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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAR 05 2012** OFFICE: NEBRASKA SERVICE CENTER



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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 seeks to “[w]rite, edit and publish acupuncture and oriental medicine text books, articles, handbooks, and refer[e]nce books; and perform the duties of an acupuncturist.” 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 did not establish that she qualifies for classification as a member of the professions holding an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner the petitioner submits a brief from counsel, a witness letter, and a newly published newspaper article. A later supplement to the appeal contains several additional exhibits including witness letters and research documentation.

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 first issue under consideration is whether the petitioner qualifies for the immigrant classification she seeks. The petitioner filed the Form I-140 petition on December 16, 2009. In the accompanying materials, the petitioner did not specify whether she seeks classification as a member of the professions holding an advanced degree or as an alien of exceptional ability in the arts, the sciences or business.

The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that the petitioner must meet at least three of six listed criteria in order to qualify as an alien of exceptional ability in the sciences, the arts, or

business. Neither the petitioner nor counsel has claimed that the petitioner meets at least three of those criteria.

The director denied the petition in part because the petitioner had not submitted evidence to meet at least three of the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). Counsel, on appeal, does not address or contest this finding. The AAO concludes that the petitioner has not claimed exceptional ability in the sciences, the arts or business. Further discussion of the issue would, therefore, serve no constructive purpose.

Both the petitioner's initial submission and subsequent appeal emphasize the petitioner's advanced degree. The AAO therefore concludes that the petitioner seeks classification as a member of the professions holding an advanced degree.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 8 C.F.R. § 204.5(k)(2).

A 2003 certificate in the record indicates that the petitioner "successfully completed the Regular courses in 'Anatomy and Neurobiology'" at the International Oriental Medicine Research Institute of the University of California, Irvine, but there is no indication that this course work led to an academic degree. The petitioner's initial submission also included documentation of the petitioner's March 2005 M.S. degree in Acupuncture and Oriental Medicine from South Baylo University (SBU), Anaheim, California, accredited by the Accreditation Commission for Acupuncture and Oriental Medicine, and her May 2006 Ph.D. in Oriental Medicine from American Liberty University (ALU), an unaccredited institution in Montgomery, Alabama. At the time she filed the petition, the petitioner was studying for a doctorate at SBU. Ongoing studies do not constitute a degree. Whatever issues may arise from the petitioner's incomplete doctoral studies at SBU and from ALU's lack of accreditation, the beneficiary's master's degree from SBU qualifies as an advanced degree.

Copies of certificates show that the California Acupuncture Board authorized the petitioner to practice acupuncture in California, and that the National Certification Commission for Acupuncture and Oriental Medicine has designated the petitioner as a diplomate in oriental medicine.

On February 19, 2010, the director issued a request for evidence (RFE), instructing the petitioner to submit further information and documentation regarding her "proposed employment as an acupuncturist." The petitioner's response did not include any new evidence. Instead, the petitioner submitted a letter from counsel, stating, in part: "The alien is not seeking employment. Rather, she is seeking qualification as an author of Oriental Medicine books which have national and international use and effect. Authors of books are traditionally self-employed and do not displace U.S. workers."

The director denied the petition on September 1, 2010, stating:

While the statute and regulations allow for an exemption of a job offer, they do not allow for the exemption of any other requirements of the visa classification, namely that the occupation . . . requires an advanced degree. . . . [T]he petitioner has not established that an advanced degree is required to perform services as an author of oriental medicine books. It is not enough to simply establish that an alien holds an advanced degree; the petitioner must also demonstrate that the proposed employment itself requires a professional holding an advanced degree or an alien exceptional ability.

...

There is nothing to suggest that an advanced degree is required to perform services as an author of Oriental Medicine books.

The AAO disagrees with the director's assertion that "the petitioner must . . . demonstrate that the proposed employment itself requires a professional holding an advanced degree or an alien exceptional ability." This stated requirement comes from the USCIS regulation at 8 C.F.R. § 204.5(k)(4)(i). That regulation, however, applies only to petitions that include a job offer. The cited regulation states, in pertinent part: "The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent." If the petitioner seeks a waiver of the job offer requirement, then there is no individual labor certification, Schedule A application, or Pilot Program application, and thus there is no "job offer portion" to contain the required information. Where, as here, there is no specific job offer, there can be no specific job requirements.

Although the regulation at 8 C.F.R. § 204.5(k)(4)(i) does not apply in instances involving national interest waiver requests, there remains the requirement that the petitioner must be a member of the professions. At this point, the director's basic logic still applies. The petitioner, through counsel, has asserted that she seeks classification not through her work as an acupuncturist, but as an author. The petitioner must, therefore, establish that authorship of acupuncture books is a profession in its own right. (The AAO notes that the record does not show that acupuncture itself qualifies as a profession. The record shows that the State of California requires certification of acupuncturists, but there is no evidence that one must hold at least a bachelor's degree to qualify for certification.)

