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U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 07 2008

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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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) 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. The petitioner seeks employment as a gastroenterologist and hepatologist. At the time of filing, the petitioner was in training at Thomas Jefferson University Hospital in Philadelphia, Pennsylvania. The record indicates that she left that institution shortly after she filed the petition. 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 has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states, in pertinent part:

(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.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] 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 Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), 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. 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.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In a cover letter submitted with the petitioner’s initial filing, counsel claimed:

According to renowned leaders in the field, [the petitioner] is established as a foremost expert in the field of gastroenterology/hepatology. Indeed, in addition to her remarkable clinical skills, [the petitioner] is credited with significant research contributions. This is particularly impressive in light of the fact that so much of her time is spent in the clinical practice of gastroenterology and hepatology. [The petitioner] has additional expertise in pathology, setting her apart from her peers. [The petitioner’s] landmark contributions have been published in Connecticut Medicine, and her work has also been presented at prestigious conferences.

The petitioner’s sole claimed publication, in *Connecticut Medicine*, consists of a four-paragraph conference abstract. The abstract describes a case study regarding “a Patient with Severe Ulcerative Colitis.” The record is silent as to how this abstract amounts to a “landmark contribution.” The unsupported assertions of counsel do

not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We must judge the record by the evidence it contains, rather than by counsel's claims.

The intrinsic merit of the petitioner's medical field is not in dispute. Regarding national scope, counsel stated:

Her role as a physician extends beyond merely attending to a small community of patients in clinical or research settings. The expansive scope of [the petitioner's] salient contributions encompass[es] not only her immediate fields of gastroenterology and hepatology, but also the medical community at large both nationally and internationally. Her original research on using flow symmetry in classifying non-Hodgkin lymphoma and research on Hepatitis C recurrence after liver transplantation (among many other vital research [*sic*]) has had a direct impact on the field and has gained her nationwide recognition.

The petitioner has indicated that she participated in various research projects, which can have national scope through conference presentations and publication of peer-reviewed articles. The director, in finding that the petitioner's work lacks national scope, focused on the petitioner's clinical practice. While the record indicates that the petitioner devotes most of her time to clinical practice, which is not national in scope, it also shows that she was active in research both before and after the filing date. The AAO therefore withdraws the director's finding that the petitioner's work is not national in scope.

Regarding the third prong of the national interest test set forth in *Matter of New York State Dept. of Transportation*, counsel stated:

[U]nder standing and properly diagnosing and treating digestive system and liver diseases affects patients' well being and has an intrinsic merit relating directly to the national interest. It is directly tied to [the petitioner's] significant contributions and future projects. In other words, the "requirements" for the position in question, namely gastroenterologist/hepatologist, relate to the national concern and are wedded to [the petitioner] herself. . . .

The importance of [the petitioner's] expertise and novel research, as it pertains to digestive system and liver disease treatment, rests on her ability to master state-of-the-art technologies and complex procedures relating to gastroenterology and hepatology. [The petitioner's] scientific ingenuity cannot be quantified because her extraordinary skills are contingent upon her specialized knowledge in gastroenterology and hepatology. The instant case, therefore, is outside the scope of the labor certification process.

Counsel, here, seems to state that the fields of gastroenterology and hepatology require such "specialized knowledge" that they should be considered to be intrinsically and automatically "outside the scope of the labor certification process." The AAO finds this argument to be baseless. Gastroenterologists and hepatologists are members of the professions holding advanced degrees, and as such they fall within the scope of section 203(b)(2) of the Act, which generally requires a job offer with labor certification. As originally written, this section of law neither included nor implied the existence of blanket waivers for any particular specialty.

Congress subsequently amended the Act (adding section 203(b)(2)(B)(ii) and its subsections) to facilitate waivers for certain physicians. This amendment confirms that the statute contains no implied blanket waivers (otherwise, a specified waiver would have been redundant). It also confirms that Congress has the power to designate certain groups for broad or blanket waivers, something that Congress has, to date, not done on behalf of gastroenterologists or hepatologists.

The petitioner submitted several witness letters in support of her claim. We shall consider examples of these letters here. [REDACTED] of Yale University School of Medicine (where the petitioner claimed to have worked for approximately one month prior to the petition's filing date) is also Editor-in-Chief of the *Journal of Clinical Gastroenterology*. Prof. Floch summarized the petitioner's work history and asserted that the petitioner "is one of the few who has risen to the very top of her field," but offered little explanation as to how the petitioner's past experience made her one of the best in her field (rather than simply prepared her for a career in her chosen specialty). Prof. Floch's most significant assertions appear to be his descriptions of the petitioner's research work, such as this example:

During her stay at Yale University, Columbia-Presbyterian Hospital, and Thomas Jefferson University Hospital, [the petitioner] . . . applied her knowledge to the research setting by getting involved with research projects such as one that examined the innate immunologic response to Hepatitis C Virus in the liver transplant recipient. The results showed that patients with a high level of inflammation in the removed liver had a higher recurrence rate of Hepatitis C. This finding is important because it provides guidance for physicians in monitoring hepatitis C patients after transplantation.

[REDACTED] of the Connecticut Chapter of the American College of Physicians and an Associate Clinical Professor at Yale University School of Medicine, claims that the petitioner's research work has earned her "national and international recognition," but [REDACTED] identifies no instances of such recognition except for travel grants to attend conferences. All of the witnesses are based at institutions where the petitioner has worked or trained. Therefore, their letters are not first-hand evidence that the petitioner has earned recognition or had any impact beyond the institutions where she has worked.

