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U.S. Citizenship
and Immigration
Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: JAN 09 2009

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IN RE:

Petitioner:

Beneficiary:

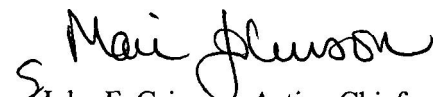
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) 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 an alien of exceptional ability in the sciences. The petitioner seeks employment as a chiropractor. 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:

(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 petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds two post-baccalaureate degrees, qualifies as a member of the professions holding an advanced degree. The two classifications, both established by section 203(b)(2) of the Act, are equivalent for the purposes of this proceeding. A determination regarding the petitioner's claim of exceptional ability would be moot; it would occupy significant space in this decision, without affecting the ultimate outcome thereof.

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 the 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 regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services (USCIS)] 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 (Commr. 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 also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner’s Form I-140 petition includes the following information:

Occupation: Doctor of Chiropractic

Job Title: Doctor of Chiropractic/Clinic Director

Nontechnical Description of Job:

1. Clinical, direct patient care.
2. Operational management
3. Business development
4. Public health educator

On Form ETA-750B, Statement of Qualifications of Alien, the petitioner repeated the assertion that he seeks employment as a "Doctor of Chiropractic," in the practice of [REDACTED], located in Wheaton, Maryland. The petitioner indicated that he had worked at that practice since 2003, and that his "[r]esponsibilities include direct clinical patient care through physical examinations to provide clinical diagnosis and treatment for neuromusculoskeletal conditions. Diagnostic evaluation may include x-ray and neurodiagnostic testing. (EMG/NCV)."

The petitioner's own descriptions of his intended work, quoted above, included no mention of research.

In an introductory statement accompanying the initial filing, counsel stated:

[The petitioner] is a Chiropractor trained in Biomechanics, Neuroscience, Electro-diagnostics and multi-disciplinary health care. In the field of Neurodiagnostics, he is regarded as a scientist of exceptional ability, and has been indispensable to federally funded research on health care delivery, neuromusculoskeleton injuries, and treatment projects on which he worked as one of only two chiropractors chosen nationwide for a National Naval Medical Center internship.

. . . Practicing integrative medicine using model applications within a clinical setting, [the petitioner's] key findings have made available more accurate diagnostic and improved integrative medicine treatment options. [The petitioner] combines his exceptional skills in neuroscience, biomechanics, electro-diagnosis together with his clinical Chiropractic experience to solve problems of national import. . . .

Published in top journals in his field, [the petitioner] has also presented his findings at influential scientific symposia such as the National Chiropractic Legislative Conference in Washington, DC. His work is internationally recognized and he is hailed by those familiar with his field, as an outstanding scientist with multi-disciplinary skills rarely found anywhere. . . .

[The petitioner] has published several professional articles in the field's top journals and presented his findings at influential scientific symposia. His publications and conference abstracts are listed in his *Curriculum Vitae* in (Exhibit G). A sampling of his publications and presentations is submitted with this application package. (Exhibit J.)

The page-long “Research/Presentation Experience” section of the petitioner’s *curriculum vitae* lists two conference presentations but no published journal articles. Likewise, the “sampling” of the petitioner’s work included in the initial submission does not include any published journal articles. The petitioner prepared a report for Nascent Health, but there is no evidence that this document was published or otherwise made available to anyone outside of Nascent Health. Indeed, every page that contains substantive content is marked “Confidential.”

The petitioner also submitted documentation summarizing “The Comprehensive Neuroscience Program in the National Capital Area: Research on Spine and Back Pain” at the National Naval Medical Center. This document describes research that the petitioner and others planned to conduct in the future, but it does not demonstrate that the research eventually took place, or that the results of that research were published. (The petitioner claims to have spent less than eight months at the National Naval Medical Center.)

Notwithstanding counsel’s claim to the contrary, the petitioner’s initial submission contains no published articles by the petitioner. (Abstracts published in conference proceedings are not articles, but rather brief summaries of oral presentations.) There is no evidence that the petitioner’s work has been “[p]ublished in top journals in his field.” The assertions of counsel do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the objective documentation in the record did not indicate that the petitioner was still involved in research as of 2006 when he filed the petition. Rather, the dated research materials show dates that coincide with the petitioner’s now-completed academic training.

