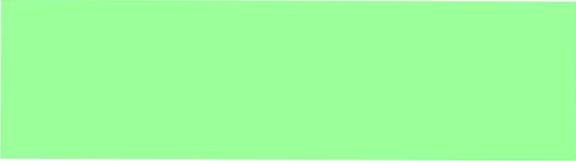




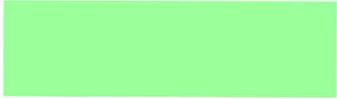
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: Office: TEXAS SERVICE CENTER

MAR 19 2014



IN RE:



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 petitioner then filed a fourth motion to reopen. The AAO granted the motion to reopen and affirmed its prior decision. The matter is now before the AAO again on a fifth 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 completing his resident and fellowship training at [REDACTED], the petitioner began his current employment at University of [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 petitioner filed the Form I-140 petition on June 23, 2010. 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.

¹ In his August 18, 2012 letter supporting one of the previous motions, counsel references the petitioner's employment at [REDACTED] as training. The petitioner's curriculum vitae supporting the initial filing indicated that he was still employed at [REDACTED] as a fellow and references to subsequent employment post-date the petition's filing date.

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's previous decisions have upheld the director's findings.

In the AAO's most recent decision, the AAO again 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 and an article the petitioner coauthored in [REDACTED]. The journal posted the article online on December 6, 2013. Finally, the petitioner submits a November 19, 2013 letter from [REDACTED], stating: "On behalf of the Board of Directors of the [REDACTED] it gives me great pleasure to inform you that [REDACTED] was approved for funding for FY2014. The total amount of funding allocated is \$5,000 and the term will be December 1, 2013 - June 1, 2014."

Counsel asserts that the article in [REDACTED] and the \$5,000 grant from the [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 asserts 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." The publication of the petitioner's article in [REDACTED] post-date the filing of the Form I-140 petition on June 23, 2010. Eligibility, however, 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). 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.

In this matter, demonstrating eligibility at the time of filing means that the petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole as of that date. *NYS DOT* at 219, n.6. All of the case law relating to eligibility at the time of filing focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977); *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Act. Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. at 49. Consistent with these decisions, a petitioner seeking a waiver of the job offer requirement in the national interest cannot secure a priority date in the hope that his as of yet unpublished research will subsequently not only appear in print but also prove influential upon dissemination in the field. Accordingly, the published article in [REDACTED] and the \$5,000 grant from the [REDACTED] cannot be considered as evidence to establish the petitioner's eligibility at the time of filing.

Regardless, there is no documentary evidence showing that, even upon dissemination in the field, the petitioner's research findings in [REDACTED] have influenced the field as a whole. For example, the record contains no evidence of citations to this article or other comparable evidence of its application in the field. With regard to the third prong of the national interest waiver test, the petitioner must demonstrate "a past history of demonstrable achievement with some degree of influence on the field as a whole." *NYS DOT* at 219, n. 6. Furthermore, regarding the petitioner's [REDACTED] [REDACTED] grant from the [REDACTED] Cancer Consortium, a variety of public and private sources are responsible for funding a substantial amount of medical research. Every research project, of which there are hundreds of thousands, receives funding from somewhere. The past achievements of the principal investigator are a factor in grant proposals because the funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, the ability to secure funding for a research project does not differentiate the petitioner from other capable medical researchers, or demonstrate that his work has already influenced the field as a whole.

The documentation submitted by the petitioner on motion does not overcome the AAO's previous findings. The petitioner has not submitted evidence establishing that the work he was engaged in or had completed at the time of filing on June 23, 2010 had benefits that were national in scope. In addition, the petitioner has failed to demonstrate that his work had already influenced the field as a whole at the time of filing or even as of the date the petitioner filed the current motion. 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 January 9, 2014 decision is affirmed. The petition will remain denied.