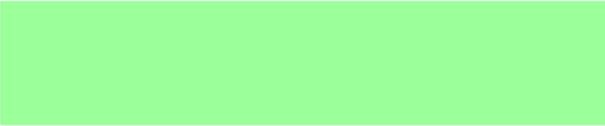


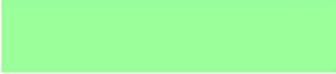


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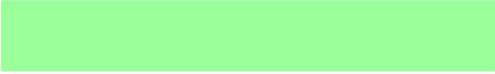
(b)(6)



DATE: **MAR 13 2014** 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 (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 employment-based immigrant visa petition. The AAO dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion to reopen, dismiss the motion to reconsider, and affirm the denial of the petition.

The petitioner seeks to classify the beneficiary under 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 business. The petitioner is a hospital that seeks to employ the beneficiary as a unit chief in the petitioner's psychiatric unit. At or around the time of filing, the beneficiary was a staff psychiatrist at the petitioning hospital; an assistant clinical professor at [REDACTED] and consultation liaison at [REDACTED] and a research staff psychiatrist 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 beneficiary 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's dismissal order expressed the same conclusion.

At the time the petitioner filed the petition, the attorney of record was [REDACTED]. In this decision, the term "prior counsel" shall refer to [REDACTED] and the term "counsel" shall refer to the petitioner's present attorney of record.

On motion, the petitioner submits a brief from counsel and supporting exhibits, including background information and witness letters.

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). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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 beneficiary qualifies for classification as a member of the professions holding an advanced degree. At issue in this proceeding is whether the beneficiary qualifies for a waiver, in the national interest, of the statutory job offer requirement.

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 an application 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 Form I-140, Immigrant Petition for Alien Worker, on July 30, 2012. The director denied the petition on April 25, 2013, stating that the petitioner had not established the petitioner's impact and influence on the field to meet the third prong of the *NYSDOT* national interest test. The AAO dismissed the petitioner's appeal on October 21, 2013; the appellate decision contains further details regarding the proceeding.

On motion, counsel states:

The beneficiary . . . was initially hired in September of 2011 as a result of his past professional services that included serving as a research clinical psychiatrist for [a] study conducted under the auspicious [*sic*] of [redacted] that claimed it had improved patient care while reducing length of stay for psychosomatic patients.

Petitioner asserts that as a result of this past performance, the beneficiary deserves a National Interest Waiver to continue his work. The petitioner's line of reasoning is as follows[:]

There is a pressing need for more and better mental health counseling. Consultation liaison psychiatry seeks to meet that need in the hospital and clinic setting. Behavioral Intervention Team (BIT) is a newly developed and highly promising approach for delivering these psychiatric services. The beneficiary . . . through his work as an "outstanding clinician" has assisted in the development of the Behavioral Intervention Team, [and] has thus "contributed to and had an important impact on patient care in the United States."

Regarding the "pressing need for more and better mental health counseling," counsel states: "recent surveys show only about 50,000 psychiatrists in the United States, a number that is already too few to care for the existing number of people seeking treatment." Counsel cites copies of news articles relating to the stated shortage of psychiatrists.

In the October 2013 decision, the AAO had addressed the shortage issue, stating:

Even if the petitioner had documented the numbers claimed, such shortages are not grounds for granting the waiver under *NYSDOT*. See *id.* at 218. Section 203(b)(2)(B)(ii) of the Act states that physicians in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals may qualify for the waiver under certain circumstances. USCIS regulations at 8 C.F.R. § 204.12 detail the requirements for such waivers. . . .

The petitioner did not submit the evidence required under the regulations cited above. Instead, prior counsel [] contended that the beneficiary qualifies under *NYSDOT*.

A motion to reconsider must establish that the decision was based on an incorrect application of law or USCIS policy, and that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3). A motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied. See *Matter of Medrano*, 20 I&N Dec. 216, 219-20 (BIA 1990, 1991). Counsel, on motion, has not established that the dismissal notice was in error. The repeated assertion that there is a shortage in the petitioner's field is not grounds to reopen the proceeding or reconsider the dismissal of the appeal.

