted Nursing Relief for Disadvantaged Areas Act of 1999. The petition was subsequently approved. The approval of the petition, however, was then revoked by the director. The matter is now before the AAO on appeal. The appeal will be sustained and the petition will be approved.

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. 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 the petitioner will practice medicine in a designated health care professional shortage area. The director initially 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.

The petition in this case was filed on August 28, 1998. The petitioner filed an appeal on July 26, 1999, which was still pending as of October 27, 2000. On that date, pursuant to the interim regulation at 8 C.F.R. § 204.12(d)(2), the AAO remanded this matter to the director for consideration under the newly enacted section 203(b)(2)(B)(ii) of the Act. The director was ordered to allow the petitioner the opportunity to submit any further evidence required by the new regulations at 8 C.F.R. § 204.12(c).

On March 4, 2001, the director issued a request for additional documentation, advising the petitioner of the requirements set forth at 8 C.F.R. § 204.12(c). The director approved the petition on March 26, 2001. Subsequently, it came to the director's attention that the petitioner's medical license had been suspended. On December 18, 2002, the director issued a notice of intent to revoke the approval of the petition. The director issued a final decision revoking the approval of the petition on December 18, 2002.

On appeal, the petitioner submits his reinstated license.

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.

8 C.F.R. § 204.12 (d) provides:

(4) Petitions filed prior to November 1, 1998. For petitions filed prior to November 1, 1998, and still pending as of November 12, 1999, the Service will approve a national interest waiver provided the beneficiary fulfills the evidence requirements of paragraph (c) of this section. Alien physicians that are beneficiaries of pre-November 1, 1998, petitions are only required to work full-time as a physician practicing clinical medicine for an aggregate of 3 years, rather than 5 years, not including time served in J-1 nonimmigrant status, prior to the physician either adjusting status under section 245 of the Act or receiving a visa issued under section 204(b) of the Act. The physician must complete the aggregate of 3 years of medical service within the 4-year period beginning on the date of the approval of the petition, if the physician already has authorization to accept employment (other than as a J-1 exchange alien). If the physician does not already have authorization to accept employment, the physician must perform the service within the 4-year period beginning the date the Service issues the necessary employment authorization document.

8 C.F.R. § 245.18(b)(2) provides that Citizenship and Immigration Services (CIS) shall not approve an adjustment application filed by an alien physician who obtained a waiver under section 203(b)(2)(B)(ii) of the Act until the alien physician has completed the period of required service established in § 204.12 of this chapter.

8 C.F.R. § 245.18(e) provides, in pertinent part:

Except as provided in this paragraph, the 6-year period during which a physician must provide the required 5 years of service begins on the date of the notice approving the Form I-140 and the national interest waiver. Alien physicians who have a 3-year medical practice requirement must complete their service within the 4-year period beginning on that date.

(1) If the physician does not already have employment authorization and so must obtain employment authorization before the physician can begin working, then the period begins on the date the Service issues the employment authorization document.

(2) 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.

As acknowledged by the director, the petitioner had already completed his three years of service in an underserved area when his license was revoked. We need not address whether or not a petitioner's inability to practice medicine in the future is relevant, as the petitioner has now demonstrated that his license has been reinstated. While we understand the director's concerns regarding whether or not it is in the national interest to admit a physician whose license has been suspended for alleged unprofessional conduct,¹ Congress has made the determination that it is in the national interest to waive the job offer requirement for physicians who have served in an underserved area for the required amount of time. A physician's good moral character is an issue for consideration at the adjustment of status stage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director approving the petition will be affirmed.

ORDER: The appeal is sustained and the petition is approved.

¹ On page seven of the Stipulation and Consent Order recommending that the petitioner's license be conditionally reinstated, the petitioner acknowledged that his conduct was unprofessional. The order is available publicly at www.healthyvermonters.info/bmp/recent.shtml.