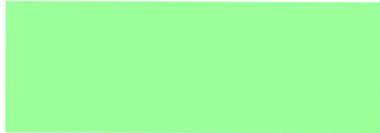


(b)(6)

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 28 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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before 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. When he filed the petition, the petitioner was a clinical fellow at [REDACTED] USCIS records show that he now works for [REDACTED] Indiana. 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 asserts that he had previously submitted sufficient evidence to establish eligibility for the benefit he seeks.

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 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. The petitioner asserted that his clinical work has a wide-reaching impact because he “frequently treats patients on referral” and “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 contended that his teaching duties amount to “leading roles in the medical community.”

At the time he filed the petition, the petitioner was on the house staff at [REDACTED] and as such his specialty training, though at an advanced stage, was not yet complete. Responsibility for less-experienced residents and students does not amount to a leading role for the hospital or the wider “medical community.” As for the claimed “ripple effect,” the record does not show that the petitioner created or improved the methods that he teaches to residents and students. The petitioner’s role in passing on existing medical knowledge appears to be routine.

The petitioner submitted no evidence to show the extent to which he “treats patients on referral.” Clinical patient treatment is inherently limited in scope because of basic limitations on the number of patients that a physician is capable of treating within a given period of time.

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 petitioner stated that, in addition to his clinical and teaching work, he “has performed research that is regarded as uniquely important and significant among his peers and within the medical community.” The petitioner submitted a copy of a published article and the manuscript of a second article, which the petitioner described as “ongoing research.”

The petitioner stated that the petition included “letters of support from independent experts nationwide . . . both from institutions at which [the petitioner] has worked and at institutions at which he has not worked.” The record does not support this assertion. The initial submission included one letter of support, from Dr. [REDACTED] fellowship director at [REDACTED]. Dr. [REDACTED] stated:

During his training he has become an outstanding clinician and leader – very capable of practicing at the best children’s hospitals in the country and as such, he will be highly recruited by such institutions when his training is finished next summer. . . .

In addition to his clinical achievements, [the petitioner] is conducting important research in the field of critical care medicine using simulation science to improve training and performance of complex medical procedures. His research is particularly important currently as the medical community continues to improve training in the prevention of medi[c]al complications and advancement in the field of medical safety.

Dr. [REDACTED] did not indicate that the petitioner’s work has had an impact on his field as a whole, but rather predicted that such an impact would occur after the petitioner published his research and completed his training at a future time.

The director issued a request for evidence on August 27, 2013. The director stated that the petitioner’s initial evidence shows that the petitioner has “potential to be an influence on [his] field

as a whole,” but did not demonstrate “a history of past achievements” to show that the petitioner was already eligible for the waiver when he filed the petition. The director instructed the petitioner to submit evidence of his impact on his field, such as citation of his published work.

In response, the petitioner stated:

I am in charge of the intensive care unit [ICU] at [REDACTED] . . . and I direct all therapies as I am very well trained in all aspects of resuscitation and critical care therapy. . . .

On top of my clinical career, I strongly believe my research work has been very practically important to the medical community in that it has stressed the importance of medical simulation in the practice of medicine [e]specially for area[s] of medicine that require acute intervention such as intensive care medicine, neonatal intensive care medicine[,] cardiology or pediatric emergency. . . . [T]his study is the first to address the simulation implication on the pediatric in-training physicians.

The petitioner submitted a printout from the *Web of Knowledge* web site about his article. The petitioner highlighted the phrase [REDACTED] This does not mean that [REDACTED] others have cited the petitioner’s work. Rather, it indicates that the petitioner’s own article cited [REDACTED] sources in its bibliography. The same *Web of Science* printout states: “Times Cited: 0.”

The petitioner submitted four letters, three of which are on [REDACTED] letterhead. One of those letters is a duplicate of Dr. [REDACTED] letter, submitted previously. Dr. [REDACTED] director of the Division of Critical Care Medicine at [REDACTED] stated that the petitioner’s “work is indispensable to the pediatric critical care service at [REDACTED] Hospital.” The petitioner has documented several inquiries from recruiters at various medical practices, but has not shown that [REDACTED] seeks or intends to continue to employ the petitioner after the end of his temporary fellowship training.

