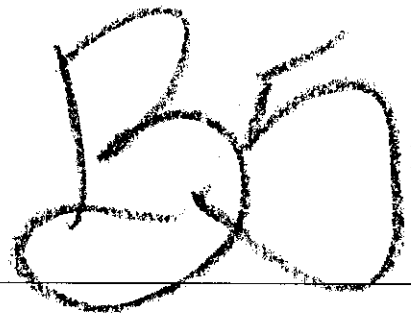

**U.S. Department of Justice**

Immigration and Naturalization Service

PUBLIC COPY

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

[redacted]

File: EAC 00 217 51337 Office: VERMONT SERVICE CENTER Date: JAN

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)

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Heyward

for 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 Associate Commissioner for Examinations 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 medical resident and researcher at Temple University Hospital and School of Medicine. 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.
> >
> > > (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 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 describes the petitioner's work:

> [The petitioner] is performing extremely important research . . . [which] focuses on the neurological and neuromuscular effects of serious afflictions, including diabetes, strokes, hepatitis C and myasthenia Gravis. His work promises to dramatically improve our ability to treat these serious events and their debilitating symptomatic effects through the development of drug therapies that address the very basis of their neurological mechanisms.

Along with copies of his papers (all apparently unpublished as of the petition's filing date) and teaching materials, the petitioner submits several witness letters. Professor David Krendel, director of Temple's neurology residency program, states:

> I am currently collaborating with [the petitioner] in a clinical investigation about the effects of diabetes on the central nervous system. Patients with diabetes complicated by renal failure were previously found to have a high incidence of demyelination in the peripheral nervous system, which may cause neuromuscular deficit going from lower extremities weakness and paresthesia to total paraplegia. But the involvement of the central nervous system myelin has not been documented in this population. . . .

> Preliminary results [of magnetic resonance imaging scans] showed periventricular white matter disease in all groups showing no increase of prevalence attributable to type I diabetes. In one case we found multiple transitory enhancing white matter lesions progressing over several years suggesting inflammatory demyelination.
> . . . [The petitioner] has made considerable progress in understanding this phenomenon as a principal investigator. His work will lead to an understanding of the etiology of the white matter enhancing lesions in the central nervous system. Proving the fact that these white matter lesions are related to inflammatory demyelination rather than small vessel disease (strokes) is of major diagnostic and therapeutic importance in the management of diabetic patients. . . .
>
> He also actively participated in a second clinical trial with colleagues from [the] University of Pennsylvania in another neuromuscular disease, Myasthenia Gravis, a severely disabling disease affecting the neuromuscular junction. [The petitioner] added a low dose of cyclosporine to the classic treatment of patients presenting severe myasthenia which showed a potential benefit in decreasing the number of crisis and decreasing the dosage of the other medications used for the treatment of the disease without major side effects from Cyclosporine. . . .
>
> In summary, [the petitioner] has made many important contributions to the study of neurological diseases. His work has been both ground-breaking in nature and of the highest quality.

Dr. Shwe Tun asserts that the petitioner "has demonstrated the highest proficiency in conducting clinical trial[s]" and asserts that the petitioner "reviewed the head MR scans of patients with diabetes and renal failure for the last 20 years. He raised the possibility that lesions seen in the brain MR scans considered as ischemic lesions may [be] of demyelination type which may radically change the managements of such patients."

Dr. Sami L. Khella, clinical associate professor at the University of Pennsylvania School of Medicine, has worked with the petitioner on the clinical trial described above. Dr. Khella describes the trial in greater detail, as well as another trial in which the petitioner "evaluated several therapies in patients affected by hepatitis C and neurological symptoms," but Dr. Khella does not specify what original contributions the petitioner made in these trials. For instance, there is no indication that it was the petitioner's idea to add cyclosporine to the treatment regimen. Rather, it appears that the trial had been planned and designed prior to the petitioner's involvement, and that the petitioner's duties essentially amounted to monitoring patients and recording data.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. The director noted that the petitioner's initial letters are from the petitioner's collaborators and superiors rather than independent witnesses.

In response, counsel states that the petitioner "has just been awarded a prestigious book publishing contract by McGraw-Hill Companies, whereby he will 'first author' a more than 400 page textbook on the field of neurology for reference by neurology residents nationwide, and practicing neurologists worldwide." A copy of the publishing agreement in the record shows that the other author of the textbook is Professor David Krendel, who has supervised the petitioner's residency at Temple. Documents from the publisher do not refer to the book as a "textbook," but rather as a "specialty board review book" consisting of "approx. 1500-1800 multiple-choice questions and answers." The book is not a primary instructional tool, but rather a review book for residents who are preparing to take their board examinations in neurology.