On appeal, counsel states:

The Director erred . . . by concluding that an author of Oriental Medicine books to be used by professionals that include licensed acupuncturists, professors of Oriental Medicine, and graduate students did not need an advanced degree. Clearly, to author such books, one necessarily must have the academic background to know and understand anatomy, acupuncture techniques, how to diagnose and treat problems; the use, benefits and precautions of oriental medicines; etc. Certainly, a medical desk or course book cannot and should not be written by someone without a related medical or science degree.

The unsupported assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 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). Counsel's use of the words "clearly" and "certainly" does not transform the above claims into established or uncontested facts. Counsel does not identify any authority, public or private, that prevents unqualified authors from writing books on acupuncture and oriental medicine. Counsel may be right that individuals untrained in acupuncture and oriental medicine "should not" write instructional books on the subject, but it does not follow that such individuals "cannot" do so.

The wording of section 101(a)(32) of the Act is instructive: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Congress did not choose these occupations arbitrarily. Each of the listed occupations involves some type of licensure or other system by which a prospective worker must demonstrate his or her credentials in order to work in the field. An untrained or unqualified individual cannot simply set up shop as an architect or surgeon. The petitioner has not shown that the same safeguards exist for the authors of books on acupuncture and oriental medicine.

The petitioner's supplement to the appeal concerns recent research that the petitioner conducted in furtherance of her doctoral studies, and does not address the director's finding about the nature of her occupation.

The petitioner has not claimed exceptional ability in the arts, the sciences or business, and has not established that her intended occupation as an author of books about acupuncture and oriental medicine qualifies as a profession. Therefore, the petitioner has not shown that she qualifies for either of the two classifications described at section 203(b)(2) of the Act. The AAO will therefore affirm the director's finding in this regard.

The second and final issue 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 petitioner cannot qualify for the waiver unless she otherwise qualifies as an alien of exceptional ability in the arts, the sciences or business, or as a member of the professions holding an advanced degree. The AAO will, nevertheless, consider the waiver claim in the interest of thoroughness.

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 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 (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 United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish 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 intention behind the term “prospective” is 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.

The AAO also notes 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.

In a statement accompanying the petitioner’s initial submission, counsel stated that the petitioner’s “diverse education and experience within the field of Oriental Medicine will greatly expand the body of acupuncture, herbal and formulaic knowledge in the United States. The Applicant’s contributions to the field of Oriental Medicine are evidenced through her extensive authorship of clinical reference books relied upon by practitioners and students alike.”

All of the petitioner’s documented education in acupuncture and oriental medicine took place at institutions in the United States. There is no evidence that the petitioner brought any new knowledge in those subjects to the United States. (The petitioner’s claimed studies before she entered the United States were in theology, language, and home economics.) Counsel does not explain how it “expand[s] the body of knowledge of acupuncture, herbal and formulaic knowledge in the United States” for the

petitioner to write instructional books detailing what she, herself, evidently learned in the United States.

The petitioner submitted English-language materials under the collective heading *The Book of Korean Oriental Medicine*, and Korean-language materials under the heading *Korean Acupuncture Class*. Occasional English annotations on the Korean materials indicate that the Korean materials cover the same subjects as the English materials. The English-language excerpts comprise the table of contents, listing the subjects covered but providing no substantive content. The Korean-language materials are, likewise, in the format of a table of contents, showing brief phrases paired with page numbers.

Counsel claimed that the petitioner's work is "relied upon by practitioners and students alike," but the materials in the record are in unbound manuscript form. The record contains no first-hand, documentary evidence that any publisher has ever published any "clinical reference books" by the petitioner. Instead, the petitioner has submitted five witness letters. Three of the witnesses are [REDACTED] faculty members. [REDACTED] doctoral program and one of the petitioner's former instructors, stated:

Her books are all excellent. They are so synoptic and concise, yet crystal clear that students in the oriental medicine would be greatly benefited for the preparation of the medical board examination as a study guide as well as a desk reference book for the practitioners. Her book in the area of western medicine, entitled as the Pathology, Clinical tests and Orthopedic Physical tests is recommended to my students. My students rated the book highly and accepted well by all.

[REDACTED] letter indicates that the petitioner has written a "book in the area of western medicine." The cover page of one set of English-language materials reads:

The Book of Korean Oriental Medicine

Pathology · Orthopedic Physical

Western Medicine

1. Pathology
2. Clinical Lab test
3. Orthopedic physical test

With respect to counsel's assertion that "a medical desk or course book cannot and should not be written by someone without a related medical or science degree," the petitioner does not claim to hold any degrees in "western medicine," pathology or orthopedics.

