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FILE:

SRC 00 005 53080

Office: TEXAS SERVICE CENTER Date: JAN 18 2008

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, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The director rejected a subsequent appeal as untimely and then reaffirmed the NOR on motion. On certification, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for issuance of a new NOIR to the correct address and attorney that fully addresses the eligibility issues discussed in the AAO's decision. The matter is now back before the AAO on certification. The director's decision will be affirmed.

On appeal, counsel asserts that the revocation decision must be based on "compelling evidence" as the original approval was several years ago. We affirm the director's decision revoking the approval of the petition. As will be discussed in more detail below, the original petition claimed that the petitioner would benefit the national interest as a researcher but was wholly unsupported by any evidence of any achievements as a researcher or even, for that matter, significant experience *as a researcher*. Thus, we find that the original approval was in gross error.¹ Moreover, none of the new evidence submitted establishes the petitioner's eligibility.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

¹ Although the petitioner did not answer the question on Part 4 of the petition regarding whether he had filed a petition in behalf of himself previously, the petitioner had filed two petitions in the same classification, EAC-98-009-53281 and LIN-98-104-51494, which had both been denied before the petition before us was filed. The petitioner's failure to provide this information with the petition, signed under penalty of perjury, which expressly requests this information and an attached explanation if any such petitions have been filed, reduces his overall credibility.

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 an alien of exceptional ability. The petitioner left blank the area of proposed employment on the petition but the petitioner held a medical degree at that time. The original brief references research as well as clinical experience but was not supported by any evidence that the petitioner had authored articles reporting the results of his medical research. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director initially approved the petition on May 24, 2001. The full procedural history of this matter, beginning with the initial NOIR on April 28, 2006, was set forth in our previous decision and need not be revisited in this decision.

On August 3, 2007, the AAO withdrew the director's May 29, 2007 decision, concluding that the previous NOIR was issued in error to a previous address and a previous attorney. On September 19, 2007, the director issued a new NOIR, properly addressed to counsel. On November 27, 2007, upon considering the petitioner's response to the new NOIR, the director issued a final notice of revocation, which he certified to the AAO.

At issue in this decision are the grounds of revocation raised in the September 27, 2007 NOIR and affirmed in the final notice of revocation.

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 initially sought classification as an advanced degree professional. As noted by the director, the petitioner must establish that he was eligible for the classification sought as of the date of filing in this matter, October 7, 1999. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Initially, the petitioner submitted his Bachelor of Medicine and Surgery

issued by the University of Sind,² Pakistan, in 1982. The petitioner also was awarded a Diploma in Thoracic Medicine from the British Postgraduate Medical Federation, Cardiothoracic Institute of the University of London on August 1, 1987. The petitioner did not initially submit an evaluation of either foreign degree.

In the most recent NOIR, the director questioned whether the petitioner was a member of the professions holding an advanced degree. In response, the petitioner submitted a credential evaluation from World Education Services, Inc., evaluating the petitioner's Bachelor of Medicine as a "First professional degree in medicine (Doctor of Medicine)" and the diploma as one year of graduate medical education. The petitioner also submitted evidence that he received a Master of Public Health degree from the University of California (UC), Davis on December 18, 2004, several years after the petition was filed.

The director concluded that the petitioner does qualify as a member of the professions holding an advanced degree based on education and experience. A baccalaureate degree plus five years of progressive post-baccalaureate experience are equivalent to a U.S. Master's degree. 8 C.F.R. § 204.5(k)(2). We are satisfied that the petitioner had, as of the date of filing, more than five years of experience following his Bachelor of Medicine degree. Thus, we need not decide whether a five-year Bachelor of Medicine degree by itself qualifies as an advanced degree, defined as a U.S. academic or professional degree above that of a baccalaureate or a foreign equivalent degree. 8 C.F.R. § 204.5(k)(2).

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment 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.

² Spelling as it appears on the diploma. We acknowledge that the evaluation of the petitioner's education refers to the University of Sindh.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Commr. 1998)(hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* 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. *Id.* at 217-18.

