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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: OCT 10 2002

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)

IN BEHALF OF PETITIONER:
[Redacted]

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The director initially rejected the appeal as untimely and treated it as a motion, but then reversed that finding and determined the appeal to have been timely filed. 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. At the time of filing, the petitioner was employed as a pediatric resident physician/research assistant at the Kalamazoo Center for Medical Studies at Michigan State University ("MSU"). On the I-140 petition form, the petitioner indicates that this position is temporary. 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 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. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement 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 Service 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 Service 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 Dept. of Transportation, 22 I&N Dec. 215 (Comm. 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.

Counsel asserts that labor certification is "extremely time consuming," and that the petitioner's employer "cannot as a practical matter take the time to test the labor market and leave the position unfilled." Whatever complaints counsel may have about the labor certification process in general, or flaws in its execution, it remains that Congress created a job offer requirement which we cannot simply ignore. Furthermore, the regulation at 8 C.F.R. 214.2(h)(16)(i) allows an alien to enter and work as an H-1B nonimmigrant while an application for labor certification was pending. While a variety of factors may have a bearing on each individual case, an application for labor certification would not automatically require a given position to be left vacant while the application is processed.

Counsel states that, in the petitioner's geographic area, the processing time for an application for labor certification averages 475 days. Service records indicate that Bay Pediatric Clinic, in Bay City, Michigan, applied for a labor certification on the alien's behalf on January 11, 2000. The clinic filed an I-140 petition on the alien's behalf on December 28, 2000, accompanied by the approved labor certification. Thus, Service records demonstrate that a labor certification was filed and approved in roughly 350 days. The alien now has an I-485 application to adjust status pending before the Nebraska Service Center. The approval of a national interest waiver on the alien's behalf would not in any way accelerate the processing of a previously filed adjustment application, nor should it affect the chances of that application's being approved.

Any arguments and evidence offered in support of this petition must be viewed in light of the information in the Service's records. The petition is based on the petitioner's work in an admittedly temporary position that she has already left, and the petitioner seeks a waiver of a requirement that has already been met.

Counsel describes the petitioner's work as "developing verifying a treatment modality for pulmonary infections associated with Cystic Fibrosis." The petitioner has submitted copious background materials about cystic fibrosis to establish the intrinsic merit of treating the disease. Research into improving treatment modalities for the disease is national in scope because a given modality is not geographically restricted. We note here that the record does not clarify whether or not the petitioner continues (or is able) to engage in this research work at Bay Pediatric Clinic. The Service is under no obligation to presume that, because the new employer is a pediatric clinic, the petitioner must still be conducting research in one particular pediatric disorder. The petitioner has described herself as a pediatric physician, and thus may be working primarily as a clinical pediatrician, practicing medicine rather than conducting research, in which case the basis for the waiver request has disappeared.

The petitioner describes her work at MSU:

I will be conducting a significant research project which is directed at finding and verifying a treatment for pulmonary infections associated with Cystic Fibrosis. . . .

The overall objective of the research I am to carry out is to determine the efficacy and safety of outpatient care utilizing a single daily dose of the antibiotic Tobramycin for the treatment of Cystic Fibrosis patients who present with pulmonary exacerbation. If single daily dosing is found to be equivalent or superior to the inpatient multiple daily dosing, it will have significant impact on the cost, convenience, and possible outcome in treating Cystic Fibrosis infections of this nature. If this result cannot be verified, however, Federal law will not permit the use of this new treatment. . . .

It is I who will conduct clinical monitoring of these Cystic Fibrosis sufferers through the study using a sophisticated Cystic Fibrosis clinical scoring system. I will also carry out microbiologic assessments which include qualitative and quantitative sputum bacterial culturing and testing the minimum inhibitory concentrations of Tobramycin on all organisms cultured. Furthermore, I will conduct the laboratory assessments . . . during and in some instances after completion of therapy. Finally, I will conduct pure tone audiography.

The petitioner does not indicate what role, if any, she played in devising the single-dose method that she was to evaluate. The petitioner describes her past research efforts, but does not establish how her findings have been of greater significance than the findings of other researchers. While the petitioner has conducted research in academic settings, her more recent career trajectory appears to be directed more towards clinical practice as a pediatrician than towards medical



research. The petitioner states that the research subjects in the above cystic fibrosis study are her patients, and she has joined professional associations for physicians such as the American Medical Association and taken equivalency examinations required for physicians but not for researchers.

