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FILE:

[REDACTED]
EAC 06 129 52574

Office: VERMONT SERVICE CENTER

Date:

JAN 24 2008

IN RE:

Petitioner:
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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which 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 an alien of exceptional ability. According to Part 6 of the Form I-140 petition, the petitioner seeks employment as a biomedical researcher and physio-therapist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director concluded 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 director also appears to conclude that the petitioner does not qualify as an alien of exceptional ability.

On appeal, the petitioner asserts that she needs additional time to acquire additional evidence from South Korea, although most of the documentation of record purports to be from China. She did not indicate how much time was need, although 30 days is automatically granted as indicated on the Form I-290B Notice of Appeal. The petitioner dated the appeal November 27, 2006. As of this date, more than one year later, the petitioner has submitted nothing further. Thus, the appeal will be adjudicated based on the evidence submitted initially, in response to the director's request for additional evidence and initially on appeal.

As will be discussed below, we concur with the director that the petitioner, who has not demonstrated any formal education or research accomplishments, has not established why it is in the national interest to waive the alien employment certification process for her to pursue employment in the sciences for which she has not even established that she is qualified.

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.

Prior to discussing the evidence, it is necessary to narrow the petitioner's proposed area of employment. According to the regulation at 20 C.F.R. § 656.10(a)(3)(i), "'Physical therapist' means a person who applies the art and science of physical therapy to the treatment of patients with disabilities, disorders and injuries to relieve pain, develop or restore function, and maintain performance, using physical means, such as exercise, massage, heat, water, light, and electricity, as prescribed by a physician (or surgeon)." Section 212(a)(5)(C) of the Act deems inadmissible foreign health care workers who are not certified as set forth in that section. The beneficiary is not certified as a physical therapist. Thus, were we to consider the petitioner's proposed employment as a physio-therapist, the petitioner would ultimately be inadmissible. As such, we will limit our analysis to whether the petitioner has established her ability as a biomedical researcher.

The petitioner appears to seek classification as an alien of exceptional ability as she has provided no evidence that she is a member of the professions holding an advanced degree. On page 4 of the denial, the director concluded that the petitioner "does not qualify for classification under Section 203(b)(2) of the Immigration and Nationality Act based on her exceptional ability." We concur that the petitioner does not qualify as an alien of exceptional ability. More specifically, the petitioner has not established that she meets any of the relevant regulatory criteria for classification as an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the petitioner's degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The petitioner asserted that she graduated in 1985 from Andong National University in South Korea. The petitioner did not submit the official academic record from this college or a credentials evaluation for her purported education. Thus, the petitioner has not established that she meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner asserts that she performed research at Inha University. She further asserts that she was invited to give lectures at the Jilin Provincial General Hospital and Changchun City Central Hospital. The record contains no letters from these institutions confirming her employment as required by the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B). In response to the director's request for additional evidence, the petitioner submitted what purports to be a salary table from Changchun City Central Hospital listing the petitioner's salary as \$3,000 in March, April, July and September 1999. The evidence does not document ten years of full-time employment in the occupation of biomedical researcher or even as a physio-therapist. Thus, the petitioner has not established that she meets this criterion.

A license to practice the profession or certification for a particular profession or occupation

The record contains no evidence relating to this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

As stated above, the record contains what purports to be evidence of the petitioner's wages in China for four months in 1999. The record is absent, however, evidence of comparative wages in China such that we could determine whether the petitioner's wages are indicative of a degree of expertise significantly above that ordinarily encountered.

Evidence of membership in professional associations

The record contains no evidence relating to this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The record contains a certificate purporting to document a 2001 award from the Chinese Ministry of Health. This purported award, however, is not consistent with the remainder of the record. Specifically, the petitioner has failed to submit the most basic evidence establishing her career as a researcher. Moreover, the award purports to recognize two publications. While the petitioner

submitted documents that purport to be the publications, they bear no indicia of publication, such as journal title, conference proceedings title or pagination. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has failed to submit credible evidence relating to this criterion and, thus, cannot be deemed to have met this criterion. Even if we found the award credible, the petitioner would meet only one criteria, of which the petitioner must meet at least three to establish eligibility.