Several witness letters accompanied the petitioner’s initial submission. While the petition was filed on June 30, 2006, most of the letters date from 2005 or earlier. The oldest and vaguest letter, dated February 6, 2003, is from [REDACTED] of the National Naval Medical Center. Dr. [REDACTED] stated that the petitioner “performed in an outstanding manner during his rotation in Orthopedics” over the course of three and a half weeks in early 2003. Dr. [REDACTED] praised the petitioner’s clinical skills but did not mention research or chiropractic.

The most recent and the most detailed letter is from neurologist [REDACTED] of Kensington, Maryland. Dr. [REDACTED] who has worked with the petitioner “for the past eight months,” stated in his March 28, 2006 letter:

Because neural inflammation is a component of pain that the drugs I hold patents on are intended to treat, I am well aware of the significance of the [petitioner’s] research. . . . The combination of genetics and markers of inflammation is a novel and important step in elucidating the etiology of multiple types of lumbar pain. Any significant outcome of this research will lead to pharmaceutical inventions for future treatment. . . .

As the Clinic Director in charge of several satellite offices, [the petitioner] focuses on total-ethical patient care as well as practice operations and management. [The petitioner] is also Medical Director of Imprimis Diagnostic Services, a private company offering state of the art neurodiagnostic services on referral from physicians in Maryland and Northern Virginia.

██████████ then detailed six contributions by the petitioner: "Integration of chiropractic and medical care," "Department of Veteran[s] Affairs Chiropractic Demonstration Program: Oversight Advisory Committee Panel Member," "Co-Principal Investigator in the Comprehensive Neuroscience Program in the National Capital Area: Research on Spine and Back Pain," "Co-Developed Hospital-Based Chiropractic Residency Program," "Delivery of Integrative Medicine in hospital settings" and "Neurodiagnostic Research." A good deal of ██████████'s discussion of the petitioner's "Delivery of Integrative Medicine in hospital settings" is copied, word-for-word, from a "Confidential" report that the petitioner prepared for Nascent Health. Dr. ██████████ stated that the petitioner "maintains a research laboratory at Spinal Care Centers in which investigations to evaluate the neurophysiological effects of spinal manipulation are performed," but the record is silent as to what results the petitioner's research laboratory has yielded.

██████████ Director of the Chiropractic Clinic at the Department of Veterans Affairs Medical Center in Buffalo, New York, is an adjunct assistant professor at New York Chiropractic College, where the petitioner studied from 2000 to 2003. Dr. ██████████ stated:

During the past 3 years, in affiliation with the Department of Defense National Naval Medical Center, [the petitioner] has been a key researcher in a highly promising collaborative neuroscience program in the national capital area involving studies on the spine and back pain.

[The petitioner's] research requires a high level of scientific and technical expertise. He has played a critical role in conducting experimental advances with new technologies that will likely play a role in the future of back pain, as well as conducting outcomes research and studies on mechanism of action. Judging both from my personal observations, and his achievements in research, it is clear that [the petitioner] has made important contributions in the field of spine research.

As [the petitioner's] research progresses, I anticipate a number of vital benefits to flow to the United States. [The petitioner's] efforts play a critical role in establishing a Defense Spine Center that will consolidate military research efforts in partnership with Conermaugh Health Systems. This combined approach will facilitate the dual goal of eliminating back pain as a major cause of morbidity in the civilian population at large and as a major factor degrading the readiness of the Nation's military forces.

██████████ letter is dated August 31, 2005, ten months before the petition's June 30, 2006 filing date. Also dated well before the filing date is an October 24, 2005 letter from ██████████ Director of

Integrative Medicine at Mississauga Wellness Integrative Medical Center in Mississauga, Ontario, who stated: "I have worked with [the petitioner] on several projects since 2002, and feel I am qualified to comment on the value of his research activities." Dr. [REDACTED] however, did not provide any details about the petitioner's "research activities." Instead, Dr. [REDACTED] offered general praise for the petitioner's background, stating:

Through his Post-Graduate education at an accredited and world-leading U.S. College; his specialized medical training at The National Naval Medical Center in Bethesda, MD; and his extensive research and study in the field of neuroscience; integrative medicine practice and model application within the clinical practice setting, he has already played a critical role in the direction to current and future studies in this field. . . .

