B5

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

PUBLIC COPY

[redacted]

File: [redacted] Office: Nebraska Service Center Date: JAN 06 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

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), initially as a member of the professions holding an advanced degree, subsequently as an alien of exceptional ability. 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 petition was filed on November 25, 1998. Initially, the waiver request was based solely on the fact that the petitioner would be working as a physician in an underserved area. On November 12, 1999, Congress passed a law specifically covering physicians intending to practice in an underserved area. The Service issued interim regulations to implement this law. On October 23, 2000, the director issued a request for additional documentation to comply with the new law and regulations pursuant to 8 C.F.R. 204.12(d) quoted below. In response, counsel asserts that the petitioner's intent to work in an underserved area is not the basis of the request for a waiver of the labor certification requirement. Rather, counsel asserts a new basis of eligibility, the petitioner's research accomplishments.

The director found that the petitioner qualifies 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.

At the time of filing, Section 203(b) of the Act provided:

> (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) the Attorney General may, when he 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.

Neither the statute nor Service 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 Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service 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.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. 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.

The director did not dispute that the petitioner's occupation requires an advanced degree and that the petitioner has such a degree.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

As stated above, in his initial brief, counsel stated that the basis of the petitioner's request for a waiver of the labor certification requirement was the petitioner's "work in this medically underserved area." Counsel relied on a non-precedent decision issued by the Administrative Appeals Office (AAO) and a subsequent precedent decision, Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998). 8 C.F.R. 103.2(c) provides that precedent decisions issued by the AAO can be overruled by subsequent precedent decisions. Clearly then, all holdings in a precedent decision overrule any conflicting conclusions in an earlier non-precedent decision.

In counsel's analysis of Matter of New York State Dept. of Transportation, he concludes that this decision merely requires a "case-by-case" analysis and asserts that it "validates the wisdom" of a 1995 memorandum concluding that doctors working in an underserved area should be considered for national interest waivers.

Matter of New York State Dept. of Transportation, however, provides the following examples of intended employment where the benefits would not be national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the

> national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

Id. at 217, note 3. This footnote makes clear that merely working as a doctor in an underserved area, while having intrinsic merit, does not provide benefits that are national in scope. In his initial brief, counsel provides many arguments as to why the alleviation of local problems is national in scope. Nevertheless, Matter of New York State Dept. of Transportation is a precedent decision and we are bound by it. Moreover, Congress has now enacted a law specifically aimed at physicians intending to work in underserved areas.

As of November 12, 1999, Section 203(b) of the Act provides:

> (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)(i) Subject to clause (ii), 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.
> >
> > (ii)(I) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if--
> >
> > > (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and
> > >
> > > (bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

8 C.F.R. 204.12(c) provides that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit the following evidence:

> (1)(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.
>
> > (ii) If the physician will establish his or her own practice, the physician's sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.
>
> (2) Evidence that the physician will provide full-time clinical medical service:
>
> > (i) In a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals and in a medical specialty that is within the scope of the Secretary's designation for the geographical area or areas; or
> >
> > (ii) In a facility under the jurisdiction of the Secretary of VA.
>
> (3) A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.
>
> > (i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.
> >
> > (ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.
>
> (4) Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

> (5) Evidence of the Service-issued waivers, if applicable, of the requirements of sections 212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.

8 C.F.R. 204.12 further provides:

> (d)(2) *Petitions pending on November 12, 1999.* Section 203(b)(2)(B)(ii) of the Act applies to all petitions that were pending adjudication as of November 12, 1999 before a Service Center, before the associate Commissioner for Examinations, or before a Federal court. Petitioners whose petitions were pending on November 12, 1999, will not be required to submit a new petition, but may be required to submit supplemental evidence noted in paragraph (c) of this section. The requirement that supplemental evidence be issued and dated within 6 months prior to the date on which the petition is filed is not applicable to petitions that were pending as of November 12, 1999. If the case was pending before the Associate Commissioner for Examinations or a Federal court on November 12, 1999, the petitioner should ask for a remand to the proper Service Center for consideration of this new evidence.

Since the petitioner's petition was pending as of November 12, 1999 and was clearly based on the petitioner's intent to work as a physician in an underserved area, the director issued a request for additional documentation on October 23, 2000, listing the evidence required under 8 C.F.R. 204.12(c) quoted above. In response, counsel noted that the law pertains to physicians "willing to work in an area having a shortage of healthcare professionals ('underserved area')." Counsel then acknowledged, "the petitioner intends to offer his services in an underserved area" but stated, "this is not the basis of our request for a waiver of the job offer and subsequent labor certification process." Counsel then argued that the petitioner's research concerning hyperkalemia and hepatic tuberculosis warrants a waiver of the labor certification requirement. Specifically, counsel argued that such medical research has intrinsic merit, that improved treatment of these diseases would be national in scope, and that, due to the petitioner's exceptional abilities, he would benefit the national interest more than an available U.S. worker with the same minimum qualifications would.