As the petitioner has not demonstrated that she is an alien of exceptional ability, the issue of whether waiving the job offer requirement is in the national interest is moot. Nevertheless, we will address this issue as it was the sole basis of the director's decision.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

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., 22 I&N Dec. 215, 217-18 (Commr. 1998)(hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

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. *Id.* at 219. 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. *Id.*

The director did not specifically address whether the petitioner works in an area of intrinsic merit or whether the proposed benefits of her work would be national in scope. Initially, the petitioner asserts that she has exceptional ability in biology and that she will contribute to the development of life science and medicine. The petitioner then asserts that her specific focus is neurology. She proposes that therapy based on a Chinese traditional medicine concept of a “meridian system” will supplement modern biomedical theory. She concludes that she will integrate Western and Asian medicine.

In considering whether the petitioner works in an area of intrinsic merit, it is important to consider her work within the context of her field. The classification sought requires exceptional ability in the “sciences, arts or business.” The only field in which the petitioner’s occupation might fit is the sciences. In the sciences, in order to demonstrate intrinsic merit, the treatment or research focus must be shown to be effective or at least promising based on scientifically sound studies. More specifically, we decline to recognize any distinction between the origins of medical treatments. Specifically, while we do not question the recent popularity of so-called complementary or alternative medicine, we will not consider “traditional” or “alternative” medicine as a separate field.

There is only scientifically proven, evidence-based medicine supported by solid data or unproven medicine, for which scientific evidence is lacking. Whether a therapeutic practice is ‘Eastern’ or ‘Western,’ is unconventional or mainstream, or involves mind-body techniques or molecular genetics is largely irrelevant except for historical purposes and cultural interest.

Fontanarosa PB, Lundberg GD, “Alternative medicine meets science,” *Journal of the American Medical Association* 280: 1618-1619, 1998. Thus, we require the same standard of evidence to demonstrate an “alternative” treatment’s effectiveness as we would from a researcher claiming to have developed a new cancer drug at a conventional medical research institution. Specifically, anecdotal letters attesting to the benefits of the beneficiary’s treatments from patients, others with no medical training or even individual physicians have little evidentiary value. Rather, recognition in distinguished peer-reviewed publications carries far more weight.

As the intrinsic merit of the beneficiary’s area of work is one of the elements in establishing that a waiver of the job offer is in the national interest, it is the petitioner’s burden of proof to establish not merely that the petitioner intends to perform research but that her area of research is scientifically sound. The record contains no evidence that the meridian system is an accepted medical system. Specifically, the record lacks evidence that articles about this system have appeared in mainstream peer-reviewed medical or science journals.

While we typically do not question that the proposed benefits of medical research will be national in scope, without evidence that the avenue of proposed research has intrinsic merit, an evaluation of the national scope of the proposed benefits of this research is meaningless.

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. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra element of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Initially, the petitioner submitted a letter from [REDACTED], a graduate of a Chinese traditional medical school, asserting that he seeks the petitioner's advice in his own clinical practice. In response to the director's request for evidence, the petitioner submits another letter from [REDACTED]. She also documents, however, that [REDACTED] owns Midland Manicure and Massage in Flushing, New York. The record simply lacks evidence that [REDACTED] has the medical expertise to evaluate the petitioner's alleged biomedical research.

The petitioner also submitted what purports to be a conference presentation and a published article. Neither document shows a printed journal or proceedings title and the pages are not numbered. As these documents bear no indicia of publication, the petitioner has not established that she has ever authored a published research paper or conference presentation.

In addition, the petitioner submitted what purports to be an award from the Chinese Ministry of Health. As discussed above, this certificate is not consistent with the record of proceedings, which includes no evidence of publication.

Finally, the petitioner proposes to conduct medical research in neurology in the United States. As discussed above, the petitioner has not demonstrated that she holds an advanced degree in a related field. According to the Occupational Outlook Handbook 152 (2006-2007 ed.), a Ph.D. is usually necessary for independent research. Thus, the petitioner has not even demonstrated that she is

qualified for the employment she proposes to pursue. The petitioner has not explained why it is in the national interest to waive the alien employment certification process for an individual who does not possess the necessary bare minimum education to pursue the type of employment proposed.

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 alien employment 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 an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.