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Office: NEBRASKA SERVICE CENTER

Date:

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IN RE:

Petitioner:

Beneficiary:

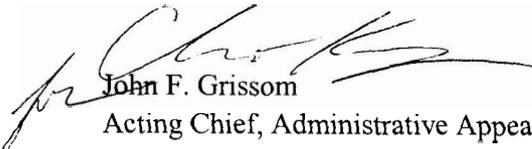
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 AAO will dismiss the appeal.

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 is an assistant professor at Tbilisi State Medical University in the Republic of Georgia. She is on leave from that position, working as a research associate at the University of Miami, Florida, working on the Miami Project to Cure Paralysis (“Miami Project”). 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.

On appeal, the petitioner submits a brief from counsel and various exhibits.

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 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 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. Similarly, aliens who are professionals with an advanced degree are also not exempt from the job offer/labor certification requirement by virtue of their higher education. 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 or education significantly above that ordinarily encountered in his or her field of expertise.

The petitioner submitted a copy of her *curriculum vitae* (CV) with the petition. The CV listed fifteen published articles. Only two of those articles were published after 2001. The CV also listed fourteen conference presentations, nine of which were in 2003 or later. None of the articles or presentations named in the initial filing arose from her work in the United States, which began only

about four months before she filed the petition. The evidence indicates that the petitioner began producing more conference presentations at around the same time she began producing fewer articles. The petitioner submitted copies of some of these articles and conference abstracts.

The petitioner submitted five witness letters, all from individuals named as references on the petitioner's CV.

[REDACTED] of Tbilisi State Medical University stated:

I was the scientific supervisor of [the petitioner's] PhD thesis. . . .

[The petitioner's] PhD study revealed a new treatment for sciatic, tibial and peroneal nerves in case of root avulsion from spinal cord. Typically, patients suffering from this type of injury would remain wheelchair-bound for the rest of their lives, but with [the petitioner's] new innovative technique, motor functions in the legs could be restored. Her experimental findings, when put into practice, enabled neurologists and surgeons to determine precisely when and what method of surgery to perform on patients' leg nerve damage.

. . . In the end, her discoveries led to new surgical techniques now used by Georgian, Italian and Russian surgeons to help restore movement and feeling to patients with paralyzed limbs.

[REDACTED] now an associate professor at the Medical University of Vienna, Austria, stated:

I have known [the beneficiary] from her student's years as I worked at Tbilisi State Medical University at that time. . . .

What separates and distinguishes her from other neurologists in the field are these qualities:

- [The petitioner] has earned international scholarships and fellowships in some of the world's leading neurology centers. . . .
- [The petitioner] has received awards to travel and present her research findings . . . around the world at conferences. . . .
- [The petitioner] is an Assistant Professor at Tbilisi State Medical University and she is Executor of Georgia's Continuing Educational program: "Modern Principles of Management and Diagnosis of Carpal Tunnel Syndrome."
- [The petitioner] is board certified to practice neurology in Georgia, and she has abundant clinical experience treating and diagnosing patients with various peripheral nerve disorders.

now Head of the Department of Neuroradiology at Klinikum Bremen-Mitte, Bremen, Germany, stated:

In 2003, [the petitioner] spent three months at the Department of Neurology of the University of Erlangen-Nuremberg . . . to receive post-doctoral training and conduct post-doctoral research. . . .

I was familiar with [the petitioner] because of her publication on peripheral nervous system disorders and treatment. . . . Her published findings promised and delivered new innovative treatments for spinal cord injuries resulting in the paralysis of patients' legs. . . .

[The petitioner's] discovery of a new surgical method of reattaching torn peripheral nerves to the spinal cord is now being used by doctors in Georgia, Russia and Italy to restore movement in patients who have paralyzed legs. This is truly a groundbreaking discovery. . . . The medical community is slow to adopt such novel treatments for spinal cord injuries and paralysis, especially when such discoveries are made by researchers in smaller, lesser known nations, but it is just a matter of time before this procedure begins to receive even wider application in other hospitals around the world.

