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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

DATE: **JUL 02 2014** OFFICE: NEBRASKA 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)

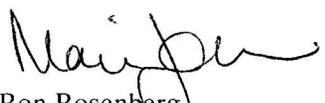
ON BEHALF OF PETITIONER:

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, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before us at the Administrative Appeals Office on appeal. We 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 physician. At the time he filed the petition, the petitioner was nearing the end of a one-year surgical pathology fellowship at [REDACTED] a teaching hospital of [REDACTED] in [REDACTED], Missouri. He later accepted a position as a fellow in gastrointestinal and hepatobiliary pathology 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 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 legal statement and copies of recent electronic mail messages.

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.

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, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 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.

In re New York State Dep’t 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 the alien 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 the alien 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.

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. *Id.* at 219. The petitioner’s assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term “prospective” is included 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. *Id.*

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on June 21, 2013. The petition included an introductory legal statement that reads, in part:

[The petitioner] has demonstrated his remarkable abilities as a medical researcher through his influential publications that have been instrumental in educating other clinicians. . . . [The petitioner] remains active in performing landmark research. . . .

[The petitioner] has performed research that is regarded as uniquely important and practically significant among his peers and within the medical community. For example, [the petitioner] showed for the first time the importance of obtaining levels when diagnosing fungal disease of the nail. . . .

The introductory statement establishes the intrinsic merit of the petitioner’s occupation, and the national scope of the benefit from his published and presented work. The petitioner’s introductory legal statement addressed the third prong of the *NYSDOT* national interest test with the assertion that the

petitioner “is constantly teaching the use of the skills to both junior and even senior peers. As such, he is creating a ripple effect that is making the performance of these procedures more widespread nationally.” The petitioner did not identify the procedures in question, or establish that he personally developed any widely used medical procedures. Teaching existing procedures, while employed at a teaching hospital, does not distinguish the petitioner from other physicians similarly engaged.

The introductory statement addressed the labor certification issue:

Please note that [the petitioner] has extensive responsibilities as both a clinician and as a medical researcher. However his contractual services encompass clinical work only. This is customary in the medical profession. Virtually all academic researchers who are not yet permanent residents are not reimbursed contractually for any research work that they may perform. Furthermore, since the Department of Labor does not allow for a combination of occupations when filing a labor certification, such a combination is not possible. A very significant percentage of the patients that [the petitioner] treats receive Medicare Medicaid [sic]. His outstanding diagnostic abilities allow him to diagnose these patients at earlier stages of their illness than [sic] the large majority of his colleagues would be able to. This saves the federal government a great amount of money because the need for later much more expensive and often invasive procedures is avoided. . . .

[The petitioner] is very well-known for his diagnostic ability. He is also known for his ability to deal with tremendous efficiency and precision in emergency situations where there is literally no margin for error and not a minute to waste.

The petitioner submitted no evidence to support the above claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

There is no blanket waiver for physicians who treat patients on Medicaid and/or Medicare, and the petitioner has submitted no evidence to show that his work has resulted in nationally significant savings in Medicaid or Medicare costs. The assertion that other doctors would make poorer or later diagnoses, resulting in greater costs, amounts to unsupported speculation.

Regarding the claim that “the Department of Labor does not allow for a combination of occupations when filing a labor certification,” the Department of Labor regulation at 20 C.F.R. § 656.17(h)(3) states:

If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers

normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity.

The quoted regulation shows that “a combination of occupations” is acceptable under certain specified conditions. Furthermore, several letters from university faculty members include the authors’ *curricula vitae*. These materials routinely show both clinical duties and research duties, as well as teaching duties, indicating that the combination of duties is customary for faculty members at medical schools. The petitioner has not shown that the Department of Labor will not approve labor certification applications for medical school faculty positions.

The petitioner did not indicate that he seeks future employment at a medical school, but rather as a physician. The petitioner’s documented research has been integral to his ongoing medical training, including his fellowship at [REDACTED]. The petitioner has not established that he has either the opportunity or the intention to continue pursuing research once his training is complete.

