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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 1 0 2006

EAC 04 211 53594

IN RE: Petitioner: [redacted]
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:

[redacted]

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 a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. 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 had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and a statement reiterating the petitioner's citation record, reflecting no cited articles after 1997.

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 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 petitioner holds a Master of Surgery degree from Patna University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue 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 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 the 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 Dep't. of Transp., 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.

We concur with the director that the petitioner works in an area of intrinsic merit, medicine. The issue of whether the proposed benefits of his work as a physician would be national in scope is complex. According to the petitioner's curriculum vitae (C.V.), the petitioner worked as a urology research fellow at the University of Mississippi Medical Center from July 1992 through June 1993. The petitioner then worked as resident in urology at the same location from July 1993 through June 1997. Since January 1998, the petitioner has been working as an attending physician in Arizona and Maryland. As noted in the director's request for additional evidence, the petitioner's published articles all date from between 1995 and 1998 and result from his work at the University of Mississippi, mostly from collaborations with [redacted] The dramatic decline in the petitioner's productivity coincides with the end of his association with [redacted] The impact of a single physician is so attenuated at the national level as to be negligible. *See Matter of New York State Dep't of Transp.* 22 I&N Dec. at 217, n.3. Nevertheless, while the petitioner's productivity as a researcher drastically diminished after 1998, the letters submitted in response to the director's

request for additional evidence reveal that he continues to be involved in clinical research collaborations in addition to his duties as a physician, including the design of medical devices that *could* have a national impact. Thus, we are satisfied that the proposed benefits of his research would be national in scope.

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. 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 he seeks. By seeking an extra benefit, the petitioner assumes an extra burden 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.

We do not question the significance of the petitioner's work at the University of Mississippi. As explained by his collaborator there, the petitioner carried out on the largest series of data collected on the relevance of routine seminal vesicle biopsy in staging for prostate cancer, showing that the procedure did not play a significant role in prostate cancer staging. The petitioner also demonstrated the prognostic implications of prostate specific antigen (PSA) nadir and PSA doubling time following treatment. In a study designed to assess the relevance of anastomostic biopsies to detect local recurrence in patients with rising PSA following radical prostatectomy, the petitioner demonstrated that recurrent cancer might be difficult to document by biopsy of the vesicourethral anastomosis. Finally, in a clinical study using ultrasonographic and urodynamic techniques, he has demonstrated a direct relationship between urinary continence and residual prostatectomy for prostate cancer, suggesting that every effort should be made to preserve the sphincter complex during radical prostatectomy for prostate cancer.

The petitioner's articles published on the above work have been cited up to 30 times each. His 1995 article on ultrasound guided seminal vesicle biopsies was selected for the 1996 Year Book of Urology, Chapter 21, Article 30. The expert comment provides that the analysis in the article "is of great practical significance." From 1997 through 2003, the petitioner did not publish any work or make any presentations, according to his C.V. In 2003, he published abstracts and presented his work, but has still not published a full-length article in a peer-review journal since 1997. The letters discussing his recent work will be considered below.

At Frostburg State University in Maryland, the petitioner has been collaborating with Dr. Chandrasekhar Thamire on research into the biomechanics of the lower urinary tract. According to Dr. Thamire, the petitioner "successfully modeled the bladder as a hyperelastic organ and determined its response in physiologic conditions, for simplified parameter-values and with assumptions such as homogeneity, axisymmetry, and incompressibility." While [redacted] discusses possible future

directions this research may take, including patent development for a urinary incontinence device, he does not assert that it has already impacted the field.

also discusses the petitioner's assessments of transurethral microwave therapy as a treatment modality for benign prostatic hyperplasia. Specifically, the petitioner generated treatment protocols outlining the optimal microwave powers, treatment times, precooling times, if any, and coolant temperatures and flow rates to achieve sets of desired necrosis zones. While opines that these protocols could improve treatment outcomes, he does not identify any official surgical committee that has adopted these protocols or provide examples of its use beyond the petitioner's immediate circle of colleagues.

an emeritus professor of urology at the University of California, Davis, asserts that the petitioner achieved a 98.2 percent stone clearance rate by incorporate extensive and "relook" ureteroscopy in to his technique. , an associate professor at Louisiana State University, provides similar information. asserts that the petitioner "is seeking collaboration with industry leaders" for his device, but does not assert that this search has been successful.

Elaborating on the petitioner's work with urinary stones, Director of the Minimally Invasive Urology Department at Columbia University, asserts that the petitioner has achieved 100 percent ureteral stone clearance through his "superior ureteroscopic techniques," which are "being implemented in the field." further asserts that the petitioner "has shown that the location of the kidney stone is not a significant predictive factor to achieve stone clearance." states that "adoption of his techniques has been vital to enable others [to] reproduce similar results." does not identify who has adopted the petitioner's techniques. does not assert that his department has increased its own stone clearance rate by adopting the petitioner's techniques.

also asserts that the petitioner developed a ureteral access sheath with improved negotiability and reduced potential for operative injuries. asserts that a patent is pending for the device. , Director of the URobotics Laboratory at the Brady Urological Institute in Baltimore, asserts that the petitioner is collaborating on this device with Boston Scientific, Inc. Manager of Technology Assessment at Boston Scientific's Urology Division, asserts that Boston Scientific is using the petitioner's inventions and expertise resulting from his clinical study "to develop the next generation of ureteral sheath."

The patent application is not in the record. Regardless, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent or has applied for one. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221, n. 7. While asserts that a patent is pending and that Boston Scientific plans to introduce the sheath "in the near future," the record lacks evidence of widespread clinic or hospital interest in purchasing the sheath.

Several references discuss the petitioner's studies regarding the mechanical failures and malfunctions of retrieval devices for urinary stones. While asserts that these studies "have provided the necessary feedback to device manufacturers in order to improve the next generation of these devices' reliability and quality," does not assert that Boston Scientific is one of those manufacturers. The record lacks letters from manufacturers confirming the importance of the petitioner's work and their use of that information in designing new devices. The only evidence of industry interest in the petitioner's work beyond Boston Scientific is a July 7, 2005 letter from a representative of Pfizer expressing their excitement about the petitioner's future plans to collect prevalence data of erectile dysfunction and overactive bladder.

, a professor of management information systems at Frostburg State University, praises the petitioner's database format for his routine medical practice. asserts that the petitioner is generating software tools that are "revolutionizing the field and will result in healthcare savings of millions of dollars." The record lacks evidence that any software company, medical clinic, hospital or surgeon has expressed an interest in the petitioner's database.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any clinical research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every surgeon who performs clinical research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. The record does not establish that the petitioner maintained his promising track record after ending his collaboration with

We note that on December 8, 2005, the Department of Labor (DOL) approved an application for labor certification filed on behalf of the petitioner. That the petitioner obtained a labor certification in his behalf on this date is not an argument that a waiver of that process is in the national interest. If anything, it demonstrates how unnecessary the waiver request was. As stated in *Matter of New York State Dept. of Transportation,* 22 I&N Dec. at 223, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process.

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.