

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **JAN 09 2014** 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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the 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 petitioner filed a second motion to reopen. The AAO granted the motion and affirmed the dismissal of the appeal. The petitioner filed a third motion to reopen. The AAO dismissed the motion and affirmed its prior decision. The matter is now before the AAO again on a fourth motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

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. According to parts 5 and 6 of the Form I-140, Immigrant Petition for Alien Worker, the petitioner identified his intended occupation as "physician," and his job title as "physician, surgeon, osteopath." After training at [REDACTED] the petitioner began his current employment at [REDACTED]. 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 qualified for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (NYSDOT), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that he seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

The director found that the petitioner's work as a physician in the field of medical oncology was in an area of substantial intrinsic merit. However, the director, in denying the petition, determined 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." The director also determined that the petitioner had not established that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The AAO has upheld the director's findings four previous times.

In the AAO's most recent decision dismissing the petitioner's motion on August 28, 2013, the AAO determined the petitioner had failed to establish that the benefits of his work would be national in scope and that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

With the current motion, the petitioner submits a letter from counsel contesting the AAO's previous decision; documentation indicating that the petitioner coauthored a manuscript submitted for publication in *Expert Review of Hematology* entitled [REDACTED] an update"; and a copy of the January 11, 2013 letter of support from Dr. [REDACTED] that was previously submitted in support of the prior motion.

Counsel asserts that the manuscript submitted for publication in *Expert Review of Hematology* and the letter from Dr. [REDACTED] show that the petitioner's work is national in scope and that the national interest would be adversely affected if alien employment certification were required for the petitioner. Counsel argues that the petitioner "could not reasonably be expected to submit evidence on work which had not been performed or completed at the time of his previous filings."

While the second eligibility factor set forth in *NYS DOT* requires the petitioner to demonstrate that the proposed benefits of his work will be national in scope, projects that come to fruition after the petitioner's filing date fail to establish his eligibility as of that date. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). While original contributions or significant research findings made by the petitioner after the filing of the petition may be considered in the course of a new petition, they cannot retroactively establish the petitioner's proposed benefits and influence on the field for the current petition.

In addition to finding that Dr. [REDACTED] letter failed to establish the petitioner met the eligibility requirements at filing, the AAO's August 28, 2013 decision dismissing the motion also stated:

Dr. [REDACTED] asserts that the petitioner is "a necessary component" of a "large research network" in Iowa and that the petitioner has been a "positive influence on the entire local community," but Dr. [REDACTED] fails to explain how the petitioner's influence or impact as a cancer researcher is national in scope. Dr. [REDACTED] does not point to specific research findings by the petitioner indicating that his original work has had, or will continue to have, an impact beyond the [REDACTED]. In addition, Dr. [REDACTED] fails to provide specific examples of how the petitioner's research findings have influenced the field as a whole. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *NYS DOT* at 219, n.6.

Furthermore, in regard to the third eligibility factor set forth in *NYS DOT*, research work submitted for publication after the date of filing does not constitute evidence that the petitioner's findings were already influential as of that date. Regarding the petitioner's co-authorship of a manuscript submitted in July 2013 for publication in *Expert Review of Hematology*, there is no evidence demonstrating that this work had commenced at the time of filing the petition on June 23, 2010. Again, eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at

49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. The petitioner must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. Consistent with the preceding precedent decisions, a petitioner cannot secure a priority date in the hope that his yet unpublished research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Accordingly, the petitioner's manuscript that was not yet published as of the date of filing and, thus, had not been widely disseminated in the field as of that date, cannot establish his eligibility for the national interest waiver as of the date of filing.

The documentation submitted by the petitioner on motion does not overcome the AAO's previous findings. The petitioner has not established that the work he was engaged in or had completed at the time of filing had benefits that were national in scope and had influenced the field as a whole. *See NYSDOT* at 219, n.6. 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.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The AAO's August 28, 2013 decision is affirmed. The petition will remain denied.