The motion includes a December 20, 2013 letter from [], the petitioner's vice president of human resources, stating that the petitioner "is in a geographical area designated by the Secretary of Health and Human Services as a medically underserved area." This letter does not suffice to meet the evidentiary requirements set forth at 8 C.F.R. § 204.12 for shortage-based physician waivers. Also, the petitioner had not previously attempted to meet those evidentiary requirements. USCIS has already adjudicated the petition and an appeal from the denial of that petition. At this late stage in the

proceeding, the petitioner cannot move to reopen the proceeding for a new adjudication for a shortage-based waiver instead of a *NYS*DOT-based waiver. 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).

Counsel describes the beneficiary's subspecialty within the field of psychiatry. This information establishes the intrinsic merit of the beneficiary's occupation, but does not meet the other prongs of the *NYS*DOT national interest test. There exists no blanket waiver for foreign workers in the beneficiary's subspecialty, apart from the shortage-based provisions discussed above for which the petitioner has not submitted the required evidence.

The dismissal notice included the following passage, which referred to a letter from [REDACTED] director of the [REDACTED]

The beneficiary's work as a clinician lacks national scope because it benefits a limited number of individual patients under his direct care. [REDACTED] did not claim that the beneficiary's work has produced wider benefits. Rather, he speculated about the future, stating: "I expect [the beneficiary] to contribute not only as a clinician but as a researcher able to advance the field of consultation liaison psychiatry." He did not indicate, however, that the beneficiary was engaged in research at [REDACTED], or that the beneficiary had conducted research in consultation liaison psychiatry. Rather, [REDACTED] stated without elaboration that the beneficiary has a "background in research."

Counsel, on motion, states:

The issue is how the beneficiary's work affects the mental health system. . . .

It seems inconsistent with recent history to take the position that providing desperately needed mental health care is not "national in scope." [REDACTED] is located in [REDACTED] . . . less than 60 miles from [REDACTED] where on December 15, 2012, 20-year-old [REDACTED] suffering from an [untreated] psychiatric condition, murdered 20 children. Less than 25 miles from where [the beneficiary] performed his clinical studies that lead [*sic*] to the issuance of the papers on BIT [Behavioral Intervention Team].

There was no finding that mental health care, on the whole, lacks national scope. The dismissal notice indicated, rather, that one psychiatrist's clinical practice did not appear to produce benefits that are national in scope. *NYS*DOT makes the distinction between the overall importance of an occupation and the local impact of one worker in that occupation, at 217 n.3.

Counsel fails to explain how a mass shooting "[l]ess than 25 miles from where [the beneficiary] performed his clinical studies," after the beneficiary performed those studies, demonstrates that the beneficiary's work has produced, and will continue to produce, benefits over a wide geographic area.

(b)(6)

Counsel also does not explain why the beneficiary's proximity to [REDACTED] establishes the national scope of his clinical work. Conducting and disseminating research has national scope, but the petitioner has not shown that the beneficiary will conduct research in the future. The beneficiary himself signed Form ETA-750B, Statement of Qualifications of Alien, which contained the following description of his duties at the petitioning hospital: "Oversee psychiatric and medical care provided to patient on intermediate length of stay in patient care psychiatric unit." Medical research produces benefits that are national in scope, but the record does not show that the beneficiary has performed medical research. It indicates, instead, that the petitioner has performed clinical duties, treating patients who, at the time, were enrolled in a research study.

New solutions to mental health problems, nationally implemented, would benefit the entire United States. Much of the motion, therefore, emphasizes the BIT as a proposed solution. Counsel states: "The Behavioral Intervention Team, developed by the [REDACTED] is a new approach that seeks to provide a more proactive consultation approach to treating Psychosomatic Medicine." The October 2013 dismissal notice addressed the petitioner's claims regarding the BIT:

There is no evidence that the beneficiary is responsible for developing the concept of the BIT. Rather, [REDACTED] asserted that the beneficiary "did outstanding work for [REDACTED] in our innovative and newly established Behavioral Intervention Team." . . . Exhibit A, a newsletter from [REDACTED] web site, credited Prof. [REDACTED] with developing the BIT at [REDACTED] work with the program, but did not mention the beneficiary.

. . . The record does not say where the BIT concept originated, and therefore the record does not show whether Yale created the concept or was simply among its early adopters.

