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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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DATE: **MAY 17 2012** OFFICE: TEXAS SERVICE CENTER



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:

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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 under 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 employment as a pharmacist. At the time he filed the petition, the petitioner was studying for a doctor of pharmacy (Pharm.D.) degree at the Massachusetts College of Pharmacy, Worcester. 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 supporting 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 director found that the petitioner qualifies as a member of the professions holding an advanced degree (although the AAO will revisit this issue *de novo*). 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, 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 (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.

The petitioner filed the Form I-140 petition on September 9, 2010. Part 6 of that form bears the heading “Basic information about the proposed employment.” On line 1, “Job Title,” the petitioner stated “Pharmacist, Dietician.” On line 2, “SOC Code,” the petitioner wrote “29-1050,” which is the Standard Occupational Classification code for pharmacists. Elsewhere on the petition form, the petitioner listed his current occupation as “student.” On Form ETA-750 B, Statement of Qualifications of Alien, the petitioner stated that he seeks employment both in “pharmacy” and in

“teaching math.” The record contains no further claim that the petitioner qualifies as a “dietician” or intends to pursue a career in that field.

In an accompanying statement, the petitioner stated:

I received my bachelors in mathematics education from University of Cape Coast in Ghana . . . [and taught] Algebra and Pre-calculus for one year. Then . . . I was admitted into the graduate program at University of Massachusetts-Amherst, UMASS, for my MEd (mathematics)[.]

My dedication to the world of education in mathematics geared my interest towards the Springfield Public Schools-MA, where I volunteered for years before graduation.

. . .

With such a busy schedule combined with academic work at UMASS, I worked closely with Professor Irving Seidman on his 3<sup>rd</sup> edition, *Interviewing as a Qualitative Research*. I did most of his literary research work and helped him conduct some interviews which were pertinent to the published book. Professor Seidman encouraged and enlightened me about the need for further studies upon completion of my graduate program. This advice heightened my interest in the pharmacy program. . . .

I worked very hard towards this goal through the accelerated program at Massachusetts College of Pharmacy, Worcester, which has brought me close to the end of getting a doctorate degree (May 2011) shortly after my MEd [in] mathematics. With such intensive, rigorous, and loaded academic semesters, I still volunteered to tutor in the Worcester Public School system while pursuing this program. . . . I have had the opportunity to make both oral and poster presentations to various professionals in the pharmacy world currently as a student.

My goal is to work tirelessly and diligently to offer the professional knowledge, skills and the certifications I have acquire[d] in pharmacy and mathematics education.

The petitioner submitted a partial copy of [REDACTED] showing that the petitioner provided “research assistance” for the book. The petitioner also submitted materials from research presentations and case reports, such as an electronic slide presentation entitled “Insulin and Future Development.” In addition, the petitioner submitted copies of his credentials as a teacher and as a pharmacy intern.

On April 21, 2011, the director issued a request for evidence, instructing the petitioner to submit evidence to meet the guidelines set forth in *NYS DOT*. The director specifically asked for “evidence that clearly demonstrates the significance of the beneficiary’s efforts in the field.” In response, the petitioner stated:

Working as a professional mathematics teacher with the school system, I dedicated my time with my multicultural background experience to fill in the numerous gaps that were created by the numerous mathematics teachers who fled from the district. . . . Having graduated from a nationally accredited university with a professional license in mathematics it is obvious that I will contribute tremendously to the upbringing of our students in the area of mathematics. . . .

I have successfully graduated from a nationally accredited university with my doctorate in pharmacy. . . . Throughout my studies, I contributed to the improvement of patient care at various hospitals where I interned. . . . My work through data collection and antibiotic stewardship lead to a complete antibiotic review which impacted clinical practice by changing prescribing patterns in the hospital. Also, my dedication to monitoring coagulation therapeutic regimen and recommending dosage adjustments helped tremendously save patients['] lives.

The petitioner documented his May 2011 D.Pharm. degree and his ongoing licensure to teach mathematics for grades 8-12. The petitioner also submitted several witness letters. Many of the witnesses did little more than verify the petitioner's past employment, but others provided additional information.