Communications from the publisher, documented in the record, indicate that the petitioner was not approached by the publisher to write the book, but rather that the petitioner took the initiative of bringing himself to the publisher's attention. An electronic mail message from a senior editor to the petitioner refers to "[t]he overall format that you are proposing." This message is dated October 31, 2000, five weeks after the director's September 27, 2000 request for further evidence, and five months after the petition's June 30, 2000 filing date. There is no evidence that this book was in progress when the petition was filed. If the petition was not approvable at the time it was filed, the petitioner cannot make it approvable after the fact by offering to co-write a review book. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. *See Matter of Izummi*, 22 I & N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Counsel states "a number of new expert opinion letters have now been provided [as] evidence that this alien's work is substantially impacting the entire field of neurology." As with the initial letters, these letters are from individuals who have worked directly with the petitioner; two of them are from individuals who had provided letters with the original petition. Professor Krendel states that the petitioner "has shown and personally contributed a high degree of innovation in this work" and that "the results of this study are soon expected to have a positive impact on the entire field." Prof. Krendel does not indicate the extent to which the petitioner had already had an impact when he filed the petition; five months after the filing date, such impact was still "expected." Prof. Krendel also indicates, with regard to the review book that they are under contract to co-author, that the petitioner "will be responsible for as much as 80% of this book" although the publishing agreement indicates that Prof. Krendel and the petitioner are to be paid equal royalties.

The other letters are from Dr. Jeffrey I. Greenstein and Dr. Sami L. Khella of the University of Pennsylvania; and Dr. Moutaa Ben Mammer, a clinical fellow at the University of Texas, Houston, who states that he has known the petitioner since 1987 when the petitioner was "a junior resident preparing his doctoral thesis."[1] These witnesses assert that the petitioner has been the principal investigator for several research projects but the letters are not first-hand evidence that the petitioner

[1] Rather than using generic University of Texas letterhead, Dr. Ben Mammer has for some reason used the letterhead stationery of Professor Hazim J. Safi.

has already influenced the field of neurology outside of the institutions where he has worked or studied.

The petitioner submits documentation regarding ongoing research, as well as abstracts of upcoming presentations. As with the initial submission, all of the presentations and articles are forthcoming rather than already presented or published.

The director denied the petition, acknowledging the intrinsic merit and national scope of the beneficiary'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. On appeal, the petitioner submits a brief from counsel.

Counsel argues that many of the petitioner's most important contributions have been outside of the defined scope of the petitioner's basic duties, and therefore these factors cannot be considered in the context of a labor certification. While these activities have been outside of the scope of the petitioner's medical residency, a residency is a temporary training assignment; the petitioner had already completed a two-year residency at the University of Pennsylvania in 1999. The petitioner's engagement in an unusual array of activities while at the advanced training stage does not demonstrate that labor certification is not a viable option once he is considered eligible for permanent employment. Furthermore, the burden remains on the petitioner to show, not merely claim, that his contributions have been especially significant.

Counsel states that the nature of the petitioner's work (e.g., new uses for existing medicines) is unlikely to produce patents or comparable documentation. The clinical trials, however, would produce reports for dissemination throughout the profession, otherwise there would be little point in conducting such trials. The influence of these published reports can then be tracked objectively via citation reports, with more influential papers being cited more frequently than less influential ones. In this instance, the petitioner has not documented the publication of any of his work; the record contains only manuscripts said to be under review.

Counsel asserts that the petitioner "has been asked to write a new comprehensive and authoritative textbook," "on the entire field of clinical neurology, for use and reference by practicing neurologists throughout the world. This textbook of more than 400 pages will be a primary reference source for the entire field." Counsel's characterization of the book is not accurate. As described above, the book is not a "textbook" for the purpose of providing new instruction or information, but rather a "review" book intended as an aid for exam preparation. There is no evidence that the book is intended as a reference for established clinical neurologists rather than for medical students or residents. The correspondence from the publisher indicates not that the publisher "asked him" to write the book, but rather that the petitioner proposed the book and that the publisher accepted the proposal. In any event, there is no evidence that the book has yet been published, and it certainly did not exist as of the petition's June 2000 filing date; the record contained no mention even of plans for the book until after the petitioner was informed that his initial filing was deficient.

Regarding the petitioner's authorship of the book, counsel states "[w]e STRONGLY DISAGREE with the INS finding that this form of recognition does 'not appear to reach a level significantly higher than the majority of [the petitioner's] colleagues,'" but an expression of strong disagreement is not a refutation or persuasive rebuttal. The burden remains on the petitioner to show that his involvement with the project reflects "recognition" as counsel claims rather than a project undertaken on the petitioner's initiative. If acceptance of the petitioner's book proposal is a form of recognition, then evidence to that effect should be available from the publisher, but such evidence is not present in the record.

Counsel states that the petitioner has shown that "he plays a leading and significant role in his research." The petitioner must still demonstrate the significance of the research; serving as a project leader or principal investigator is not *prima facie* evidence of eligibility for the waiver. The petitioner has participated in several such projects but the record does not show how the petitioner has affected the field of neurology outside of the universities in Philadelphia where he has worked. Counsel asserts that the petitioner's "research has resulted in the adoption and acceptance of new diagnostic and treatment protocols for a variety of serious diseases and conditions," but the record does not support this assertion. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.