It would be deleterious to the field of Integrative Medicine and to the health and well-being [of] millions of American citizens if [the petitioner] did not have the opportunity to continue his research and clinical studies in the U.S., for which he requires permanent residency.

[REDACTED] Director of the Spine Clinic at Metropolitano Hospital in Quito, Ecuador, has worked with the petitioner "on several projects." Dr. [REDACTED] stated:

[T]he preliminary results of [the petitioner's] study in asymmetry of leg length inequality . . . have led to the creation by [the petitioner] of Imprimis Diagnostic Services (IDxS), an innovative healthcare in-office service company to enhance patient care delivery in partnership with care providers. IDxS provides premier electrodiagnostic testing services to support clinical decision making, improving diagnostic accuracy and by providing objective clinical measures. Previously, such neuro-diagnostic services were only available in academic medical centers, research and hospital settings.

The record contains no objective documentary evidence about IDxS. Dr. [REDACTED] identified the petitioner as "Medical Director of Imprimis Diagnostic Services," but on his *curriculum vitae*, the petitioner stated that he was the "President" of that entity.

The clinical practice of medicine lacks national scope as required by *Matter of New York State Dept. of Transportation* at 217. On May 30, 2007, the director issued a request for evidence (RFE), stating:

The clinical practice of chiropractic medicine would not normally meet the national benefit test. . . . Please submit additional evidence about the prospective research activities: 1) to establish the amount/percentage of your professional time that will be devoted to research . . . 2) evidence documenting all current research grant funding. . . .

Please submit any available additional documentary evidence that, as of the petition priority date, you had a degree of influence on chiropractic medicine that distinguishes

you from other researchers with comparable academic/professional qualifications. The evidence may include, for example, copies of additional published articles that cite or otherwise recognize your research achievements.

In response, the petitioner submitted a new letter from [REDACTED] who stated that he has invited the petitioner “to serve as co-principle [*sic*] investigator with me in an important research study to assess the potential efficacy of neurological drug called Felbatol in patients with Lou Gehrig’s disease or amyotrophic lateral sclerosis (ALS).” The petitioner also submitted an undated proposal for the aforementioned study. The petitioner submitted no evidence to show that the study had yet begun, or to clarify what preparations (such as obtaining funding) remained to be made before the study would take place.

In his previous letter, [REDACTED] stated that he invented Felbatol before he began his collaboration with the petitioner. He did not, however, indicate that he and the petitioner were collaborating on a study of Felbatol. It appears, therefore, that the study was not proposed until after the petition’s filing date. 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 USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Beginning a new research study after the petition’s filing date does not establish the extent of the petitioner’s research work as of the filing date.

The petitioner also submitted a copy of a print advertisement promoting the petitioner’s chiropractic practice. The advertisement does not mention research, but it does contain the new and unsupported claim that the petitioner “has served as ‘Team Chiropractor’ to several [unidentified] amateur, professional and National sports teams.”

The petitioner’s submission did not address any of the concerns expressed by the director in the RFE. Consequently, the director denied the petition on January 24, 2008. The director noted that the record contains unsupported claims, such as the assertion by [REDACTED] that the petitioner “is Board Certified in the field of Neurophysiology.” The director found that the petitioner’s work lacks national scope, and that “for well over four years [the petitioner] has practiced clinical chiropractic medicine in the United States and there is no evidence that he intends to abandon that practice, or even curtail it, to pursue research.” The director concluded “the evidence fails to establish that the petitioner will make an impact beyond the patients who visit his local clinic.” The director also found that the petitioner had not established “a record of accomplishments which set him apart from other state board certified chiropractors.”

On appeal, counsel stated that the petitioner “will serve the national interest to a substantially greater degree than would an available US worker having the same minimum qualifications – because under 8 CFR 204.5(k)(3)(ii) he is exceptional.” The regulation cited by counsel concerns the evidentiary requirements for classification as an alien of exceptional ability. Meeting those requirements, however,

does not presumptively qualify an alien for the national interest waiver. The plain wording of section 203(b)(2)(A) of the Act shows that aliens of exceptional ability are normally subject to the job offer requirement (and, hence, labor certification). Therefore, it is *erroneous* to assert that the petitioner qualifies for the waiver “because . . . he is exceptional” as the regulations define that term.