The petitioner submitted copies of two articles showing him as a co-author, as well as abstracts and other materials from presentations he has made. The earlier of the petitioner’s articles, published in the *Journal of Cutaneous Pathology* in 2010, compared two types of stain used to diagnose onychomycosis (fungal infection of the nail). The petitioner documented two citations of the 2010 *Journal of Cutaneous Pathology* article, and asserted: “This article was also recognized by F1000 prime faculty network,” which “identifies and recommends the most important articles in biology and medical research publications.” The petitioner quoted the F1000 (Faculty of 1000) recommendation as stating that his article is “the most thorough and balanced to date” on the subject. The petitioner subsequently submitted a partial copy of the recommendation, of which only the first three lines are legible; one must have an F1000 account to view the full article. The legible portion includes the quoted language. The petitioner claimed: “Since its establishment in 2002, only 29 articles on the topic of onychomycosis has [sic] been recommended by F1000, 8 of which only had an average rating of very good or above. Our article was among these 8.” The petitioner submitted no evidence to support this assertion. Even then, the petitioner did not establish that the low number of articles on the subject is the result of the difficulty of the subject, rather than the narrowness of the specialty or a lack of interest within the field.

In his *curriculum vitae*, the petitioner stated that his latest research at [REDACTED] concerned genetic analysis of tissue removed in “a rare case where the patient presented with a benign tumor that was removed and recurred twice to finally develop into a malignant phyllodes tumor.” This project was still at an early stage when the petitioner filed the petition; he described activities that he “will perform” as part of the research. When the petitioner filed the petition on June 21, 2013, less than ten days remained in his one-year fellowship at [REDACTED]. The petitioner’s submission contains a mention of his upcoming employment at [REDACTED] and therefore the petitioner was aware of his upcoming change in employer and specialty.

The petitioner submitted several letters with the petition. [REDACTED] Professor [REDACTED] stated:

It is my opinion that [the petitioner] is one of a select group of extraordinary pathology specialists whose expertise has been instrumental in diagnosing patients’ diseases, and

has saved thousands of lives. Undoubtedly, his continued practice in the field and research publications will save the lives of thousands more. Furthermore, with the nationwide shortage of practicing physicians in the U.S. today, it would be in the national interest to approve the immigrant visa petition of [the petitioner], for he is an exceptional physician.

The record lacks evidence to support the claim that the petitioner's work "has saved thousands of lives." See *Matter of Soffici*, 22 I&N Dec. at 165.

With respect to the claimed "nationwide shortage of practicing physicians," a shortage of qualified workers is not grounds for a national interest waiver under *NYS DOT*, because the labor certification process exists to address those shortages. See *NYS DOT*, 22 I&N Dec. at 218. Verifying the existence of the claimed shortage lies under the Department of Labor's jurisdiction. *Id.* at 221.

Section 203(b)(2)(B)(ii) of the Act describes an alternative waiver procedure for certain physicians in designated shortage areas. To qualify for that waiver, it cannot suffice for the petitioner to submit a letter referring to a general shortage of physicians. Rather, the USCIS regulation at 8 C.F.R. § 204.12 sets forth the specific requirements for the physician shortage waiver. The petitioner has not addressed or attempted to meet any of these requirements. The general claim of a shortage is without effect in the present proceeding.

Regarding the claim that the petitioner is entitled to the waiver "for he is an exceptional physician," the plain wording of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability in the sciences, the arts, and business are subject to the job offer requirement. The USCIS 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. 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.

Dr. [REDACTED] a dermatopathologist at [REDACTED] co-author of the 2010 article in the [REDACTED] stated that the petitioner's *curriculum vitae* provides "[e]vidence of [his] outstanding reputation as one of the top surgical pathologists and physician-scientists in the nation." The petitioner's own *curriculum vitae* lists his credentials and achievements, but is not, itself, evidence of his reputation in the field.