Regarding the last assertion, [redacted] did not describe what efforts, if any, have been made to introduce the petitioner's technique to neurosurgeons in Germany. [redacted] continued:

[A]s I was already familiar with her achievements before she came to our Hospital in 2003, I invited [the petitioner] to help me with a project in my own lab concerning a method to precisely isolate and identify areas of the brain damages by stroke. . . .

[The petitioner] independently produced breakthrough results in our lab in Germany allowing us to precisely identify lesions on stroke patients' brains. . . .

As a direct result of [the petitioner's] work and collaboration, we developed the absolute best way to diagnose and treat stroke patients who suffer from lesions on the brain. The first step is to quickly identify where the lesions are using the CT-perfusion imaging method devised by us.

[redacted] of King's College at the University of London, United Kingdom, stated:

In 2004, the EFNS [European Federation of Neurological Societies] awarded [the petitioner] a post doctoral scholarship and so we invited [the petitioner] for training in peripheral nerve disorders. . . .

[The petitioner] won her award because of her extensive background, qualifications, and commitment to the field of Neurology. For instance, in previous research work conducted in Georgia on peripheral nerve disorders, [the petitioner] discovered a novel way to reattach torn peripheral nerves in patients with paralyzed legs. . . . The technique she discovered is now currently employed by surgeons in Georgia.

Before coming to King's College, [the petitioner] engaged in collaborative research with [REDACTED] in Germany, wherein together they made breakthrough discoveries in how to precisely diagnose and then restore limb movements to stroke patients. . . . [The petitioner's] finding of how to precisely identify stroke induced brain injuries such that surgeons may treat them has directly contributed to curing paralysis suffered by stroke patients. The results of her collaborative work . . . have improved the clinical treatments of patients throughout Europe.

So, [the petitioner] came to King's College with an impressive background, and while here she studied and researched Guillain-Barré syndrome (GBS) and Inflammatory Demyelinating Neuropathies. . . .

While at King's College, [the petitioner] received intensive training on how to diagnose and treat GBS while also participating in GBS research. Upon completion of her work here, [the petitioner] returned to Georgia and founded a Georgian chapter of GBS/CIDP Foundation International.

Forming this chapter was significant for the Georgian medical community because . . . in Georgia the [GBS] patients often do not receive appropriate medical treatment because of the lack of GBS awareness, training, and clinical expertise among the local doctors.

Regarding [REDACTED] assertion that forming a chapter of the foundation in Georgia addressed a "lack of GBS awareness" in that country, the record shows that the foundation is already active in the United States. The petitioner gave a presentation at a foundation meeting in Phoenix, Arizona, in 2006. Therefore, the record does not establish a "lack of GBS awareness" in the United States that is comparable to the previous situation in Georgia.

of the University of Miami stated that the petitioner "has previously achieved research breakthroughs to help restore limb movement to patients suffering from paralysis. . . . Her new method to restore leg movements is now currently used by doctors and surgeons in Georgia, Italy and Russia." [REDACTED] did not claim that the University of Miami teaches, or intends to teach, the petitioner's method, or that the petitioner's work in Miami directly relates to that method. No witness has indicated that there exists no alternative surgical treatment already in use outside of Georgia, Italy and Russia to restore leg movement to patients with nerve root avulsion injuries. Also, no witness has claimed, for example, that significant numbers of such patients have traveled to Georgia, Italy or Russia for surgery using the petitioner's method.

also stated:

[The petitioner's] job here in Miami consists of evaluating the paralyzed muscles of patients by using Electromyography (EMG) recordings to prove that dormant, paralyzed muscles are still alive years after injury. Using this information, the aim is to find a way to restore muscle function by innervating the muscle and nerve tissues with new stem cells.

[The petitioner] is specially qualified to conduct this research as she has an extensive background in making precise EMG recordings in both research and clinical settings, and she is well qualified to independently design and perform experiments and to expertly analyze the results.

On a surface level it may appear that [the petitioner] is just performing basic medical research, but her 17 years clinical experience of treating neurological disorders combined with her extensive international background of studying neurology . . . make her exceptionally qualified to take basic medical research to a higher, more penetrating level of scientific analysis. Put another way, she has the research background and clinical experience to make breakthrough connections in the data she collects. Entry level researchers and post docs simply don't have her expertise.