Counsel states: “The fact that [the petitioner] practices clinical chiropractic medicine does not exclude the fact that he also conducts research and records data gathered in the clinic.” It is true that clinical practice and research are not mutually exclusive, but the petitioner must show that he has, in fact, engaged in significant research while operating his private practice. We reiterate, here, that the petitioner’s own Forms I-140 and ETA-750B did not mention research as part of his intended employment, and when the director specifically instructed the petitioner to explain how much of his time was devoted to research, the petitioner’s response did not address the question; the petitioner merely identified one project that had apparently not yet begun.

Counsel observes that it is more difficult for the petitioner to obtain research funding as a private practitioner than in an academic or other institutional setting. This may well be true, but it is not an argument in favor of approving the petition. Counsel does not explain why the petitioner left a setting more conducive to research except to claim that the petitioner “is something of a ‘maverick.’” This is a matter of the petitioner’s personal preference, not a favorable factor in adjudicating the waiver request.

Counsel states that, while the petitioner “has but few publications as yet,” he will “add more in [the] future,” and that “he will be far more able to obtain funding for his research” after he becomes a permanent resident. Counsel, here, appears to argue that while the petitioner has not yet accumulated a significant research record, he will do so after his petition is approved. This argument is highly speculative and conjectural, and is not founded on any existing evidence. Assertions of prospective national benefit must be grounded on an alien’s track record. *See Matter of New York State Dept. of Transportation* at 219. While it is true that permanent residents have opportunities that are closed to nonresident aliens, this applies to all nonresident aliens and is not a reason to grant a waiver to one alien in particular.

The petitioner submits a copy of the office schedule from his web site, showing that the petitioner’s office is open to patients 26 hours per week. Although the web site does not mention research, counsel claims that the office hours schedule shows that the petitioner devotes “approximately 75%” of his time to research. The director, in the RFE, had specifically asked the petitioner for evidence “to establish the amount/percentage of [his] professional time that will be devoted to research.” The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner, at that time, disregarded the director’s request. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner now attempts to address the request on appeal (albeit by questionable inference rather than by direct evidence). The AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The director correctly found that the petitioner failed to address this issue when directly instructed to do so.

The petitioner submits various exhibits on appeal, some relating to the petitioner's credentials and others to general issues in the petitioner's field, but the exhibits submitted do not refute the director's findings or show that the director erred in denying the petition for the reasons stated in the denial notice. When considering the ever-shifting nature of the petitioner's claims and evidence, it is worth noting that the appeal apparently contains no mention of the petitioner's work with Imprimis Diagnostic Services.

When the petitioner filed the appeal on February 22, 2008, the petitioner did not indicate that any further evidence would be submitted. Nevertheless, on March 24, 2008, the petitioner submitted evidence indicating that his "abstract submission titled 'Treatment of Spinal Cord Pain and Spasticity with Felbatol' [was accepted] for poster presentation at the third annual American Conference on Pain Medicine in New York City." The message conveying this acceptance was dated March 10, 2008. In general, the evidence relating to the petitioner's research work tends to be dated either several years before the petition was filed, or after the director began asking for evidence of the petitioner's research activity.

We stress that, while active involvement in published research would establish national scope, this alone cannot suffice to establish eligibility for the national interest waiver. The petitioner would still need to establish the significance of his published work in relation to that of others in his field. Here, the record (including the appeal) contains no evidence that any journal has published a full article (rather than an abstract) by the petitioner, and the record does not objectively establish the impact of his conference presentations. On the petition forms that initiated this proceeding, the petitioner presented himself first and foremost as a clinical chiropractor, and the record contains little credible evidence to contradict that characterization of the petitioner's work.

As is clear from a plain reading of the statute, it was not the intent of Congress that every alien of exceptional ability, or 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, an alien's professional goals are not grounds for a waiver if the alien's existing record of accomplishments does not persuasively show that those goals are realistic. 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.