[REDACTED] assistant principal of the [REDACTED] Springfield, Massachusetts, stated that the petitioner's skill with students "and incredible talent in the classroom . . . are huge accomplishments in an urban setting with high risk students." Ms. Mason did not convey the impression that the petitioner would continue teaching. Rather, she stated:

I was saddened to lose but simultaneously pleased to write a letter in support of his pharmaceutical studies. Most recently, I am absolutely thrilled to be asked for another letter [to] support his search for employment. . . . I would choose a pharmacy to have him behind the counter as I would have all the confidence in the world that he would only deliver the best service and the best product.

For all the above reasons and those too numerous to mention, I most highly recommend [the petitioner] to you as a potential leader in your business.

Dr. Ping Zhao, associate professor and director of the mathematics program at Bay Path College, Longmeadow, Massachusetts, stated:

I . . . got acquainted with [the petitioner] when he started teaching for Bath [sic] College as an adjunct faculty in Spring 2008.

[The petitioner]'s experience in teaching mathematics to a wide variety of students is a great asset to Bay Path College. . . . Our classes require online web-based software

for teaching and learning, and he mastered the software quickly and has succeeded in teaching at Bay Path College.

The witnesses quoted above attested to the petitioner's competence as a math instructor, but they did not indicate that the petitioner has had national impact or otherwise stands apart from other math teachers to an extent that would justify a national interest waiver. Furthermore, as [REDACTED] acknowledged, the petitioner's pursuit of a professional degree in a field unrelated to teaching or mathematics calls into question the petitioner's intention of remaining in the teaching profession.

[REDACTED] Mercy Medical Center, Springfield, "had the pleasure of working with [the petitioner] over two [six-week] rotations while he completed his training to become a licensed Pharmacist":

The first rotation . . . was an Advanced Institutional Experiential Rotation. . . . [The petitioner] first observed the workings of pharmacy technicians and pharmacists in order to understand the operations of a hospital pharmacy. . . . [H]e then applied this knowledge and actively participated as a member of the hospital pharmacy team. . . .

The second rotation . . . was an Advanced Internal Medicine Rotation. It was during this rotation that [the petitioner] applied his clinical knowledge to provide high quality pharmaceutical care to the patients during their hospitalization. Medications were verified according to their proper use and dose required to treat the individual patient. . . . There were two major projects that [the petitioner] played an integral part in during this rotation:

- Antibiotic monitoring: There were three antibiotics in particular that the pharmacy thought were being use[d] inappropriately by the prescribers. [The petitioner] was tasked with examining the charts of patients that were receiving these antibiotics to ensure that they were being utilized appropriately. . . . In response to his work, it was recommended that a new process be started that requested prescribers obtain an Infectious Disease consult for patients using these three antibiotics. This suggestion was approved . . . and will begin shortly.
- Anticoagulant monitoring: . . . Anticoagulants are considered a High Risk class of medication as a large proportion of patient adverse events (including death) has been attributed to them. [The petitioner] was handed a daily report of hospitalized patients that were utilizing at least one anticoagulant. It was his task to monitor all those patients for any signs or symptoms of bleeding. He also looked for any abnormal laboratory values that might be a warning of potential complications. . . . With the [petitioner's] help . . . , this hospital was able to nail down a process in which patients on High Risk anticoagulant therapy would be monitored on a daily basis to prevent adverse events relating to the anticoagulants.

The above-quoted letter identified specific contributions that the petitioner made to the hospital where he trained as a pharmacist, but the record does not show that any other institutions have implemented the procedural reforms described. Furthermore, the letter did not indicate that the petitioner personally developed the new procedures concerning antibiotics or anticoagulants – only that the petitioner gathered patient data used in formulating those procedures.

The director denied the petition, stating that the petitioner had not clearly identified his intended occupation (either a math teacher or a pharmacist). The director found that the petitioner had not shown that either of those occupations has national scope, or that the petitioner has had a significant impact in either occupation.

