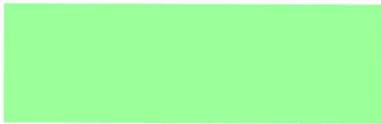


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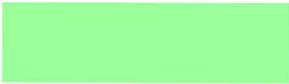
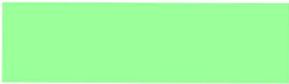
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



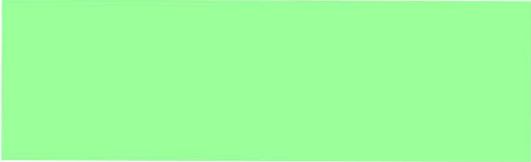
U.S. Citizenship
and Immigration
Services



DATE: **NOV 04 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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,

Handwritten signature of Ron Rosenberg in black ink.

Ron 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, specifically as an orthopedic surgeon. At the time he filed the petition, the petitioner was a fellow at [REDACTED], but he already had a job offer to work at [REDACTED], where he has since begun working. 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 statement, some of which repeats elements from earlier submissions.

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 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. 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, Immigrant Petition for Alien Worker, on June 28, 2013. On Part 6, lines 1 and 3 of that form, the petitioner indicated that he seeks employment as a “physician” whose duties are to “diagnose and treat patients.” In accompanying statement, the assertion that the benefit from the petitioner’s work is national in scope rested on a discussion of the research duties that the petitioner has undertaken during his medical training. 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 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, the record indicates that a combination of clinical, teaching and

research duties is customary for medical school faculty members. The petitioner has not shown that the Department of Labor will not approve labor certification applications for medical school faculty positions.

The initial filing of the petition included two similar letters, signed by Dr. [REDACTED], professor and chairman of [REDACTED] Department of Orthopedic Surgery, and by Dr. [REDACTED] is professor and chairman of the Department of Orthopaedic Surgery at [REDACTED] [REDACTED] where the petitioner trained as a resident from 2007 to 2012. The letters contain duplicative wording and phrasing. The submission of such similar letters, from purportedly independent sources, casts doubt on the actual authorship and origin of the letters, and thereby diminishes their weight as independent evidence of the petitioner's reputation and the significance of his contributions.

A section of the record bears the heading "Honors, Awards & Distinctions." All of the materials reproduced in this section are student awards such as Dean's List certificates, scholarships, and memberships in academic honor societies, with the exception of an "Editor's Choice Award" from the [REDACTED] which appears to be unrelated to the petitioner's medical career.

Under the heading "Significant Original Contributions," the petitioner submitted copies of published and unpublished papers and materials from presentations. The significance of these materials is not self-evident; the petitioner submitted no evidence to show that his work has influenced the field as a whole, or had a greater impact than articles and presentations by other qualified professionals in his field.

The petitioner submitted a copy of a "Physician Employment Agreement," effective September 1, 2013, between the petitioner and [REDACTED], engaging the petitioner "to provide full-time medical services as a specialist in the area of orthopaedic surgery." The agreement indicates that the petitioner "shall participate in research activities as directed by the Chairman" of the Department of Orthopaedics at [REDACTED] but his "Primary Competencies" do not include research as being among the "main function[s] of [the] position," listed below:

- Provides medical services and consultation to patients in a number of clinical environments throughout the group practice environment . . .
- Provides direct patient care
- Facilitates appropriate communication with other specialties and departments on clinical issues
- Participates in administrative activities as designated and approved by the Department chair
- Supervises and provides teaching services for residents, medical students, and other trainees . . .
- Properly executes/prepares documentation that pertains to medical billing and patient coding

The documentation regarding the petitioner's current employment, therefore, places a minimal emphasis on research, indicating that the petitioner's duties focus considerably more on clinical care and teaching duties.

The extent of the petitioner's ongoing research work is material because clinical patient treatment does not produce benefits that are national in scope; it directly benefits only the limited number of patients whom the petitioner personally treats. Similarly, teaching duties benefit the residents receiving the training. Medicine and medical training are nationally important in the aggregate, but this does not lend national scope to the duties of individual practitioners. *See NYSDOT, 22 I&N Dec. at 217 n.3.*

The director issued a request for evidence on August 27, 2013. The director stated that the petitioner's initial evidence showed the "potential to be an influence on the field as a whole," but did not demonstrate existing impact at the required level. The director requested "documentary evidence to establish . . . a past record of specific prior achievement," including citation data for the petitioner's published work.