Other writers are from various medical schools and institutions. Some of the writers praised the petitioner but did not offer any details about the nature or significance of the petitioner's work. For example, Dr. [REDACTED] medical director of the [REDACTED] Foundation, stated that the petitioner "is a phenomenal pathologist . . . whose research markedly affects the field of medicine," but she did not elaborate on the point. Professor [REDACTED] called the petitioner "an outstanding pathologist" and listed the petitioner's past employment history. Professor [REDACTED] praised the petitioner's "landmark work" and "pioneering research" but did not describe it except for the petitioner's planned work on phyllodes

tumors. Prof. [REDACTED] acknowledged that this research had not yet been conducted, but claimed: “This work is highly anticipated in the field.”

Other writers commented on the petitioner’s specific work. Dr. [REDACTED], associate professor at the [REDACTED] described the petitioner’s article on onychomycosis and noted its F1000 recommendation. Dr. [REDACTED] whose specialty is dermatology, did not claim any expertise in the petitioner’s field of pathology.

The director issued a request for evidence (RFE) on August 28, 2013. The director stated that the petitioner had not “demonstrated . . . a history of past achievements” that would justify approval of the national interest waiver. The director asked for further information about citation of the petitioner’s published work, and further evidence to establish his influence on his field as a whole.

The cover letter submitted with the RFE response repeated previous claims about the importance of his article in the [REDACTED]. The petitioner documented one further citation of the article. The cover letter stated: “the attached testimonials from his peers document that the importance of his ongoing research work is being closely monitored within the field and will almost certainly lead to significant additional publication citation in the future.” These testimonials primarily took the form of electronic mail messages, requesting copies of the petitioner’s articles or asking his advice on related matters. A researcher at the [REDACTED] stated that she intended to propose that her employer adopt the biopsy staining procedure outlined in the petitioner’s 2010 article.

The RFE response also included a letter from Dr. Reetesh Pai, associate professor at [REDACTED]. Dr. [REDACTED] described the petitioner’s work at [REDACTED] asserting that the petitioner’s “research findings and activities [are] of major significance to the broader field of cancer research. [The petitioner] has been instrumental in evaluating the factors that are associated with metastatic spread of colorectal carcinoma.” The petitioner submitted no evidence to show the impact of his work at [REDACTED] or even to show that this work, at this early stage, was known outside of that one institution.

Furthermore, even if the petitioner had established the significance of his latest work at [REDACTED] that work began after the petition’s filing date, and cannot retroactively establish eligibility as of the filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 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).

An updated *curriculum vitae* did not mention the phyllodes tumor study among the petitioner’s duties at UPMC. Phyllodes tumors occur in breast tissue, and the petitioner’s fellowship at [REDACTED] concerns the digestive system and related organs. The updated *curriculum vitae* did repeat the claim that the petitioner “will perform a complete analysis of the genetic material,” but this claim appeared in the context of a description of his “work at [REDACTED].” The paragraph is unchanged from the earlier version of the *curriculum vitae*, prepared when the petitioner was still working at [REDACTED]. There is no evidence that the petitioner completed, or even started, the genetic analysis before he changed employers in 2013.

The director denied the petition on November 1, 2013, stating that the petitioner had not established the influence and impact of his past work.

On appeal, the petitioner repeats prior assertions about his 2010 article in the [REDACTED] and repeats the claim that he “is very highly regarded for his clinical abilities in the field of gastrointestinal pathology.” The petitioner’s 2010 journal article, the only one shown to have any citation history, does not concern gastrointestinal pathology.

The petitioner submits copies of electronic mail messages regarding the petitioner’s intended participation in professional conferences scheduled for early 2014. The petitioner did not support the claim that these conferences are “very prominent forums.” All of the messages date from November 2013. These materials indicate that the petitioner remained active in research in late 2013, consistent with earlier information about his fellowship at [REDACTED]. Being an active researcher does not suffice to establish eligibility for the national interest waiver, and messages inviting the petitioner to prepare new papers after the petition’s filing date cannot show that those papers had already influenced the field as of the filing date.

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that his influence be national in scope. *NYSDOT*, 22 I&N Dec. 217, n.3. More specifically, the petitioner “must clearly present a significant benefit to the field of endeavor.” *Id.* at 218. *See also id.* at 219, n.6 (the alien must have “a past history of demonstrable achievement with some degree of influence on the field as a whole.”).

As is clear from 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.

We will dismiss the appeal for the above stated reasons. 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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.