



U.S. Citizenship
and Immigration
Services

[REDACTED]

B5

DATE: DEC 27 2012

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. Subsequently, the petitioner filed a motion to reopen and reconsider. The AAO dismissed the motion to reconsider, granted the motion to reopen and affirmed its prior decision. The matter is now before the AAO on another motion to reopen. The AAO will grant the motion and affirm the dismissal of 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 an alien of exceptional ability in the sciences and as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. After training at East Tennessee State University (ETSU), Johnson City, he began his current employment at University of Iowa (UI) Community Medical Services. 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. The AAO has twice affirmed that decision.

On motion, the petitioner submits a brief from counsel; a witness letter; documentation regarding recent employment; and various background materials.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The petitioner's latest filing includes evidence intended to address issues that the AAO newly raised in its prior decision. Therefore, the AAO will grant the motion in order to consider that evidence.

The petitioner filed the Form I-140 petition on June 23, 2010. The director denied the petition on August 31, 2010, and the AAO dismissed the petitioner's appeal on December 15, 2011. The AAO issued its subsequent decision on motion on July 23, 2012. The AAO incorporates these prior decisions by reference, and will quote or summarize relevant passages as necessary in the present decision.

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.

Neither the statute nor the regulations provide substantive guidance regarding how to establish eligibility for the national interest waiver. *Matter of New York State Dept. of Transportation (NYSDOT)*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show 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.

On the petition form, the petitioner identified his intended occupation as "physician," and his job title as "physician, surgeon, osteopath." The petitioner's earliest evidentiary submission indicated that he was involved in research at ETSU, but it also showed that the petitioner's position there amounted to training rather than a career position.

The director, in denying the petition, found that the petitioner had not established that the benefit arising from his intended future employment would be national in scope. The director concluded that the petitioner's "impact will be limited to the hospital in which he will practice; therefore, the benefit of his skills will be limited to a small area."

In its dismissal decision of December 2011, the AAO stated:

Counsel asserts [on appeal] that the petitioner's "work towards the cure of cancer [is] national in scope." Published research is national in scope, but the petitioner's minimal research record appears to be tied to his ongoing training at ETSU. The record is devoid of evidence that the petitioner will be a researcher, rather than a clinical oncologist, after he completes his training. Furthermore, the only research that the petitioner appears to have been conducting as of the petition's filing date is the oft-touted NIH project which, according to witnesses, concerns "communication with cancer patients" rather than "the cure of cancer."

On motion from the AAO's first decision, counsel stated that "it was not reasonable for the A.A.O. to conclude that cancer research work in one location could not have national implications or benefits." The AAO, in its second decision, observed that there had been no finding that "cancer research work" lacked national scope. Rather, the AAO restated the finding that there was no evidence that the petitioner would continue to perform research once his training was complete.

The petitioner submitted a copy of a "Letter to the Editor" that appeared in the online edition of *Bone Marrow Transplantation* on November 14, 2011, written by four authors, including one [REDACTED], [REDACTED], affiliated with Vanderbilt University Medical Center and Veterans Affairs Medical Center,

both in Nashville, Tennessee. The petitioner had not previously claimed affiliation with either of those entities.

In its second decision, the AAO observed that the “Letter to the Editor” did not establish that [REDACTED] was an active researcher. Rather, the letter cited an article that did not name [REDACTED] among its authors. The AAO concluded: “The letter does not report new original research, but rather comments on prior research by authors other than [REDACTED] at an institution where the petitioner has never before claimed employment. The letter is not evidence that the petitioner has engaged in research since he left Tennessee for Iowa in mid-2011.”

The petitioner’s second and latest motion includes a copy of a March 21, 2011 letter from [REDACTED] associate dean of graduate medical education at Vanderbilt University Medical Center (VUMC), approving the petitioner’s request for a 30-day “elective rotation . . . in the Division of Hematology and Oncology . . . for the period of 4/1/2011 through 4/30/2011.”

