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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date: **MAR 06 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

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.

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).

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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 a member of the professions holding an advanced degree. The petitioner states that he seeks employment as a researcher of stroke neurology. 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 statement, letters from witnesses, and other 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.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver. In the denial notice, the director noted this requirement, but did not state that the required documentation was absent from the record. A prior request for evidence

issued by the director likewise did not note this omission. We will, in the interest of thoroughness, review the matter on the merits.

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] 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 initial submission included six recommendation letters, all from members of the faculty or staff of Emory University School of Medicine, Atlanta, Georgia, where the petitioner had completed an internship and residency in neurology. [REDACTED] of Interventional Neuroradiology, stated that the petitioner "continues to be very involved with our service, in particular in the care of acute stroke patients, where his skills as a Stroke Neurologist combined with his knowledge of Interventional Neuroradiology have been extremely useful to very sick patients." [REDACTED] [REDACTED] praised the petitioner as a "physician" but said nothing about the petitioner's skills or accomplishments as a researcher.

Another witness who did not mention research is [REDACTED] who stated that the petitioner "intends to pursue a career in the very labor intensive and much needed field of neurocritical care and interventional neuroradiology."

[REDACTED] of Emory's Department of Neurology, mentioned the petitioner's research but focused on his clinical patient work:

[The petitioner's] knowledge and competency have given him a strong base to be able to deliver the excellent care he shows. He is a hard worker and efficiently organizes whatever the task at hand, whether in the clinic or classroom. He has instructed medical student in clinical neurology and stroke, neuroanatomy, and neurological localization of common disorders. He also has presented at Grand Rounds to his colleagues. His collaborations on research in the area of stroke have made promising tracks toward understanding cause and prevention.

. . . [The petitioner] will be one of only a handful of such specialized physicians in either neurocritical care or interventional neuroradiology; to be trained in both will make him even more rarefied.

[REDACTED] of Vascular Neurology, stated that the petitioner "is on the path of establishing an impressive research and clinical career" but provided no further information regarding the petitioner's research work

[REDACTED] stated:

[The petitioner] has established an outstanding research record. . . .

In the past it has been a challenge to interest neurologists in participating cardiac trials. [The petitioner] has shown keen interest in these studies and has provided the neurological assessments for several carotid stent studies, a left atrial appendage closure trial, a Patent Foramen Ovale (PFO) closure study and an upcoming coronary study in diabetics.

[REDACTED] stated:

[The petitioner] is extremely hardworking, efficient, bright, and committed to a career as a physician scientist with a particular interest in novel interventional therapies for preventing and treating stroke.

He has undertaken an important research topic this year on “The distribution and risk factors of stenosis among the major intracranial arteries.” He performed this research very well and the quality of this work is attested to by the fact that it was accepted for presentation at the most pre-eminent conferen[c]e in our field, the International Stroke Conference to be held in San Francisco in February 2007.

The petitioner submitted materials relating to his research work, including a two-page report entitled “Distribution and Risk Factors of Stenosis Among the Major Intracranial Arteries”; a case study entitled “Primary Intracerebral Hemorrhage from Nerurosarcoidosis – An Unusual Presentation”; and conference registration materials. An accompanying exhibit list indicated that the petitioner wrote a textbook chapter entitled “Intercerebral [sic] Hemorrhage: Recreational drug induced and vasculitis,” but the record contains no evidence that directly supports this claim. Instead, the record contains an electronic mail message addressed to Prof. Frankel, inviting him “to contribute a chapter entitled ‘Intracerebral Hemorrhage: Recreational drug induced and vasculitis’ for our book. . . . You are free to invite co-authors to help writing the chapter(s) assigned to you, as you deem appropriate.” An attached draft Table of Contents shows a chapter entitled “Recreational drug induced and vasculitis,” but it is the only chapter that does not display the name of an author or authors. Thus, the record does not show that the petitioner, or anyone else, actually wrote the book chapter. The evidence submitted shows only that the publishers approached someone else [REDACTED] to write it. [REDACTED] himself did not mention the book chapter, either in his letter on the petitioner’s behalf, or in his *curriculum vitae* (which mentions four other book chapters).

On February 19, 2008, the director issued a request for evidence, instructing the petitioner to establish the national scope of his intended work, and to show the influence of his work “outside the Emory University system.” In response, counsel stated: “***Various groups in local communities and on the national front are coming together to increase the number of hospitals equipped and trained to offer all forms of stroke therapy as well as the number of doctors trained in endovascular techniques***” (counsel’s emphasis). This establishes the national scope of the efforts to fight the effects of stroke, but it does not demonstrate that the efforts of one physician within that system are national in scope.

Counsel also asserted that the beneficiary “is a member of a small[] group of physicians who specialize in the area of neurocritical care. . . . Such specialists are needed nationwide, not just in a few geographic areas” (counsel’s emphasis). The petitioner himself contended that there are “probably less than 100 trainees” with his “specialized training” in the United States. Once again, a national need for physicians in the petitioner’s specialty does not establish that the work of one physician in that specialty has national scope.