Counsel states:

The argument that the application fails to provide proof that [REDACTED] developed the concept of the BIT program would appear to be irrelevant. . . . The issue is whether the study advances the field of psychosomatic medicine in a significant way and whether [the beneficiary] had an impact on the success of that study and thereby on the field as a whole.

The BIT's origin is relevant because creation of an important new technique has greater impact on the field than learning an existing technique developed by others. An alien's job-related training in a new method cannot be considered to be an achievement or contribution comparable to the innovation of that new method. See *NYS DOT* at 221, n.7. If the beneficiary was not among those who conceived the idea of the BIT, or who were directly responsible for its widespread adoption, then general statements about the importance of BITs relate only to the "intrinsic merit" prong of the *NYS DOT* national interest test. There is no blanket waiver for foreign workers familiar with the BIT concept, regardless of how many or how few foreign workers fit that description.

After claiming that the origin “of the BIT program would appear to be irrelevant,” counsel claims that the beneficiary was part of the program’s development. Counsel reiterates the intrinsic merit of BITs and states: “it seems reasonable to conclude that the individual whose clinical studies was [sic] instrumental in developing the BIT approach would be serving the national interest to a greater extent than others in the profession.”

In a new letter, dated December 20, 2013, [REDACTED] discusses the origin of the BIT:

This is an innovative approach that has not been carried out in other settings or reported before we began to do so in the Fall of 2006. During that time we tried a 6 week experiment which is summarized in the attached publication. . . . Because of the success of the pre-pilot on the length of stay which is demonstrated in this publication, we implemented a pilot of the program in three medical units which covered the end of Fiscal year 2009-Fiscal year 2010. By the way, this publication won the award [from] the American Academy of Psychosomatic Medicine for the best paper published in Psychosomatics in 2011. . . .

The program continues to evolve and change but the basic idea stays the same. . . .

Based on these results, other settings have expressed interest in what we do. . . . So, the program is real, it did start with us, and it is being implemented in other settings.

[REDACTED] refers several times to “the attached publication,” but the submission on motion includes no publication matching the description in the letter. The submission does include a printout of an electronic slide presentation that [REDACTED] on November 27, 2012. That presentation showed part of the first page of a 2011 article from [REDACTED], with the title [REDACTED] at Medical Team.” The article listed five authors, including [REDACTED], but the beneficiary is not a credited co-author. Counsel asserts that the beneficiary’s “name is conspicuously mentioned in the presentation made by [REDACTED].” The beneficiary’s name appears once in the 32-page presentation, as one of four members of the “Clinical Team.”

[REDACTED] does not state that the beneficiary helped to develop the BIT, and the above chronology indicates that the beneficiary did not do so. The beneficiary’s own résumé indicates that he left [REDACTED] after completing a fellowship in September 2002, and did not return until almost nine years later in August 2011. This timeline would indicate that the beneficiary was not at [REDACTED] for the program’s inception in 2006 or for the pilot studies in 2009-2010. [REDACTED] does not credit the petitioner with initiating the idea or making significant improvements to it. He states: “[the beneficiary] in his role with us was very helpful in grasping this concept early and being a strong advocate for it and helping us put it forward.”

The petitioner submits a letter, dated December 16, 2013, from [REDACTED], director of the [REDACTED]. Most of

this letter repeats [REDACTED] earlier letter, dated July 18, 2012. [REDACTED] has inserted two new paragraphs, which read as follows:

[The beneficiary] is also a skilled researcher. During the period of our work with us between 2011 and 2012, he participated in developing a new approach to consultation psychiatry in the general hospital. In usual models, the psychiatric consultation team waits for requests for assistance from medical teams caring for patients. The result is that psychiatric issues may not be recognized or may be recognized after a delay. This yields poorer clinical care and sometimes lengthening of hospital stay. In the new approach, all patients are screened for psychiatric issues and appropriate care is provided immediately. During the 2011-2012 period, we believe that we developed at [REDACTED] a method of accomplishing such "proactive" patient care in an efficient and feasible fashion. [The beneficiary] worked with us in devising new modes of patient care: during this year we tested multiple methods of screening patients based on review of the medical record, discussion with medical team, or brief exam, using nursing, social work or physician staff members[. The beneficiary] assisted in developing different assessment protocols, supervising their implementation, and also assessing the effectiveness of these protocols by providing the "gold standard" of assessment by an experienced psychiatrist. I should note that [the beneficiary] was here many hours more than his scheduled shifts in contributing to this research project and to the care of his patients.

