



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **NOV 04 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:

[Redacted]

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 is a pediatric cardiology fellow at the [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 brief and supporting materials, including a new third-party letter.

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 August 15, 2013, with a 16-page supporting letter signed by Dr. [REDACTED] associate clinical professor at [REDACTED]. Some of this letter concerns the intrinsic merit and national scope of research in pediatric cardiology, and the reputation of UCSF as a research institution; these issues are not in dispute in this proceeding. Concerning the petitioner's work, Dr. [REDACTED] stated:

[The petitioner] is doing nationally important research work on clinical outcomes for surgical procedures to correct congenital heart defects in newborns and adults. . . . Specifically, [the petitioner] is Principal Investigator in a number of important research projects in this area. Briefly, the three major projects are:

1. A major multi-center study . . . of outcomes of pulmonary artery angioplasty to treat arterial stenosis (arterial narrowing) in children and adults.
2. A study examining the long-term effects of transcatheter closure of an Atrial Septal Defect (ASD – a hole between the upper chamber[s] of the heart). . . .
3. A study evaluating the use of Balloon Atrial Septostomy (BAS) to stabilize newborns with a malformation of the pulmonary artery and aorta known as Transposition of the Great Arteries (TGA).

Dr. [REDACTED] provided technical details about the studies identified above. Because the studies were ongoing at the time of filing, they had not yet produced findings for publication. Dr. [REDACTED] also described an earlier project in which the petitioner studied “premature extubation (that is, removal of infants from ventilators.” She stated that the petitioner’s “research led to change of practice in [the] neonatal intensive care unit where the study was conducted, and has been published and presented at scientific conferences.” She did not indicate that the petitioner’s work, once published, led to procedural changes at other hospitals.

Several times in her letter, Dr. [REDACTED] claimed that no more than ten physicians in the United States begin training in pediatric interventional cardiology each year, and she asserted that the petitioner’s inclusion in this small group is “evidence of his excellence in his field.” Dr. [REDACTED] identified no source for the statistic. 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)). Furthermore, even if the claimed figure is correct, the small size of the group is not, by itself, “evidence of . . . excellence”; the petitioner has not established a correlation between the number of physicians in a given subspecialty, and the skill required to begin training in that subspecialty.

The petitioner submitted ten shorter letters, most of them from writers with past or present ties to [REDACTED] where the petitioner trained from 2008 to 2011. A number of the writers predicted that the outcome of the petitioner’s current research will eventually have a significant impact on the practice of pediatric cardiology. They do not demonstrate that the petitioner’s past work has had such an effect, which would justify predictions of future impact.

Dr. [REDACTED] professor at [REDACTED] of which [REDACTED] is a teaching hospital, stated that the petitioner “is performing high quality research addressing very important issues affecting numerous children born with congenital heart disease.” Dr. [REDACTED] stated: “I feel well qualified to assess [the petitioner’s] stature in the field,” but he did not make any statements

about that stature, instead predicting that the petitioner's "research will shed more light" on important medical issues.

Dr. [REDACTED] associate professor at [REDACTED] School of Medicine, speculated about the possible impact of the petitioner's ongoing research, but in terms of existing impact, he stated only that the petitioner's "findings led to a change in practice in the neonatal intensive care unit where he was employed."

Dr. [REDACTED] associate professor at [REDACTED], provided technical details about the petitioner's research projects, but did not indicate how the petitioner's work has affected patient treatment throughout the field.

Dr. [REDACTED] now a lieutenant commander at the [REDACTED] California, previously trained in a fellowship at [REDACTED] Dr. [REDACTED] asserted that the petitioner "is well-known nationwide for his ground-breaking work in interventional Pediatric Cardiology." Dr. [REDACTED] described some of the petitioner's ongoing projects and asserted that the petitioner's "current research will receive even greater national acclaim than his prior very well-respected and constantly referenced research findings have. . . . He will change the way Pediatric Cardiologists manage their patients' [sic] nationwide." Predictions of this sort, however sincere, do not have the same weight as verifiable, documentary evidence of the petitioner's existing impact on his field.

Dr. [REDACTED] another former [REDACTED] fellow, now practices with the [REDACTED] in [REDACTED] California. Regarding the petitioner's multi-center study, Dr. [REDACTED] stated: "If the findings of the study are positive, it will lead to nationwide changes in treatment protocols" for pediatric arterial stenosis.

Dr. [REDACTED] now practicing at [REDACTED] California, was also a fellow at [REDACTED] She called the petitioner "a leading researcher in a number of the most serious genetic cardiovascular defects affecting children in the United States."

Dr. [REDACTED] assistant professor at [REDACTED] stated that the petitioner's "research has changed the way we treat many patients suffering from the most common, yet serious, congenital cardiac malformations," but when discussing the petitioner's individual projects, he stated only that they "have the potential to change current practices" or "the potential to alter treatment protocols."

Dr. [REDACTED] clinical assistant professor at [REDACTED] School of Medicine, was previously the director of the Pediatric Residency Program at [REDACTED] Dr. [REDACTED] asserted that the petitioner's multi-center study "will have [a] major impact on the way [arterial stenosis] patients are treated."