[REDACTED]

One of [the petitioner's] books, the Acupuncture Points, Acupuncture & Moxibustion, is an excellent book. I am very satisfied with her book so that her book is recommended to my students for their references. Her book will contribute to the patients with problems of narcotics, smoking, alcoholics, obesity, diabetics, and hypertension. Acupuncture Points, Acupuncture & Moxibustion, has received high ratings from students and professors. It is not only used as learning aids but also as a reference for clinical practice.

[redacted] who teaches master's and doctoral courses at SBU, stated:

Two of [the petitioner's] books, [redacted] Chinese Medicine, are excellent. It is sufficient to be used as a study guide by students, since it thoroughly explains the concept of Chinese Medicine in an easily understandable manner.

Acupuncturist [redacted] whose master's studies at SBU overlapped with those of the petitioner, stated:

I am using . . . Herbs & Formulas any time by [the petitioner] when I prepare . . . herbal tonic for my patients. I realized that my patients showed outstanding improvements [in] their health.

I wholeheartedly recommend . . . Herbs & Formulas by [the petitioner], not only for students of Oriental Medicine but also [for those who] intend to study more systematically as well as the ones who want to obtain materials needed in the clinic, because the Herbs & Formulas, is an excellent book. . . . This is a valuable review for any herbalist and provides information integral to understanding the principles of prescribing Chinese herbs.

[redacted]

[The petitioner] is an excellent writer, who has written books that specifically clarify distinct herbs and related formulas, thereby helping simplify what would otherwise be a very arduous subject for Chinese medicine students.

These books are also of much help to clinical treatments because they compare much of the same symptoms, and therefore have practical applications for diseases of Western medical science as well.

The above descriptions are vague and general, providing little information except to describe the subject matter covered in the petitioner's books.

In the February 2010 RFE, the director instructed the petitioner to submit evidence to show meet the guidelines set forth in *NYSDOT*. As noted previously, the petitioner's response to the RFE consisted solely of a short letter from counsel. Counsel stated: "As supported by the supporting letters, her books are and will be used by oriental medicine practitioners as well as students. Certainly, books that facilitate the treatment of people in healing ailments and improving their health are in the national interest."

The director, in the RFE, had specifically stated that "the petitioner seeking the waiver must establish that the alien will serve the national interest t[o] a substantially greater degree than would an available U.S. worker having the same minimum qualifications." Counsel's response did not address this point, focusing on the general merit of "books that facilitate the treatment of people" instead of any attempt to distinguish the petitioner from others engaged in the same work. There exists no blanket waiver for textbook authors. Therefore, the observation that textbooks in the healing arts "are in the national interest" does not demonstrate or imply that every author of such books qualifies for the waiver.

In the denial notice, the director did not dispute the intrinsic merit or national scope of the publication of textbooks. The director found, however, that the petitioner failed to distinguish her work from that of other authors on the same subjects. The director stated: "the witness statements stress the petitioner has and will continue to have a profound [impact] on the field of Oriental Medicine, but the record lacks corroborating evidence of such an impact."

On appeal, counsel states that the petitioner "is an author of books that have been, and will continue to be, used by acupuncturists, professors and students nationwide." The record, however, contains no evidence that the petitioner's books have been published at all, let alone that they are "used . . . nationwide." All of the petitioner's witnesses, both initially and on appeal, are in Los Angeles.

The petitioner's appeal includes a new letter from [REDACTED] which adds nothing of substance to the record. It mostly repeats the earlier letter from the same witness, with the added assertion that "someone who does not possess at least a Master's degree in Acupuncture and Oriental Medicine would not be able to write such professional books."

The petitioner also submits a translated copy of the petitioner's "Article about Wind-Stroke" published in the *Korea Times* on September 15, 2010 (two weeks after the director denied the petition). Even if the petitioner had shown that this article is an important contribution to medical writing, it could not establish the petitioner's eligibility as of the petition's December 2009 filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The publication of this article on September 15, 2010 cannot retroactively show that the director erred two weeks earlier by denying the petition on September 1, 2010.

In this instance, the petitioner did not establish the significance of the article. Its submission establishes only that it exists. The appeal, like the initial petition, does not show that the petitioner had published anything before the petition's filing date.

As noted previously, the petitioner submitted a supplement to the appeal more than a year after its filing. Except for undated exhibits, every exhibit dates from September 2011 or later, long after the petition's December 2009 filing date. The exhibits concern research that the petitioner performed as part of her doctoral studies at SBU. Counsel had previously asserted that the petitioner seeks a national interest waiver not as an acupuncturist (which counsel calls "incidental"), but rather "as an author [REDACTED]." None of the materials in the untimely 2011 supplement relate to the petitioner's work "as an author of Oriental Medicine books." 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 (Comm'r 1998). Therefore, the AAO rejects the petitioner's attempt, two years after the petition's filing date, to recast herself as a researcher instead of as an author of reference books. The untimely supplement to the appeal does not address the stated grounds for denial, and does not establish the petitioner's eligibility for the national interest waiver.

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 AAO will dismiss the appeal for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.