The specific results of work during this year are currently being prepared for publication, and will recognize his contribution. Our results have attracted not only national but international attention. We were recognized by a national award from the [REDACTED] for this work. This fall, our method was the subject of a symposium at the [REDACTED], a national meeting sponsored by the [REDACTED]. Our method has also been the subject of invited symposia at international meetings (most recently, the annual meeting of the [REDACTED] in July of 2013 and the [REDACTED] in September of 2013). Representatives from multiple hospitals have visited our hospital to learn about our new approach, and this method has been adopted in multiple hospitals in the United States. The work that [the beneficiary] contributed to has had an important impact on patient care in the United States.

The two letters described above indicate that the petitioner played a role in helping to test the BIT model, but not in developing or shaping it. There is no indication that the BIT program would have turned out differently if another psychiatrist had taken the beneficiary's role in the testing stages.

The dismissal notice discussed "[a]n unsigned letter attributed to [REDACTED] associate clinical professor at [REDACTED] letter did not specify the nature or extent of the beneficiary's participation in the studies described."

The petitioner's motion includes a signed copy of [redacted] letter (dated July 20, 2012), as well as what counsel called "an additional letter that provides more details regarding [the beneficiary's] participation." In the second letter dated June 21, 2013, in which [redacted] stated:

[The beneficiary] has been involved in clinical research trials conducted at [redacted]. His role was sub investigator and therefore his name does not appear on the publications.

In addition to the cited article, studies funded by [redacted] have been conducted while [the beneficiary] was working with me.

This letter contains no further substantive details about the nature of the beneficiary's work, except the assertion that, as a "sub investigator," the beneficiary's contributions did not warrant co-author credit on publications resulting from the research.

In the appellate brief, counsel had stated that "the decision by the Service ignores evidence in the record and a line of precedent decisions by the AAO." In the dismissal notice, the AAO stated: "Counsel does not identify the 'line of precedent decisions by the AAO.' *NYSDOT* is the only precedent decision that directly addresses the national interest waiver." On motion, counsel states: "We misspoke. There is a line of non-precedent decisions on which we based that statement."

The petitioner submits an article published by the [redacted] in which attorneys [redacted] summarized "10 successful cases [their] office has handled since *NYSDOT*'s designation" as a precedent in 1998. The article describes approvals at the service center level (issued without written decisions), rather than "decisions by the AAO" as counsel had claimed. Rather, all of the approvals were at the service center level. Service centers, unlike the AAO, do not issue a written decision to accompany the approval of a petition. None of the cited approvals had binding precedential authority. Only published precedent decisions are binding on USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c).

Other assertions on motion address peripheral points that did not determine the outcome of the petition, and which counsel attributes to error by prior counsel. For example, prior counsel had stated that the beneficiary's combined training "in child psychology, addiction psychiatry and consultation liaison psychiatry . . . is extremely rare as only seventy (70) individuals train in this area each year." Prior counsel also claimed that "less than 69" individuals in the United States practice in the beneficiary's specialty. These claims are contradictory, because if the field produces 70 new trainees each year, the total number practicing would be higher, not lower, than 69. Counsel, on motion, states: "Although we cannot speak to the representations of prior counsel, it is a fact that the [redacted] recognizes on average, less than 70 fellowships in this field per year." The petitioner submits a list of 53 "fellowship trainees" for the 2012-2013 academic year. Even at a rate of approximately 50 trainees per year, the total number practicing would not be "less than 69" barring a high rate of attrition that the petitioner has neither claimed nor established.

The motion does not establish that the decision was based on an incorrect application of law or USCIS policy or that the decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the motion does not qualify as a motion to reconsider under the USCIS regulation at 8 C.F.R. § 103.5(a)(3). The motion does, however, include relevant new evidence that satisfies the regulatory requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Nevertheless, the new evidence does not show that the petition was approvable at the time of filing or that new facts justify the petition's approval now. The denial of the petition will be affirmed.

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 AAO's decision of October 21, 2013 is affirmed. The petition remains denied.