The remaining two writers are at institutions participating in the petitioner's multi-center study. Dr. [REDACTED] asserted that the petitioner "is well-known for his

work in studying the long-term effects of transcatheter closures of an Atrial Septal Defect,” and “has continually distinguished himself amongst the very best physicians in the world.”

Dr. [REDACTED] assistant professor at the [REDACTED] has collaborated with the petitioner on the multi-center study discussed above. Dr. [REDACTED] stated: “These studies are extraordinarily uncommon in the field of pediatric cardiology. . . . This project will be of significant clinical impact. [The petitioner] has done an extraordinary job as the principal investigator.” Dr. [REDACTED] asserted that the petitioner’s studies “will likely be very significant contributions to the field of . . . interventional congenital cardiology.”

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is “self-serving.” *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: “We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available.” *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien’s eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to “fact”). *See also Matter of Soffici*, 22 I&N Dec. 165.

In all, the writers of the submitted letters contend that the petitioner has earned a high place in his field, although they base this conclusion largely on conjecture about the eventual outcome and consequences of unfinished projects. Because the writers all have ties to the petitioner or to the institutions where he has trained, the letters are not evidence of wider impact or influence; some writers specifically indicated that the petitioner’s work, so far, has affected practices at [REDACTED] but they did not identify impact beyond this local level.

Furthermore, the documentary evidence submitted fails to support key claims in the letters. For instance, with respect to the claim that the petitioner’s past research is “constantly referenced,” the record shows a total of five citations to his published work – three citations of an article from 2009, and one citation each for an article from 2010 and another from 2011. This minimal citation history does not, on its face, support a presumption that future publications will have greater impact.

A section of the initial submission bears the heading “Awards received by [the petitioner] in recognition of his excellence in pediatric medicine and research.” All of the submitted awards are

from [REDACTED] limited to residents at that institution. Recognition of this type can provide partial support for a claim of exceptional ability under 8 C.F.R. § 204.5(k)(3)(i)(F), but exceptional ability does not establish eligibility for the waiver, as aliens of exceptional ability remain subject to the job offer requirement at section 203(b)(2)(A) of the Act.

The director issued a request for evidence on September 11, 2013, stating that the petitioner's initial "evidence fails to establish the influence [the petitioner's] work has had on the field," and that his "publications appear to have very few independent citations." The director stated that the petitioner had met the intrinsic merit and national scope prongs of *NYSDOT*, and therefore "it is not necessary to include any further evidence regarding the importance of the field in general."

In response, the petitioner submitted further details about his ongoing projects at [REDACTED] Dr. [REDACTED], assistant professor at [REDACTED] discussed one of those studies ("Effect of pulmonary artery angioplasty on exercise capacity and symptoms in children and adults with unilateral proximal artery stenosis"):

[The petitioner] is creator and Principal Investigator of [the] national multi-center study, which is being carried out at [REDACTED] and our own home institution, [REDACTED]. He is the central figure in the conception and design of the study. . . . [The petitioner's] collaborators are literally a "Who's Who" of leading cardiac pediatric researchers.

The study is ongoing; Dr. [REDACTED] did not claim to know its outcome. Instead, he stated: "This encouraging line of inquiry could significantly change the treatment options for this type of patient." This claim amounts to speculation, and the petitioner has not demonstrated a past history of impact to justify such a prediction.

The petitioner also provided further details about two other ongoing projects and about the underlying medical conditions that they seek to address. The director issued the RFE not because the petitioner failed to describe his research adequately, but rather because the record did not support claims regarding his existing (rather than expected) impact on his field. Information about the reputations of participants in the petitioner's multi-center study cannot take the place of the necessary evidence.

The petitioner's role in a specific project is not sufficient to establish eligibility for the waiver. See *NYSDOT*, 22 I&N Dec. at 218. Furthermore, the petitioner already holds nonimmigrant status allowing him to work in what is inherently a temporary training position at [REDACTED] the lack of permanent resident status has not prevented the petitioner from working on the projects discussed.

The director denied the petition on December 20, 2013, stating that the petitioner has demonstrated only "a minimal degree of interest in the [petitioner's] work." The director quoted several of the letters submitted in support of the petition, and concluded that the record lacks "definitive evidence

of the [petitioner's] work actually being implemented.” The director further concluded that the other evidence, such as awards from [REDACTED] do not significantly distinguish the petitioner from others in his field.

On appeal, the petitioner claims to have submitted “ample, compelling evidence . . . to establ[is]h that [he] is an outstanding research figure whose work has and will continue to serve important national benefits.” Repeating an earlier claim, the petitioner states that he “is one of literally a handful of researchers with advanced experience in the subspecialty, which fact alone is sufficient to illustrate his elite status.” As noted previously, the petitioner has not submitted evidence to establish either the number of pediatric interventional cardiologists in the United States, or to show that physicians in that subspecialty are necessarily superior to other physicians.

By enacting section 203(b)(2)(B)(ii) of the Act, Congress created an alternative procedure by which certain physicians could qualify for the national interest waiver, if they were to practice in a designated shortage area or a facility administered by the Department of Veterans' Affairs. The petitioner has not claimed to qualify under those provisions. The unsubstantiated assertion that few physicians practice in his subspecialty is not a qualifying ground for approving the waiver.

