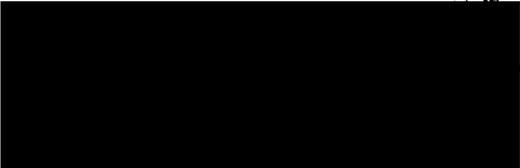
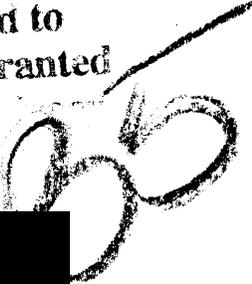




U.S. Citizenship
and Immigration
Services

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not warranted



FILE:

Office: VERMONT SERVICE CENTER

Date: JUN 7 2004

IN RE:

Petitioner:
Beneficiary:



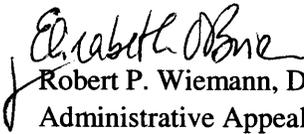
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained, the petition will be approved.

The petitioner seeks classification pursuant to 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 he is an alien physician who has agreed 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. The director found that the petitioner had not established his employer's ability to pay the wage specified on the petition.

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) Waiver of the 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)(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(c) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit the following evidence:

- (1)
 - (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.
- (2) Evidence that the physician will provide full-time clinical medical service:
 - (i) In a geographical area or areas designated by the Secretary of 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; or
 - (ii) In a facility under the jurisdiction of the Secretary of VA.
- (3) A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.
 - (i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.
 - (ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.
- (4) Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

- (5) Evidence of the Service-issued waivers, if applicable, of the requirements of sections 212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.

The petitioner initially submitted a full-time contract with [REDACTED] M.D., P.C., a February 21, 2002 letter from [REDACTED] Program Coordinator for the Virginia Department of Health's Center for Primary Care and Rural Health, earlier letters from [REDACTED] and the petitioner's credentials.

On September 18, 2002, the director requested evidence that the Secretary of Health and Human Services (HHS) has designated the location of the medical practice, Swords Creek Medical Center in Russell County, Virginia, as having a shortage of health care professionals; a letter from a federal agency or a state department of health dated within the six month period prior to the filing date of the petition; and evidence of [REDACTED] M.D., P.C.'s ability to pay the petitioner the wage listed on the petition.

In response, the petitioner submitted evidence that HHS has designated Russell County as having a shortage of health care professionals and a copy of the February 21, 2002 letter from [REDACTED] Counsel noted that the petitioner was seeking a waiver of the labor certification requirement and concluded that the director's request for evidence regarding the employer's ability to pay the petitioner must have been in error.

Citing 8 C.F.R. § 204.5(g)(2), the director concluded that the petitioner was required to demonstrate that its employer had the ability to pay him the wage indicated on the petition.

On appeal, counsel notes that 8 C.F.R. § 204.5(g)(2) only applies to petitions where a job offer is required and that the petitioner seeks a waiver of that requirement.

8 C.F.R. § 204.5(g)(2) provides:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant **which requires an offer of employment** must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Emphasis added.) Section 203(b)(2)(B) clearly provides for a "waiver of the job offer." Despite this language, the director relies on 8 C.F.R. § 204.12(c)(1), quoted above, for the proposition that an offer of employment is required for alien physicians. Subparagraph (ii) of that regulation, however, allows for physicians to submit, in the alternative, an affidavit that they are setting up their own practice. Thus, a job offer is not required. In discussing the national interest waiver for this classification for non-alien physicians, 8 C.F.R. § 204.5(k)(4)(ii) provides that the director "may exempt the requirement of a job offer, and thus of a labor certification." Thus, it is clear that in the context of petitions filed pursuant to Section 203(b)(2) of the Act, the phrase "job offer" is synonymous with the labor certification process, a process that the petitioner seeks to have waived. For the above

reasons we find that the regulations do not require the petitioner to establish his employer's ability to pay the wage listed on the petition.

Finally, we simply note that under the alien physician program, the petitioner will not be able to adjust status until he has completed five years of employment in an underserved area and provided documentation of that employment to Citizenship and Immigration Services (CIS). 8 C.F.R. § 245.18(h). Thus, this program already has a mechanism to ensure the viability of the job offer.

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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.