[REDACTED] an associate professor at VUMC, worked with the petitioner “during his Bone marrow transplant rotation in April 2011.” [REDACTED] observed that he and the petitioner were co-authors of a piece that appeared in “one of the most reputed international journals in the field of bone marrow transplant.” That collaborative work, however, was simply the “Letter to the Editor” that the AAO has already discussed in some detail.

A printout from the publisher’s web site states: “*Bone Marrow Transplantation* publishes high quality, peer reviewed original research.” Citing this printout, counsel states: “No distinction is made based upon the format of presentation of the original research, suggesting that the format of the article as a ‘Letter to the Editor’ [is] of no relevance to its importance.” The record, however, does not show that the “Letter to the Editor” is a peer-reviewed article that reports new research; the quoted passage from the web site does not indicate that everything in the journal constitutes “peer reviewed original research.” The petitioner’s latest submission does not address or overcome the AAO’s findings regarding the piece.

The new evidence places the petitioner at VUMC shortly before the writing of the “Letter to the Editor,” and to that extent it addresses a concern raised in the prior AAO decision. The rotation at VUMC, however, was short-term. A reference to “the Office of Graduate Medical Education” suggests that this rotation was part of the petitioner’s ongoing training. The AAO had already acknowledged that the petitioner performed research as part of his temporary training duties. The new evidence from VUMC, therefore, describes more of the same.

The petitioner’s first motion also included evidence reporting the petitioner’s “appointment as Cancer Liaison Physician (CLP) at Regional Cares – Ottumwa Regional Health Center,” for three years beginning July 1, 2011. The AAO observed that the letter describing the appointment “does not indicate that a CLP’s duties include active participation in cancer research. Rather, the letter indicates that the CLP is responsible for making sure that the CLP’s own employing institution complies with CoC goals and practices. As such, the letter does not show that a CLP’s duties are national in scope.”

On motion, the petitioner submits documentation from summer 2011, reflecting the petitioner's registration as a "participating member" of the National Surgical Adjuvant Breast and Bowel Project (NSABP) and his one-year registration as an "investigator" by the National Cancer Institute (NCI). A June 26, 2011 letter from the NCI indicates that "investigators" administer experimental drugs to patients as part of the clinical trial process. A printout from the NSABP web site indicates that "more than 5000 physicians, nurses, and other medical professionals conduct NSABP treatment and prevention trials." The scale of the operation does not indicate that every participant is a "researcher" in any significant sense of the word. Rather, the evidence indicates that the "physicians, nurses, and other medical professionals" administer experimental drugs on behalf the researchers who are studying those drugs, and follow (rather than establish) protocols established by those researchers.

At about the same time as the petitioner became involved with the NSABP, UI's Carver College of Medicine offered the petitioner a three-year appointment as an adjunct clinical assistant professor, beginning July 1, 2012. The June 22, 2012 job offer reads, in part:

You will be asked to participate and present at Fellow teaching conferences. Also you may be asked to offer an elective rotation for Carver College of Medicine medical students and/or a rotation for Fellows at the UI Medical Oncology and Hematology, Ottumwa Clinic. You will be the on-site supervising physician for these learners.

You may be considered for promotion any time after the first three years of your appointment. . . . Briefly, promotion will be based on evidence of an appropriate amount of high quality teaching, good clinical service, and evidence of other contributions to the missions of the Carver College of Medicine.

The letter does not mention research. It is particularly significant that the specified criteria for promotion include "high quality teaching" and "good clinical service," but not participation in research. Furthermore, while the petitioner "may be asked to offer an elective rotation . . . at the UI Medical Oncology and Hematology, Ottumwa Clinic," the position's primary responsibilities are not in either of those specialties. Instead, the job offer is from the Department of Internal Medicine.

The materials submitted on motion do not establish that the petitioner is engaged in ongoing medical research, or that the AAO reached incorrect conclusions in its past decisions.

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.

ORDER: The motion to reopen is granted. The AAO's previous decision of July 23, 2012 is affirmed. The petition remains denied and the appeal remains dismissed.