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. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. Given the evidence on which the petitioner relies in this matter, we emphasize that the inclusion of the term "prospective" is used here to require future contributions by the alien, and *not* to facilitate the entry of an alien with *no* demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

As stated above, Part 6 of the petition regarding the petitioner's proposed employment is blank. In prior counsel's initial cover letter, counsel asserted that the petitioner intended to "continue his research work in the field of Pulmonary Medicine." In his personal letter, the petitioner listed the subject of the letter as "Application for Permanent Residence in USA as a Physician." He noted that he was currently employed as a senior physician. He further asserts that his experience is transferable to a U.S. "Academic Hospital or Research Institution." On the Form G-325 Biographic Information dated January 2, 2002 and submitted with the petitioner's Form I-485 adjustment application, the petitioner indicated that he had worked as a "doctor" from September 1996 through the present. His 2003 tax return lists his occupation as "counselor/student." When the petitioner was interviewed in 2004 regarding his form I-485 Application to Register Permanent Residence or Adjust status, it was revealed that he was enrolled in a Master of Public Health program. In our previous decision remanding the matter for a new NOIR, we noted the following two issues:

- If the petitioner intends to work as a physician, the director may wish to inquire how this work would provide benefits that are national in scope. The director should carefully consider the language set forth in *NYSDOT*, 22 I&N Dec. at 217 n.3.
- If the petitioner intends to work as a researcher, the director may wish to inquire as to whether, as of the date of filing, the petitioner had a track record of success with some degree of influence on the field as a whole. *Id.* at 219, n.6.

Finally, we reiterated that the petitioner must demonstrate his eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49 (Regl. Commr. 1971). The petitioner also may not make material changes to a petition that has already been filed in an effort to make an

apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998).

The director did not contest that the petitioner seeks to work in an area of intrinsic merit, pulmonary medical research. The director stated at the end of his decision:

Additionally, the record does not appear to hinder an acceptance of the petitioner's work extending nationally in scope due to the extensive network that the medical professions hold within themselves permitting for benefits on a national level.

We withdraw any implication that a physician can typically demonstrate that the benefits of his work are national in scope as defined in *NYSDOT*, 22 I&N Dec. at 217 n.3. Rather, consistent with that decision, we find that the benefit of a single physician would be so attenuated at the national level as to be negligible. Significantly, after *NYSDOT* was issued, Congress passed the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat. 1312 (1999). Section 5 of this law, 113 Stat. at 1318-19, is designed to facilitate waivers for certain physicians working in "shortage" areas. Section 203(b)(2)(B)(ii) of the Act. We must assume that Congress was aware of our previous treatment of national in scope when the new waiver provision was enacted and did not intend to alter our interpretation of that concept for physicians other than those who meet the requirements of newly enacted section 203(b)(2)(B)(ii) of the Act. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

Nevertheless, even initially, the petitioner suggested that he might seek employment at a research institution, implying that he sought to perform some research duties. Thus, we are satisfied that the *proposed* benefits of his work, improved treatment of diseases such as tuberculosis, 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.

Counsel has consistently noted the importance of the petitioner's area of clinical experience, pulmonary diseases, especially tuberculosis. Eligibility for the waiver, however, 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. *NYSDOT*, 22 I&N Dec. at 218.

Counsel further discusses the petitioner's experience outside the United States, where virulent strains of tuberculosis have been more common. Counsel also alleges a shortage of medical professionals in the United States. It cannot suffice, however, to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. *Id.* Moreover, the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

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 element 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. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221 n. 7.

The petitioner initially submitted seven letters from his immediate circle of colleagues. In response to the director's most recent NOIR, the petitioner submitted letters regarding his research beginning in 2004. These letters have no relevance to the petitioner's track record of success as of October 7, 1999 when the petition was filed. Nevertheless, we will review all of the letters.

At the outset, we note that Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of experience and a record of achievement are less persuasive than letters that provide specific examples of individual achievements and of how these achievements have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive. Moreover, the Department of Labor's Occupational Outlook Handbook 151 (2006-2007 ed.) provides that a solid record of published research is essential in obtaining a permanent position involving basic research in the biological sciences. Thus, it would appear that establishing a published record is a major part of biological and medical research. Even where an alien is able to demonstrate a record of published work, publication is only indicative of the originality of the work. As stated above, the petitioner must demonstrate the significance of any original innovation, *see NYSDOT*, 22 I&N Dec. at 221 n.7, such as evidence that the petitioner's published work is well cited.