Under the USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii)(B), ten years of full-time experience in a given occupation can form part of a claim of exceptional ability, with the understanding that expertise often results from long experience. By law, however, exceptional ability in the sciences does not automatically result in a national interest waiver. Aliens of exceptional ability in the sciences are typically subject to the job offer/labor certification requirement.

On April 3, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit "documentary evidence" of "a degree of influence on [the petitioner's] field that distinguishes [the petitioner] from other researchers/scientists with comparable academic/professional qualifications." As an example, the director noted that the petitioner could submit copies of published articles by other researchers, citing the petitioner's work.

The petitioner's response consisted mostly of more witness letters.

Executive Director and Chief Executive Officer (CEO) of the American Academy of Neurology, discussed the petitioner's previously discussed achievements and added:

[The petitioner's] other contributions to the field of neurology include:

- Establishment of a Chapter of GBS Foundation International in Georgia. . . .

- Contributing to the World Health Organization's International Demonstration Project, "Management of Epilepsy at the Primary Health Care Level in Georgia," held by The International League Against Epilepsy, and the International Bureau for Epilepsy.
- Developing a continuing medical education program in Georgia titled, "Modern Principles of Management and Diagnosis of Carpal Tunnel Syndrome," which was accredited by the Board of the State Medical Academy, Tbilisi, Georgia.

These three achievements show a strong social commitment to the field of neurology and to improving the medical care of patients suffering from CTS, GBS, and Epilepsy on a national scale.

██████████ of Tbilisi State Medical University listed the same accomplishments described in ██████████ letter, and stated that the petitioner's "[e]xtensive EMG experience and expertise is [*sic*] absolutely essential to analyze muscle weakness and fatigue in paralyzed subjects from SCI [spinal cord injury]."

██████████ of Naples, Florida, also described the same research projects. ██████████ repeated the assertion that "Georgian, Russian, and Italian surgeons have used the [petitioner's] method to help restore movement and feeling to patients with paralyzed limbs," but like the other witnesses, stated no intention to learn or to use that technique. Also like the other witnesses, Dr. ██████████ did not state that the petitioner's method is the best or only method to restore limb movement to these patients.

██████████ stated:

When evaluating the work of scientists from the former USSR it is important to look beyond traditional academic benchmark measures like . . . citation indexes to see the substance of a researcher's achievements; (1) the researcher's ability to collaborate with international institutions; (2) the ability to research and receive training outside their third world surroundings and; (3) the improvement of the administration of health care in one's homeland.

None of the three factors listed above are persuasive. What is important is what the petitioner can contribute to the United States; her origins are irrelevant except for how they relate to her abilities. By referring to the petitioner's "third world surroundings," ██████████ implies that the state of medicine in Georgia lags behind more developed nations. The petitioner may have helped to bring a "third world" nation closer to higher standards that already exist in other nations, but this achievement does not show that the petitioner can effect comparable changes in those more developed countries that already represent higher standards in health care.

██████████ Member of Parliament in Georgia, stated: “I cannot really speak for what [the petitioner] does in academia, I can only speak for the tangible results she has achieved in improving and contributing to the health care system of Georgia.” ██████████ then described the same research projects discussed above. The record offers no objective comparison between “the health care system of Georgia” and that of the United States, to show that the sort of improvements discussed are needed in the United States.

██████████ of the University of Miami provided further details about the petitioner’s duties on the Miami Project and, like other witnesses, asserted that the beneficiary’s years of experience qualify her for the work.

The petitioner submitted a translated copy of a 2005 newspaper interview from *Kviris Kronika*, in which the petitioner answered general questions about stroke, epilepsy, carpal tunnel syndrome and other neurological disorders.

On August 20, 2008, the director issued a second RFE, instructing the petitioner to “provide documentary evidence to verify” that the petitioner’s techniques are “widely employed in Europe” as claimed. We note that the director did not request letters, but rather “documentary evidence.” Nevertheless, the petitioner’s response consists entirely of letters.