With respect to the asserted scarcity of physicians in the petitioner's specialty, the labor certification process exists as a means to document and verify worker shortages, and therefore a worker shortage is not generally a strong argument for the national interest waiver. *See Matter of New York State Dept. of Transportation* at 218. Section 203(b)(2)(B)(ii) of the Act indicates that a physician shortage warrants a national interest waiver, but only under certain conditions:

(I) The Attorney General shall grant a national interest waiver . . . on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--

(aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

The petitioner has not satisfied the above conditions, or submitted the documentary evidence required under 8 C.F.R. § 204.12. The petitioner has simply asserted that there are few doctors in his specialty.

Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. Furthermore, the small number of specialists in neurocritical care appears to be attributable to its very recent designation as a specialty, as documented in the record, indicating that there may be an unknown number of physicians with comparable expertise who, having completed their training previously, are not classified as specialists in that area.

In response to the director's observation that all of the petitioner's initial witnesses are at Emory University, the petitioner submitted a letter from [REDACTED] now of Penn State College of Medicine, who previously trained with the petitioner at Emory. [REDACTED] stated that the petitioner "has not wavered from his dream of becoming an interventional neurologist. He completed his residency in neurology followed by a stroke fellowship and is now completing his neuro-critical care fellowship. After this he will enter a fellowship in neuroradiology/interventional neurology." Other materials submitted by the petitioner confirm that his training is ongoing, and incomplete, in the field through which he intends to benefit the United States.

The director denied the petition on May 7, 2008, stating that the petitioner "has not submitted documentation that his has published articles that [are] important or influential to other researchers in [his] field of endeavor," and that the "letters fall short of demonstrating the petitioner's influence on the field beyond his past and present educational institutions and circle of colleagues."

On appeal, the petitioner indicates that his “educational accomplishments since the initial [petition] have grown further.” The beneficiary of an immigrant visa petition must be eligible at the time of filing; subsequent developments cannot retroactively make the petitioner eligible as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Even if this were not so, the petitioner’s educational and academic credentials are not grounds for a waiver. The petitioner clearly is a member of the professions holding an advanced degree, but the statutory language quoted earlier in this decision is clear that such aliens are, generally, subject to the job offer requirement.

The petitioner asserts: “I do have an ongoing unique research project . . . which I believe will soon change the current management protocols of detecting vasospasm. . . . I . . . will be presenting my experience . . . at the Neurocritical Care Conference in Nov 2008.” The petitioner discusses other recent activities as well.

As noted above, pursuant to *Katigbak*, the petitioner must have been eligible as of the date of filing. The petitioner filed his petition on January 31, 2007. A proposed research presentation that was still five months in the future when the petitioner filed his appeal in June 2008 cannot establish that the petitioner already qualified for the waiver in January 2007. If the petitioner’s technique results in a substantial improvement in the outcome of stroke treatment, then it may eventually form the basis of a successful waiver claim at a time when the petitioner is able to produce persuasive evidence to that effect. For the purposes of this proceeding, however, we can only consider the state of the petitioner’s career and reputation as of January 2007.

New letters accompany the appeal. [REDACTED] discusses the petitioner’s mastery of “invasive brain monitoring devices such as the NeuroSensor® Cerebral Blood Flow and Intracranial Pressure Monitor. . . . Very few physicians even know this device exists, and yet [the petitioner] is becoming one of the leaders in its use.” Apart from the question of how the petitioner can have national impact by using an obscure device on a handful of patients, this is yet another instance of expertise that the petitioner acquired after he filed the petition.

[REDACTED] is a Senior Product Manager for Neurocritical Care at Integra LifeSciences Corporation, the company that manufactures the NeuroSensor device. Mr. [REDACTED] states that the device was “cleared to market . . . in August, 2007. Upon release of the device, Emory University Hospital was one of the very first facilities to utilize the device, largely due to the experience and leadership of [the petitioner] and Emory’s other neurocritical care medical staff.” There is no indication that the petitioner was even aware of the device when he filed the petition in January 2007, more than half a year before the device’s August 2007 release. Even if the chronology were not problematic, there is no indication that the petitioner played any part in the design of the device. Rather, he appears to have been among the first to learn its use. An alien’s job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. *Id.* at 221, n.7.

The petitioner states: "Please do consider the very early stage of my career which upon completion will only blossom further significantly, and also it being a factor in not having as much significant research output to date." The AAO has considered these factors, and they support denial based on insufficient evidence, rather than approval based on speculation or hope that the petitioner will eventually have a more productive research career.

Clinical patient treatment lacks national scope, as the direct benefits of a physician's services are limited to the physician's clientele. Published medical research has a wider effect, because research findings can be implemented by others, but the record contains little information about the nature and scope of the petitioner's research activities. The statute and regulations contain specific guidelines regarding the national interest waiver for physicians in shortage areas, but the petitioner has made no attempt to meet those guidelines, instead simply asserting that there are few qualified workers in his newly designated specialty.

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.