On appeal, counsel consistently and exclusively refers to the petitioner as a pharmacist. Counsel discusses the intrinsic merit of pharmacy, which the director did not contest. Counsel then states:

While undergoing his PhD [*sic*] training in pharmacy, the Applicant demonstrated an outstanding research ability and capability in patient pharmaceutical care. In his book, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences*, Dr. Irving Seidman . . . stated that Applicant was “an outstanding graduate student . . . [in] command of the new electronic databases” who provided invaluable research assistance.

When the petitioner helped [REDACTED] with the book named above, he was studying for a master’s degree in education and had no formal training at all in pharmacy. It is, therefore, highly misleading for counsel to associate the petitioner’s work with [REDACTED] with “his PhD training in pharmacy.” The title of the book, quoted by counsel, does not indicate even a passing association with pharmacy. The AAO notes that the petitioner studied for a Pharm.D., not a Ph.D., in pharmacy.

Counsel states: “It is indisputably true that the delivery of pharmaceutical care plays a fundamental role in the nation’s health care system and, by extension, in the economy itself.” The national scope of an industry or field, however, does not necessarily imply that the work of one person in that industry or field has national scope. *See NYSDOT*, 15 I&N Dec. 217, n.3.

Counsel points to research that the petitioner conducted, but this research was part of his graduate education. The petitioner has not claimed that, as a pharmacist, he will participate in conducting and disseminating research, or that such research is an inherent duty of pharmacists (as opposed to graduate students).

Ostensibly turning to the third prong of the *NYSDOT* national interest test (which is “specific to the alien,” *id.* at 217), counsel simply makes a series of general assertion about pharmacists. For example, counsel states “pharmacists are becoming more involved in patient care” and “more individuals will be needed” in the profession. Because these assertions apply to every qualified pharmacist, counsel, in effect, contends that there should be a blanket waiver for pharmacists. As

members of the professions holding advanced degrees, pharmacists fall under section 203(b)(2) of the Act, which subjects such aliens to the job offer requirement. Congress created a blanket waiver for certain physicians at section 203(b)(2)(B)(ii) of the Act, but has not done so for pharmacists. Absent such statutory authority, USCIS will not create blanket waivers for every alien in a given occupation or profession. *See id.* at 217.

For the reasons specified above, the petitioner has not established that he qualifies for a national interest waiver as a pharmacist. Because the appeal does not mention the petitioner's work as a math teacher, the petitioner has effectively abandoned any claim to a waiver through that employment. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (plaintiff abandoned his claims because he failed to raise them on appeal to the AAO).

The AAO may identify additional grounds for denial beyond what the Service Center identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

As noted above, the petitioner claims eligibility for classification as a member of the professions holding an advanced degree, and intends to work in the United States as a pharmacist. The director found that the petitioner qualifies for the underlying immigrant classification because he holds "a Master's degree in Education from the University of Massachusetts." That degree, however, pertained to the petitioner's work as a math teacher, not as a pharmacist. As explained previously, the petitioner has abandoned that claim to focus on his intended work as a pharmacist.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) provides the following definition:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

According to the Department of Labor's Occupational Outlook Handbook, "Pharmacists must have a Doctor of Pharmacy (Pharm.D.)."<sup>1</sup> Therefore, for immigration purposes, an aspiring pharmacist who does not yet hold a Pharm.D. degree does not yet qualify as a member of the professions holding an advanced degree. The record shows that the petitioner earned his Pharm.D. degree on May 15, 2011, more than eight months after he filed the petition on September 9, 2010.

<sup>1</sup> Source: <http://www.bls.gov/ooh/healthcare/pharmacists.htm> (printout added to record May 9, 2012).

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). A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. The beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The beneficiary held an advanced degree before the filing date, but not in pharmacy or any closely related field. The degree or major must be academically appropriate to the profession for which petitioned. *Id.* at 46.

Pharmacy customarily requires a doctorate, which the petitioner did not hold at the time he filed the petition in September 2010. Therefore, the AAO must withdraw the director's finding that the petitioner, at the time filing, qualified as a member of the professions holding an advanced degree.

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. Furthermore, the petitioner has not established that, as a pharmacist, he qualified for the underlying classification as of the petition's filing date, in which case he was not eligible even to apply for the waiver.

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.