A letter co-signed by ██████████ and ██████████ lists 31 spinal injury patients who “were treated with the cross innervation method” at Tbilisi State Medical University from 2001 to 2007. This list indicates that one institution uses the procedure about five times a year. It does not show or imply wider use of the method.

In another jointly signed letter, ██████████ and ██████████ both of the Academy of Medical Sciences of the Ukraine, stated that the petitioner’s doctoral thesis resulted in “a new method of surgical treatment . . . in cases of traumatic injuries of limb nerves. . . . The developed method of the surgical treatment is applied successfully in the Ukraine, in cases of nerve root avulsion from spinal cord.”

██████████ of the N.N. Burdenko Scientific Research Institute of Neurosurgery, Moscow, Russia, stated that the petitioner’s “method is been [*sic*] used in various clinics in Russia since 2004 with good clinical outcome.”

██████████ of the University of Erlangen-Nuremberg, where the petitioner trained for three months, stated: “I use CTP [computerized tomography perfusion] and especially the methods introduced by [the petitioner] as a diagnostic method in routine. It has for example an impact on the treatment of patients with stroke in our institution and other important centres in Europe.”

A letter from ██████████ Associate Executive Director of the American Academy of Neurology, is nearly identical to ██████████ earlier letter. The petitioner also submitted a

copy of  
redundant submissions.

earlier letter. It would serve no useful purpose to quote from these

The director denied the petition on October 20, 2008. The director acknowledged the intrinsic merit and national scope of the petitioner's field of research, but found that the petitioner had not established that she stands out in her field to an extent that would justify a waiver.

The director noted the petitioner's failure to provide "primary evidence . . . to substantiate [witnesses'] assertions" regarding implementation of the petitioner's methods, even after the director specifically requested such evidence. The director stated: "assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)."

On appeal, counsel stated that the director improperly classified witness letters "as non evidentiary 'assertions'" and that the director erred by citing *Matter of Obaigbena* and *Matter of Ramirez-Sanchez*. Counsel states that *Obaigbena* states only that "affirmations or statements made by an attorney on behalf of his client do not constitute evidence." We agree with counsel's characterization of *Obaigbena*. The cited case law does not apply to witness statements, and to this extent the director erred. Nevertheless, the outcome of the decision did not rest on these particular citations of case law. Also, other case law exists which finds more broadly that unsupported claims do not constitute evidence. See *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)).

The director, in the August 2008 RFE, acknowledged the petitioner's submission of witness letters, and requested "documentary evidence" in order to support the claims in those letters. In context, it is clear that the director distinguished between documentary evidence and testimonial evidence. We note that the record still, even now, contains no first-hand evidence, documentary or testimonial, from any source in Italy to show that the petitioner's methods are used there. That claim rests entirely on the claims of witnesses outside of Italy.

More broadly, the record reflects only limited application of the methods credited to the petitioner. The claim that the petitioner's methods will eventually gain wider acceptance has little value, as it amounts to speculation and conjecture. Witnesses within the Miami Project have not indicated that they have used, or ever intend to use, these methods. Instead, they have indicated that, because the petitioner has 17 years of experience in neurology, she possesses valuable expertise with the advanced technology used in her position. As we have already explained, a partial claim of exceptional ability (in this case regarding more than ten years of experience) does not present a compelling case for a national interest waiver.

The petitioner, on appeal, submits documentation relating to her published and presented work following the petition's filing date. The beneficiary of an immigrant visa petition must be eligible at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The petitioner's subsequent activities cannot retroactively establish eligibility.

The petitioner submits a new letter from [REDACTED] listing five articles that are said to contain citations to the petitioner's work. The petitioner does not explain why she has not submitted direct documentary evidence of these citations. More significantly, the director had previously requested citation information in the first RFE. At that time, rather than submit any citation evidence at all, the petitioner submitted a letter from a witness [REDACTED] who claimed that the work of researchers in former Soviet republics should not be judged by citations.

By failing to submit citation information upon the director's specific request, the petitioner effectively forfeited the opportunity for consideration of that information. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaighena* at 537.

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.