As the petitioner failed to submit the evidence required under the new law, the director, as requested, adjudicated the petition under the provisions of Matter of New York State Dept. of Transportation instead of under the provisions of the new law. The director agreed that the petitioner's area of work, medical practice, had intrinsic merit. The director then determined that research was not included as one of the petitioner's duties on the petition and that the original position listed on the petition, "physician," would not have a national impact. Finally, the director determined that the record did not support a conclusion that the petitioner would benefit the national interest to a greater extent than other researchers in the field.

On appeal, the petitioner submits a letter explaining the importance of his area of research and provides supporting documentation of his claims. The supporting evidence relates to the benefits of the petitioner's area of research, but not his specific contributions to this research, if any. The

evidence that does relate to the petitioner personally relates to his accomplishments as a practicing physician.

As discussed above, the petitioner initially based his petition on his willingness to work as a physician in an underserved area. When Congress enacted a law that would specifically apply to that claim, the petitioner declined to comply with that law and, instead, sought to change the basis of his eligibility to his research. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, 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 Service requirements. See Matter of Izummi, 22 I&N Dec. 169, 175 (Comm. 1998).

We concur with the director that the petitioner's original claim of eligibility, as a doctor willing to practice in an underserved area, is insufficiently supported to comply with the new law or the provisions of Matter of New York State Dept. of Transportation. As stated above, the petitioner did not submit the evidence required under the new law as requested. In addition, Matter of New York State Dept. of Transportation, supra, indicates that teachers or lawyers working pro bono have a purely local impact. We find that a doctor working in an underserved area similarly has a purely local impact. Moreover, since Congress has passed a law that specifically provides benefits to physicians who intend to practice in an underserved area, we do not see how it is in the national interest to waive the labor certification requirement for a physician who claims that he will work in an underserved area but is unable or unwilling to meet the requirements of that new law. The petitioner's examination scores, his recognition from his immediate supervisors in the form of letters and awards, and his salary are not indicative that he has influenced the practice of medicine as a whole.

Even if we considered the petitioner's amended claim to eligibility based on his research, the evidence does not warrant a waiver of the labor certification requirement. It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term 'prospective' is used 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.

We concur with counsel that the petitioner works in an area of intrinsic merit, medical care. Were we to consider the proposed benefits of the petitioner's research, improved treatment for hyperkalemia and hepatic tuberculosis, such benefits would clearly be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Matter of New York State Dept. of Transportation, supra, at 219, note 6.

As stated above, counsel argues that since the petitioner has exceptional ability, the waiver should be approved. As stated in Matter of New York State Dept. of Transportation:

> Because, by statute, "exceptional ability" is not by itself sufficient cause for a national interest waiver, the benefit which the alien presents to his or her field of endeavor must greatly exceed the "achievements and significant contributions" contemplated in the regulation at 8 C.F.R. 204.5(k)(3)(ii)(F). Because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability, this standard must apply whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.

Id. at 218-219. While counsel argues that this interpretation is erroneous, Matter of New York State Dept. of Transportation is a precedent decision and we are bound by it. See 8 C.F.R. 103.3(c). To date, neither Congress nor any other competent authority has overturned the precedent decision other than to create an exception for doctors seeking to work in underserved areas, a law with which the petitioner has declined to comply. Thus, counsel's disagreement with that decision does not invalidate or overturn it. Therefore, the director's reliance on relevant, published, standing precedent does not constitute error.

The petitioner submitted a letter fro[redacted] director of the PRIME program and clinic at St. Louis University, who provides high praise of the petitioner as a practicing physician. As stated above, while counsel continued to discuss the petitioner's abilities as a physician in response to the director's request for additional documentation, counsel specifically stated that the waiver request was based solely on the petitioner's research accomplishments.

The petitioner submitted a February 29, 2000 letter from Dr. Bahar Bastani of St. Louis University to Dr. K. M. Koch of Medizinische Hochshule Hannover requesting publication of "Life Threatening Hyperkalemia and Acidosis Secondary to Trimethoprim-sulfamethoxazole Treatment" as a case report. In addition, the petitioner submitted an abstract submitted by Dr. Mary Gellens of St. Louis University to the National Kidney Foundation. The petitioner is listed as an author for this abstract. The petitioner's resume reflects that he has submitted articles to the *Journal of Clinical Nephrology* and the *Journal of Tropical Medicine*. These documents are not evidence that the petitioner had authored published articles that had already been widely cited or were otherwise

influential at the time of filing. Thus, the articles are not evidence of the petitioner's eligibility at the time of filing. See Matter of Katigbak, supra.

Finally, the petitioner's examination results, his recognition from his peers as a talented physician, administrator and teacher, and his salary documented in the record are not evidence that his research accomplishments have influenced his field as a whole.

As is clear from a plain reading of 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.