Some of the witnesses attest to a shortage of qualified professionals in the petitioner's specialty. The question of a worker shortage, however, is already addressed by the labor certification process, and assertions of such a shortage cannot justify a waiver. See *Matter of New York State Dept. of Transportation* at 221. (While Congress has created a limited exception to this policy at section 203(b)(2)(B)(ii) of the Act, that section of law imposes specific conditions which this petitioner has not claimed to have met.)

On June 15, 2007, the director issued a request for evidence, stating that the petitioner had not established "an impact on the field as a whole" or "a past record of prior achievement which justifies projections of future benefit to the national interest."

In response, the petitioner submitted a letter from [REDACTED] Chief of Gastroenterology and Hepatology at Norwalk Hospital. Counsel referred to Dr. [REDACTED] as an "Independent Third-Party," but at the time of the letter, the beneficiary worked in [REDACTED] stated that the petitioner "spends 75% of

her time performing clinical duties.” Because clinical practice directly benefits only those particular patients receiving treatment, it is not clear how this imparts national scope to the petitioner’s work. [REDACTED] added that the beneficiary “has rare expertise in the most difficult yet innovative techniques and procedures.” Counsel revisits this argument on appeal, and the AAO will address it in that context.

[REDACTED] stated: “Currently, at Norwalk Hospital-Yale University, [the petitioner] spends at least 25% of her time performing research” (emphasis in original). [REDACTED] then stated that the petitioner’s “work has been published in leading and prestigious journals.” At the time of filing, the petitioner did not claim to be “at Norwalk Hospital-Yale University,” and the initial discussion of the petitioner’s research work identified only one published piece. These developments, therefore, occurred after the petition’s filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). This is not to state that the new claims set forth in response to the request for evidence would have warranted approval of the petition. [REDACTED] discussed the importance of the journals said to have carried the petitioner’s work, but the record contains no actual evidence that the petitioner’s work had, in fact, appeared in any of the named journals, let alone evidence to show that the petitioner’s articles had been heavily cited or otherwise influenced the field. The petitioner only submitted a copy of an unpublished manuscript (co-authored by [REDACTED] and a June 7, 2007 letter indicating that one of the petitioner’s articles was accepted for publication in *Liver Transplantation*.

The director denied the petition on November 15, 2007, stating that the objective, documentary evidence of record did not support the claims of counsel and witnesses regarding the extent or importance of the petitioner’s influence on her field. The director noted that the acceptance letter from *Liver Transplantation* was dated more than a year after the petition’s June 20, 2006 filing date. The director also observed that, because aliens of exceptional ability are generally subject to the job offer/labor certification requirement, it cannot suffice for the petitioner to show that she is “exceptional” in comparison to others in her field.

On appeal, counsel asserts that the petitioner’s “unique skills . . . should be deemed to exempt her from the labor certification process.” Counsel asserts that the petitioner is “able to master many of the most advanced procedures in the field and also to teach these procedures to peers, thereby creating a ripple effect in making the performance of these very important cutting-edge modern procedures more widespread on a national level.” Counsel does not claim that the petitioner invented or developed these procedures; only that she is adept at them.

A *reduction ad absurdum* argument shows the flaw in counsel’s assertion. If, by counsel’s logic, the petitioner deserves a waiver because she might teach advanced methods to other physicians, then the waiver should go not to the petitioner, but to the instructor who taught those methods to the petitioner, or, even better, to the instructor who taught the petitioner’s instructor. Simple training in advanced technology or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Matter of New York State Dept. of Transportation* at 221.

It is true that gastroenterologists and hepatologists possess specialized skills found in no other occupational group; counsel has detailed various specialized clinical procedures. It is equally true, however, that these skills are, by definition, common (or even universal) among fully qualified and competent gastroenterologists and

hepatologists. Therefore, we are not persuaded by the assertion that the petitioner should receive a waiver because she is capable of performing procedures that only a gastroenterologist or hepatologist could perform. The petitioner must establish that she would especially benefit the United States in comparison to other gastroenterologists and hepatologists; it cannot suffice to claim that she will benefit the United States simply by being a gastroenterologist and hepatologist.

Counsel once again lists the petitioner's conference presentations as evidence of "her significant contributions to the field." The presentations, by themselves, are not evidence of their own significance. The petitioner has not shown how these presentations distinguish her from other physician/researchers in her field. (The claim that the petitioner is a physician and a researcher may distinguish her from physicians who are not researchers, but being both a physician and a researcher is not a presumptive factor in granting the waiver; the petitioner must still distinguish herself from others who, like her, are both physicians and researchers.)

Counsel lists five associations to which the petitioner is said to belong, and counsel claims "[o]nly an exceptional gastroenterologist and hepatologist of the highest order can boast membership [in] so many of the field's most elite organizations." This statement contains a number of unsupported assumptions, such as the claim that it is difficult for a qualified gastroenterologist to join these organizations, and that the number of memberships is a direct indicator of one's qualifications and prestige in the field. Contrary to counsel's claims, the petitioner has not established herself as a premier gastroenterologist/hepatologist. Rather, she has listed her achievements and counsel has simply declared that, with those achievements, the petitioner must be among the best in her field. (We note that, to qualify for the waiver, one need not be at the top of one's field. In this instance, however, the petitioner has repeatedly claimed to be at the top of her field. The accuracy of those claims necessarily affects her overall credibility in this proceeding.)

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 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, 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 a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.