In response, the petitioner stated that "the original submission [included] numerous independent testimonials from prominent experts." The petitioner did not elaborate on this point, and the record does not support this claim. As noted above, the petitioner's initial submission included two letters, both from professors at universities where the petitioner had trained.

In his statement, the petitioner describes his work at [REDACTED] "My patients come mostly from the greater Philadelphia region, however many also come from different parts of the nation and world. . . . I have been able to bring minimally invasive joint replacement to this region." The petitioner submitted no evidence to show that minimally invasive joint replacement surgery was not performed in Philadelphia prior to his arrival. *See Matter of Soffici, 22 I&N Dec. at 165.* Furthermore, the petitioner did not begin working in Philadelphia until several months after he filed the petition in June 2013. Therefore, even if his new employment met the requirements for the waiver, these circumstances did not exist at the time of filing. 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).*

The petitioner submitted letters from two [REDACTED] faculty members. Dr. [REDACTED] is chairman of the Department of Orthopedic Surgery. Dr. [REDACTED] specified no title, but his letter is on [REDACTED] letterhead. Dr. [REDACTED] asserted that the petitioner "has made substantial contributions to the Department and Training Program" at [REDACTED] for instance he "revitalized the joint replacement educational curriculum for didactics and clinical training."

Dr. [REDACTED] who previously encountered the petitioner at [REDACTED] of Medicine, stated that [REDACTED] recruited the petitioner because "[w]e were interested in [the petitioner's] academic performance, his expertise in total joint arthroplasty especially revisions, and we were also

interested in his ability to make contributions to the literature by virtue of his scholarship and his interest in basic science research.” Both doctors at [REDACTED] praised the petitioner’s latest work in general terms. This information shows that the petitioner continues to practice medicine and to train residents, and indicates at least the possibility of future involvement in research, but it does not show that it is in the national interest for the petitioner, rather than a qualified United States worker, to fill his current role at [REDACTED] or that the petitioner already qualified for the waiver at the time of filing.

Some of the writers asserted that there is, or will be, a shortage of qualified professionals in the petitioner’s specialty. Such shortages are not generally grounds for waiving the job offer requirement, because the labor certification process addresses such shortages. *See NYSDOT*, 22 I&N Dec. at 218. Section 203(b)(2)(B)(ii) of the Act provides for a shortage-based waiver for certain physicians, but eligibility is not a simple matter of asserting that a shortage exists (or will exist). Rather, a foreign physician seeking a shortage-based national interest waiver must meet several requirements, spelled out in the USCIS regulations at 8 C.F.R. § 204.12. The petitioner has not attempted to meet this requirements.

The petitioner stated:

I also believe that my research work has been very practically important to the medical community. I was the first to describe the occurrence of extensive pigmented villonodular synovitis after total knee replacement. The work was published in a prominent journal, [REDACTED] and has been cited multiple times since publication. Since the submission of my [petition], I have published two other articles. . . . I currently have many projects in the pipeline at different stages of implementation.

The petitioner submitted a printout from the [REDACTED] search engine, indicating that the article described above had been cited three times. There were no citations shown for the petitioner’s other published work. The petitioner did not identify the citing articles, although [REDACTED] has that function. The petitioner did not show that the three citations are independent and non-duplicating, or that three citations is an unusually high number of citations for articles of that kind. There is no blanket waiver for researchers; the petitioner must still establish influence on the field as a whole.

The director denied the petition on December 17, 2013. The director listed the petitioner’s evidence and noted that the newest letters “indicate [the petitioner’s] abilities to perform [his] duties as a clinician, and peripherally note [his] research work, [but] they do not suggest that [the petitioner has] had a history of achievement with some degree of influence on the field as a whole.” The director also found that the petitioner had established only minimal citation of his published work.

On appeal, the petitioner submits a statement, parts of which exactly repeat portions of the introductory statement that accompanied the filing of the petition. The appeal statement consists of general statements that do not identify any specific error of fact or law in the denial notice, and conclusions without supporting premises. For instance, the appellate statement indicates that the petitioner “has proven over the course of his career that his original research is both progressive and

extraordinary,” but identifies no evidence to support this claim. Unsupported claims have no weight as evidence. *See Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner repeats his initial claim that USCIS should “take into consideration the opinions of [the petitioner’s] peers that he is regarded as being uniquely skilled as an orthopedic surgeon” as well as “his unique roles within major academic teaching hospitals.” The writers of the submitted letters were all directly involved in the petitioner’s medical training, and the petitioner has not shown that his roles at teaching hospitals have differed materially from the functions performed by other residents and fellows at such institutions.

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. *NYS DOT*, 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.