PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

B5

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

[redacted]

File: EAC 99 256 50545 Office: VERMONT SERVICE CENTER Date: JAN 17 2003

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: SELF-REPRESENTED

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 Hayward

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 clinical psychologist with the District of Columbia Department of Mental Health (formerly the Commission on Mental Health Services). 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.

The petitioner describes her work:

> For the past three years, I have provided psychological services within the DC Commission on Mental Health Services, a government agency which provides psychological services to predominantly minorities and indigent clients. Two of the aforementioned three years of experience . . . have been as a trainee. In addition . . . I was selected to serve on two committees . . . at St. Elizabeth's Hospital, the Quality Assurance Committee and the Psychology Credentials and Privileges Subcommittee. . . .
>
> I submit that as a clinical psychologist, my ability to provide psychological services (diagnosing and treatment of psychological disorders/individual and group psychotherapy, and psychological testing) can **improve healthcare in the United States**. . . . [O]nly **4.3% of the trained psychologists are members of the Black race with 2.6% of trained psychologists being Black females**. I am a black female who is a trained clinical psychologist. . . . I submit that I can improve . . . mental healthcare in the United States, by contributing to the population of psychologists who are minorities, members of the Black race and female.

Most of the petitioner's initial submission consists of documentation of her own credentials, and source material reflecting the statistics cited above. The petitioner has also submitted one letter with her petition. Dr. Phyllis J. Mayo, chief psychologist and the petitioner's immediate supervisor at the Adult Inpatient Hospital at St. Elizabeth's, states:

> [The petitioner] functions as a key member on two multidisciplinary teams serving an underserved population of chronic adult psychiatric patients who are predominantly African American. Specifically, she provides psychological services including individual psychotherapy, group psychotherapy and psychological evaluations. . . . She continues to perform above a satisfactory level in her position. . . . In addition, [the petitioner] has provided psychological services to inner city youth at the Hillcrest Children Center where I also served as her supervisor.

In *Matter of New York State Dept. of Transportation*, the Service held that a shortage of workers is not grounds for a national interest waiver, because the labor certification process itself is intended as a response to such shortages. Subsequently, new legislation created section 203(b)(2)(B)(ii) of the Act, which makes the waiver available to certain physicians practicing in medically underserved areas. This legislation, however, applies only to physicians. The petitioner does not hold an M.D. degree and is not a psychiatrist, and therefore she is not a physician.

Subsequently, the petitioner has submitted a letter from a prospective employer (a private counseling service) to indicate that she can easily obtain a job offer. The petitioner does not explain why her ability to secure multiple job offers should exempt her from the job offer requirement.

The director requested further evidence that the petitioner has met the guidelines published in *Matter of New York State Dept. of Transportation*. In response, the petitioner has submitted performance evaluations that show her to be a highly skilled worker, and other materials regarding her work. In a letter dated June 20, 2001, Vicente Roberts, associate consultant in the Mental Health Program of the Pan American Health Organization, states that he has "approached [the petitioner] to work" on "a project on the health behavior of school aged adolescents." From the wording of the letter, it appears that the project had not yet begun as of June 2001 when the letter was written. The petition was filed August 27, 1999, nearly two years before this letter. Even if the petitioner's invitation to join a program were a strong argument for a national interest waiver, neither the invitation nor the program itself existed when the petition was filed and thus the invitation cannot retroactively establish that the petitioner was already eligible at the time of filing. *See 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.

Dr. Steve Wolf, director of the Neurology Clinic at St. Elizabeth's Hospital, and Dr. Philip Scrofani, director of Psychology at the D.C. Department of Mental Health, state in a joint letter that the petitioner conducted postdoctoral research with the Department from 1996 to 1997. They state that the petitioner "spent approximately fifty percent of her time conducting neuropsychological evaluations through the Neurology Clinic at St. Elizabeth's Hospital," and that the petitioner "evidenced solid clinical and neuropsychological assessment skills as she successfully completed the postdoctoral fellowship." This letter offers details about the petitioner's training but it does not show that the petitioner has made contributions that stand out from the work of others in the same specialty.

Dr. Michael Moran, captain of the Commissioned Corps of the U.S. Public Health Service, discusses the petitioner's paper entitled "Racial Differences In Eating Disorders between African Americans and Caucasians." Dr. Moran states that the petitioner "shows promise as a researcher and clinician. She employed sound data analysis practices and her conclusions were well supported and expressed." Dr. Moran asserts that the petitioner's "study provided greater understanding of the similarities and differences in presentation between racial groups." Peer reviews of this article are dated June 2001, again placing them well after the petition's filing date. Furthermore, the petitioner has not shown that her research work has had an especially significant impact on the practice of clinical psychology.

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. On appeal, the petitioner states that she "will be submitting new evidence of a recent permanent job offer by the District of Columbia Department of Mental Health," and asserts that bureaucratic delays prevented her from obtaining this job offer earlier.

Subsequently, the petitioner submits a letter from R.E. Smith, personnel management specialist at the D.C. Department of Mental Health, who asserts that the petitioner "is in a permanent position" as a clinical psychologist. The petitioner also submits evidence that Caring Hands Services, Inc., based in Hyattsville, Maryland, seeks to employ the petitioner for ten hours per week, from 4:00 to 6:00 on weekday afternoons. The petitioner submits a copy of an application for labor certification filed by Caring Hands on her behalf, but we note an apparent impediment to the approval of that labor certification. In the Department of Labor's regulations governing labor certification, the term "employment" is defined as "permanent full-time work by an employee for an employer other than oneself." See 20 CFR 656.3. Ten hours per week is not full-time and therefore, while the decision on the labor certification is under the jurisdiction of the Department of Labor, on its face the application does not appear to be approvable.

By law, advanced degree professionals including clinical psychologists are generally subject to the job offer requirement. This requirement does not merely require the existence of a job offer; the employer must also secure an approved labor certification and establish its ability to pay the proffered salary to the alien. These conditions must be met at the time the petition is filed. The petitioner does not satisfy the job offer requirement simply by showing a job offer or permanent

employment in the form of a letter dated three years after the petition's filing date. If the petitioner's full-time employer obtains a labor certification on the petitioner's behalf, the employer must then file a new petition, including the approved labor certification, and meet the other requirements under the classification sought.

The national interest waiver is a special exemption from requirements that normally apply to clinical psychologists. The petitioner does not show eligibility for this waiver simply by demonstrating the beneficial purpose served by all clinical psychologists or by listing her various roles and establishing that she, like most if not all advanced degree holders, has conducted original research. In a similar vein, the petitioner's sex and ethnic background may distinguish her demographically from others in the field, but she has not shown that these factors rise to the level of serving the national interest, and granting blanket waivers on the basis of sex or race would raise profoundly troubling questions.

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, 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.