██████████ an internal medicine consultant at the Saudi ARAMCO Medical Center and Hospital in Dhahran, asserts that the petitioner was working there as a senior physician. Dr. ██████████ reviews the petitioner's credentials and praises the Dhahran facility. Dr. ██████████ opines that the petitioner would be a good asset to the United States based on the petitioner's 10 years of experience as a physician. With regard to experience, the regulations indicate that ten years of progressive experience is one possible criterion that may be used to establish exceptional ability. Because

exceptional ability, by itself, does not justify a waiver of the job offer/labor certification requirement, arguments hinging on the degree of experience required for the profession, while relevant, are not dispositive to the matter at hand. *NYS DOT*, 22 I&N Dec. at 222. Moreover, 10 years of experience as a physician does not predict future contributions to the national interest as a researcher. Dr. [REDACTED] concludes with a discussion of the petitioner's professionalism, participation in clinical meetings, seminars and conferences, and duties teaching medical students. The record does not contain any evidence, such as conference proceedings or agendas, confirming that the petitioner has presented research results at major scientific conferences. Dr. [REDACTED] does not identify any research contribution by the petitioner or explain how that contribution has influenced the field of pulmonary medicine.

The other letters from colleagues in Saudi Arabia provide similar information. [REDACTED], a Consultant Gastroenterologist at the Dhahran facility, also asserts that the petitioner conducted a new study on the treatment of *Helicobacter Pylori*. Dr. [REDACTED] does not explain the results of the petitioner's study, the significance of any results, or their influence in the field. The record does not contain evidence that the petitioner has authored a published article on the subject or presented his results at a major scientific conference.

In a letter dated September 5, 2007, Dr. [REDACTED], a consultant pulmonologist at the King Abdulaziz Medical City in Saudi Arabia, confirms that the petitioner is now working at that facility as a staff physician. He confirms the petitioner's clinical experience prior to entering the United States and the petitioner's research experience at UC Davis. Dr. [REDACTED] does not assert that the petitioner had any research experience prior to the date of filing in this matter.

[REDACTED], Chair of the Department of Public Health Sciences at UC Davis, has provided three letters in support of the petition. In his first letter, dated September 23, 2004, [REDACTED] asserts that the petitioner has 15 years of *clinical* experience and notes that the petitioner had begun a research project at UC Davis. In his second letter, dated July 28, 2006, [REDACTED] asserts that the petitioner's research project at UC Davis was entitled "Causes of Sarcoidosis." While [REDACTED] asserts that more work is needed in this area and that he hopes to utilize the petitioner in the future, he does not assert that the petitioner's results were published in a peer-reviewed journal or otherwise disseminated in the field. In his final letter, dated October 15, 2007, [REDACTED] reiterates his previous assertions and notes that the petitioner's area of research is meaningful and funded by the National Institute for Occupational Safety and Health (NIOSH). Once again, [REDACTED] does not assert that the petitioner is a named author on any research publication appearing in a peer-reviewed journal or that the petitioner has presented his work at a major scientific conference. We note that all research must receive funding from somewhere. It does not follow that every researcher who has worked on a project receiving government funding qualifies for a waiver of the alien employment certification in the national interest.

[REDACTED], a professor at UC Davis, confirms his interest in offering the petitioner a research position but does not discuss any of the petitioner's past accomplishments. [REDACTED], Chief of the Program Development Section of the Department of Public Health Services at UC Davis,

asserts that the petitioner focused on obesity in adults and the use of pedometers to increase physical activity with subsequent decrease in weight, morbidity, and mortality from pulmonary diseases and other chronic diseases. Dr. [REDACTED] does not assert that this work has been published in a peer-reviewed journal or presented at a major scientific conference. He does not explain how this work has otherwise influenced the field. The record contains a manuscript by the petitioner on this subject, but it bears no indicia of publication. Moreover, [REDACTED] does not explain how the petitioner's work on obesity relates to the treatment of dangerous forms of tuberculosis, the proposed future benefits that counsel claims justifies a waiver of the alien employment certification.

As the petitioner has not demonstrated any track record of success as a researcher, or even significant experience as a researcher, prior to the date of filing in this matter, we must conclude that the petition, based on his proposed future contributions as a medical researcher, was approved in gross error and, thus, that the director's revocation of that approval was proper.

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 alien employment 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. Accordingly, the decision of the director revoking the approval of the petition will be affirmed.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The director's decision revoking the approval of the petition is affirmed.