Dr. [REDACTED] discussed a clinical case that the petitioner handled, and claimed that “this case was selected to be published in the [REDACTED]” although the record contains no evidence to support this assertion. Dr. [REDACTED] stated that the petitioner “has produced a great deal of innovative research, and he has advanced the understanding of pediatric diseases through his work on pediatric stem cell transplantation clinical review . . . and his medical simulation project.” The record does not show how the petitioner’s work in these areas has affected medical practice or research beyond [REDACTED]

Dr. [REDACTED] associate professor and medical director of [REDACTED] [REDACTED] asserted that the petitioner “is a nationally recognized pediatric critical care specialist” who “is highly esteemed for his work in critical care medicine.” Dr. [REDACTED] provided no details except to list medical procedures that the petitioner is qualified to perform. Dr. [REDACTED] asserted that the petitioner “is also conducting important ongoing research . . . on simulation-based

procedural training for clinical fellows and advance practice nurses,” but did not show that the petitioner’s research work has had any recognizable impact beyond [REDACTED]

Dr. [REDACTED] also referred to “the physician shortage across the country.” A shortage of qualified workers is not grounds for a national interest waiver under *NYSDOT*, because the labor certification process already takes into account the unavailability of qualified workers. *See id.* at 218. Section 203(b)(2)(B)(ii) of the Act makes the national interest waiver available to physicians in designated shortage areas, but to qualify for the shortage-based waiver, physicians must meet a number of conditions described in the regulations at 8 C.F.R. § 204.12. The petitioner has not met, or claimed to have met, those conditions. Therefore, the assertion of a shortage is not relevant, except to the extent that a true shortage would tend to improve the petitioner’s chances of obtaining an approved labor certification.

The only letter not on [REDACTED] letterhead is from Dr. [REDACTED] now an assistant professor at [REDACTED]. Dr. [REDACTED] did not provide a *curriculum vitae*, and did not state whether or not he had any prior affiliation with [REDACTED]. Dr. [REDACTED] stated that the petitioner “is unique in that he is highly respected as a physician and research-scientist. . . . [The petitioner] is one of the few physician-scientists still in practice.” When he filed the petition, the petitioner was training at a university-affiliated teaching hospital. The record offers no support for the claim that it is rare for trainees in similar circumstances to participate in research. Dr. [REDACTED] cited “a report by the [REDACTED]” but did not identify or submit a copy of the report. Therefore, the claim is unsupported. *See Matter of Soffici*, 22 I&N Dec. at 165. Dr. [REDACTED] also claimed that the petitioner’s “groundbreaking work is published in leading medical journals,” but the record does not show that the petitioner had more than one published article at the time Dr. [REDACTED] made this assertion on July 2, 2013. Dr. [REDACTED] letter contains general praise but no description of the petitioner’s work.

The director denied the petition on February 9, 2014, stating that the petitioner had established the intrinsic merit of pediatric medicine and the national scope of medical research, but that the petitioner had not established “a history of achievement with some degree of influence over the field as a whole.” The director listed the evidence that the petitioner submitted with the petition and in response to the request for evidence. The director concluded that, while the individuals who wrote the letters “speak highly of” the petitioner, the evidence did not show wider influence.

On appeal, the petitioner states that he submitted “substantial evidence demonstrating and establishing that he has distinguished himself from his peers.” He continues:

[C]lear evidence was submitted showing that [the petitioner] has made significant contributions to the field, that his work has impacted the national interest, and that he has distinguished herself [*sic*] from his peers, thereby justifying the waiver of labor certification.

By way of explanation, the petitioner asserts that he had submitted evidence “regarding publication of his research as well as presentation of his research before prominent forums.”

The director, in the denial notice, acknowledged the petitioner's published and presented work, but found that the petitioner had not established the impact of this work. The petitioner, on appeal, does not overcome this finding. Asserting the existence of published and presented work is not a rebuttal of the denial decision.

The petitioner states that "he is currently the primary investigator on a major research project funded by the [REDACTED]." The petitioner does not demonstrate that the source of the funding establishes the impact and influence of the project, before that project has even been completed and its results known or published.

The petitioner asserts that, despite his research work, he "is . . . primarily recognized for his clinical abilities in the field of pediatric critical care," and that the letters from "prominent peers around the country" "made clear that he is highly respected for his clinical abilities in the field of pediatric clinical care." The director, in the denial notice, had found that "only one [submitted letter] is from an expert in the field who does not work with" the petitioner," which "suggests that . . . [the petitioner has] little influence over the field as a whole." The petitioner does not rebut this finding on appeal. The record does not support the claim that the letters are from "prominent peers around the country."

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. at 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.