The appellate brief rests on five points:

- a. The medical issues addressed by [the petitioner's] research are extremely serious and they are also widespread in the United States
- b. [The petitioner's] record of achievement is shown by his position at the [REDACTED] and the support of that institution, since [REDACTED] has demonstrated a long-standing commitment to our nation's health
- c. [The petitioner] had led important research projects addressing major issues in pediatric interventional cardiology . . .
- d. The series of outside support letters . . . show extensive influence on the referees and on the field as a whole . . .
- e. [The petitioner's] receipt of awards show[s] that he has been above the level of his peers for the entirety of his academic research career

Point (a) is undisputed, but it is a general statement about the petitioner's occupation and does not address the third prong of the *NYSDOT* national interest test. Regarding point (b), the petitioner has not shown a connection between [REDACTED] reputation and his own “record of achievement.” As for point (c), the petitioner has shown that the research projects address important problems, but this does not establish the importance of the projects themselves. As noted previously, the projects have not yet produced results, and therefore speculation about their ultimate results is premature. 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, in essence, asserts that

USCIS should approve the petition now, and that the future results of the projects will eventually justify that approval.

Point (d) misstates the range of writers of the submitted letters. Their statements do not show the effect the petitioner's work has had on the field as a whole (as opposed to individual institutions where he has trained). Point (e) likewise mischaracterizes the record. The awards all concern his residency at [REDACTED], and a high level of performance at a teaching hospital does not establish or imply wider impact or influence.

The petitioner submits a new letter from Dr. [REDACTED] who discusses details of the petitioner's three research projects at [REDACTED] and quotes from previously submitted letters. Dr. [REDACTED] asserts that "the U.S. does not have enough doctors with his skills" and repeats the claim, in more general terms, that very few doctors are trained in pediatric interventional cardiology. The Department of Labor addresses claims of worker shortages through the labor certification process, and therefore an asserted shortage is grounds for obtaining, rather than waiving, labor certification. See *NYSDOT*, 22 I&N Dec. at 218. The exception for physicians at section 203(b)(2)(B)(ii) of the Act has specific provisions, outlined at 8 C.F.R. § 204.12; a physician does not qualify for the waiver simply by asserting that few doctors practice in his subspecialty.

Dr. [REDACTED] states:

In addressing . . . [*NYSDOT*'s] "prong three," I wish to bring forward four key points: 1) [The petitioner's] record establishes a high level of individual achievement, as opposed to potential future achievement; 2) Particular aspects of [the petitioner's] research career . . . should be re-evaluated; 3) The overall trajectory of [the petitioner's] career is highly suggestive that his work will be of national benefit; and 4) The likelihood of national benefit is what the *NYSDOT* provisions are designed to capture.

With respect to points 3 and 4, section 203(b)(2) of the Act states that the job offer requirement applies to aliens who "will substantially benefit prospectively . . . the United States." By the plain wording of the statute, benefit to the United States is not sufficient grounds for the waiver; the statute presumes such benefit from all foreign workers who qualify for the underlying classification.

Dr. [REDACTED] stated that the petitioner's various projects "are tangible contributions to existing treatment protocols used today for cardiac abnormalities in newborns." Regarding one of his past projects at [REDACTED] Dr. [REDACTED] stated that the petitioner has "proposed new treatment protocols . . . published in the [REDACTED]." The conclusion of that study, as stated in the article, was "We speculate that limiting BAS for clinical hypoxemia and aggressive weaning of PGE₁ following BAS would improve outcomes." The journal article, published in [REDACTED], had one citation when the petitioner filed the petition in 2013. The petitioner has not shown widespread implementation of the new protocols, or reported follow-up studies to demonstrate that what the petitioner described as a

speculative recommendation was well-founded. It is the use, not the proposal, of the protocols that would demonstrate the petitioner has influenced, rather than sought to influence, the field as a whole.

In a similar vein, Dr. [REDACTED] maintains that the petitioner's latest work "will have significant prospective benefit once it is completed and published." The outcome of the petition must rest on the petitioner's impact as of the filing date, rather than on his employer's expectations of future results. Dr. [REDACTED] portrays the unfinished and preliminary nature of the petitioner's latest work as grounds for lenient consideration, because the petitioner cannot yet produce final results and so it is unfair to require them; but this is, instead, a basis for concluding that the waiver request is premature. If the petitioner's high expectations for the projects prove to be justified, those results can provide support for a future petition at a time when the results are available.

Dr. [REDACTED] asserts that the works of the petitioner's collaborators "have been cited a total of 257 times." In this way, she acknowledges the significance of citation as a measure of the impact of published work, but states that it is "unreasonably restrictive" to base a decision on the petitioner's own low number of citations. Dr. [REDACTED] also states that the petitioner's leadership of a project that features such distinguished researchers is, itself, evidence of the petitioner's existing impact on his field. This claim of influence by association is not persuasive. Eligibility must rest on the petitioner's own qualifications, rather than those of his collaborators.

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.