Along with documentation pertaining to her field of research, the petitioner submits several witness letters. Dr. James Donald Hare, associate professor at MSU, devotes most of his letter to a discussion of cystic fibrosis. Dr. Hare states that the petitioner “will be playing a significant role in our research project,” and that the petitioner’s “unique combination of expertise in both clinical medicine and medical research . . . will result in her playing a critical role in this important project.” The consistent use of the word “will” suggests that the project had not yet begun as of the date of his letter. The petitioner, too, had referred to the project as something that “will” occur rather than something that had occurred or that was then underway. The petitioner has provided figures showing significant cost savings if the single-dose method is proven to be effective, but obviously those savings will not be present if the method is not effective, and if the study had not even been done yet, it was clearly too early to conclude that it would be found to be effective. In any event, if the petitioner played no role in the actual creation of this treatment modality, then she has earned no credit for any cost savings that may result from that modality.

Several professors who had supervised the petitioner’s earlier research work at various universities attest to her skill as a researcher, but they do not establish that the petitioner’s research work has had a greater impact than that of other competent researchers. Simply being a productive and capable researcher is not grounds for a waiver; section 203(b)(2)(A) explicitly states that aliens of exceptional ability in the sciences are, as a rule, subject to the job offer requirement; the statute does not contain an express or implied blanket waiver for researchers.

The director denied the petition, acknowledging the intrinsic merit and national scope of the petitioner’s work but finding that the petitioner’s own contribution does not warrant a waiver of the job offer requirement that, by law, attaches to the classification that the petitioner chose to seek. The director concluded that the petitioner’s duties appear to be readily quantifiable on an application for labor certification, and that the statute does not allow for a blanket waiver for scientific researchers.

On appeal, counsel argues that the special value in the petitioner’s services lies in her qualifications not only as a researcher, but as a physician as well. Thus, counsel argues, the patients receive medical care as well as the attention of a researcher. Counsel does not substantiate the implied claim that these seriously ill children would be denied medical treatment if the researcher performing the study were not also a physician.

Most of the materials submitted on appeal are copies of previously submitted documents. An exception is a letter from Dr. Weiran Chen of the Johns Hopkins School of Medicine. Dr. Chen states:

After reviewing the materials regarding [the petitioner], I conclude that she is an extraordinary medical researcher with abilities which far exceed that of a researcher with minimum qualifications for the position. [The petitioner] has carried out important research to develop an effective treatment for Cystic Fibrosis. . . .

[The petitioner's] research explored the efficacy and safety of administering a daily dose of the antibiotic tobramycin to treat pulmonary exacerbation due to Cystic Fibrosis infections. This research utilized highly complex medical techniques and procedures for both laboratory and clinical assessments. Equally important, this research required the ability to treat and assess human cystic fibrosis patients who are often young and always very sick.

I firmly believe that [the petitioner], unlike minimally qualified researchers, is more than qualified to carry out this difficult medical research. . . .

[The petitioner's] current and past achievements are very significant compared to other medical researchers doing similar research, particularly those with minimal qualifications. I attribute [the petitioner's] success to her extensive medical training and her laboratory research expertise.

Dr. Chen does not specify the nature of the "materials" mentioned in the letter. None of the materials contained in the record indicate that the cystic fibrosis project had even commenced yet, and therefore its importance had not yet been determined.

It remains that the petitioner had a valid nonimmigrant visa at the time she filed the petition, and was therefore already able to participate in the project, and given that the employment itself was admittedly temporary in nature, it is not clear why permanent immigration benefits would have been necessary for the petitioner to participate. Finally, as discussed above, the petitioner has in fact obtained a labor certification (through another employer) and her adjustment application is already pending. The labor certification application was filed several months before the appeal was filed, yet counsel's appellate brief contains no mention of this highly relevant fact. At this point, there is no evidence that the petitioner is even involved in research anymore, rather than devoting her attention to clinical practice at Bay Pediatric Clinic.¹ The petitioner having secured a labor certification and an approved immigrant petition, and hence the right (which she has already exercised) to apply for adjustment of status, it is far from clear what benefit if any would accrue to the United States through approval of a national interest waiver based on employment that has already ended.

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

¹The Community Choice Michigan Provider Directory, available online at www.ccmhmo.org/Files/directory13.pdf, dated September 9, 2002, lists the petitioner as a provider under the heading "Pediatrics." There is no indication that the Bay Pediatric Clinic is a research facility in addition to a health care provider.



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

This denial is without prejudice to the petitioner's pending adjustment application or any other proceeding arising from the approved petition filed by Bay Pediatric Clinic on the petitioner's behalf, because the clinic's petition did not involve a national interest waiver. The present decision does not amount to a finding of ineligibility for the underlying immigrant classification.

ORDER: The appeal is dismissed.