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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 17 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Haynard
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center. On the basis of new information received and on further review of the record, the director determined that the beneficiary petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately revoked the approval of the petition on June 8, 2001. The matter 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), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. 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 because she intends to practice medicine in a medically underserved area. The director revoked the approval of the petition because the petitioner had left the underserved area where she had said she would practice, and submitted evidence that indicated she would not be eligible to practice medicine for several years.

Section 203(b) of the Act states in pertinent part that:

> (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 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.

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 note that section 203(b)(2)(B)(ii) of the Act (created over two years after the filing of the present petition) makes the national interest waiver available to physicians practicing in medically underserved areas. 8 CFR 204.12(c)(2)(i) requires that a petitioner seeking a waiver as a physician intending to work in an underserved area must submit evidence that the physician will provide full-time clinical medical service 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. The record shows that the petitioner has studied radiology, and she has stated her intention "to have a clinical and academic career in Vascular and Interventional Radiology." The petitioner has not shown that the Secretary of HHS has, at any time during the relevant period, designated shortages of radiologists in New York or anywhere else, and therefore the petitioner's stated specialty places her outside of the class of physicians covered by the regulations at 8 CFR 204.12.

The petitioner graduated from medical school in India in 1996, and later that year received certification from the Educational Commission for Foreign Medical Graduates. Counsel stated "[t]he area in which the beneficiary intends to practice medicine is a blighted urban area that suffers

from a severe health-care shortage and is in dire need of qualified physicians." The petitioner stated "I will combat the illnesses which primarily [a]ffect the indigent who suffer from substandard nutrition, poor living condition[s], and inadequate health care," and indicated that she would work for the medical practice of Dr. Cecile Wechsler. Dr. Wechsler states that the petitioner would provide "a full range of primary health care services to the residents of this medically underserved area," and that the petitioner "has made a commitment to live and practice medicine in this area." On her resume, the petitioner stated her objective as "[t]o gain Research Experience before applying for residency in a competitive Radiology Program to have a clinical and academic career in Vascular and Interventional Radiology." The petitioner did not specify which "illnesses which primarily [a]ffect the indigent" are treated by radiologists.

The director approved the petition on September 24, 1997, prior to the publication of *Matter of New York State Dept. of Transportation*. The petitioner subsequently applied for adjustment of status to become a lawful permanent resident. Submitted with the adjustment application was a February 1999 letter from Dr. Cecile Wechsler, indicating that "the position offered to [the petitioner], as a provider of primary health care services is available to her as soon as she receives the appropriate credentials." Dr. Wechsler did not specify what credentials the petitioner lacked. Another letter, also dated February 1999, from Professor Claudia I. Henschke of the New York Presbyterian Hospital, indicates that the petitioner "is currently a volunteer in the Department of Radiology at The New York Presbyterian Hospital."

On June 26, 2000, the director requested, among other documentation, evidence of the petitioner's employment and income. In response, the petitioner submitted a letter from Peter C. Hentzen, residency program co-director at the University of Louisville (Kentucky) Health Sciences Center. Dr. Hentzen stated that the petitioner "is a resident in good standing in the Department of Radiology at the University of Louisville. [The petitioner] began her residency training . . . on July 1, 2000. . . . Her anticipated date of completion will be June 30, 2004." Thus, this letter indicates that the petitioner would be in "training" until the summer of 2004, nearly seven years after she filed the petition in August 1997.

On December 1, 2000, the director informed the petitioner of the Service's intent to revoke the petition, because the petition "was approved with the stipulation that [the petitioner was] to be employed in a medically underserved area . . . [in] the New York City area," but the petitioner had left New York for a residency program in Louisville, Kentucky.

In response to the notice, the petitioner submitted evidence showing that there are medically underserved areas in and near Louisville. Considering that the petitioner was, at the time, a trainee and not fully qualified to practice medicine, it is not clear to what extent the petitioner was able to provide services; clearly, she was not yet considered sufficiently qualified to treat patients at Dr. Wechsler's practice. Furthermore, the documentation does not show that the area was underserved with regard to radiologists, the specialty for which the petitioner had traveled to Louisville to study.

The petitioner also submitted a new letter from Dr. Wechsler, who stated:

> [The petitioner] will be joining us . . . after she completes her advance training, as required for full licensing and board eligibility. Indeed, in order for [the petitioner] to fully perform her duties at the primary care facilities [in New York], it is necessary for her to complete residency training. . . . [T]he position is still open to [the petitioner] and . . . she is expected to join the practice in July 2004.

A letter from Dr. Gregory Postel, residency program director at the University of Louisville, reaffirmed that the "anticipated completion date of [the petitioner's] training is June 30, 2004." Counsel argued that "it is necessary for [the petitioner] to complete residency training so that she can acquire her license," and cited case law from 1968 and 1969 indicating that an alien, fully licensed as a physician in the country where she obtained her education, may enter the U.S. as a physician even if she would not "be eligible to practice his/her profession immediately upon admission to the United States." The present matter is distinguished from the precedent decisions by several factors, such as the degree of prior employment experience; the petitioner has not claimed any actual employment experience as a physician, in the U.S. or elsewhere.[1] Also, the earlier cases simply involved the aliens' eligibility for classification as professionals. In this instance, the petitioner seeks not only classification as a member of the professions holding an advanced degree, but also the special additional benefit of a national interest waiver (a benefit that did not exist until more than a decade after the issuance of the cited precedents). The burden is on the petitioner to explain how it was in the national interest to approve, in 1997, a petition for an alien who would not be able to practice in the underserved area for another seven years. While the petitioner's initial submission in August 1997 made it clear that the petitioner was not yet licensed to practice in New York, nothing in that initial filing indicated or suggested that the petitioner was still several years away from eligibility for licensure, or that the petitioner would require training outside of the underserved area highlighted in that initial filing. When she filed the petition, the petitioner already resided near the site of her intended employment. The implication, if only by omission, was that the petitioner's licensure was imminent.

The director revoked the approval of the petition on June 8, 2001, noting that "[t]he record contains no current statement from the beneficiary regarding her intentions," and stating "[w]e are not persuaded that the possibility that the beneficiary might take a job in New York City some 3-and-a-half years in the future warrants the continuation of the approval of the present visa petition."

On appeal, the petitioner submits a letter from Dr. Gregory Postel, dated June 27, 2001, indicating that the petitioner would leave the University of Louisville effective July 2001 for another training assignment at the University of Rochester (New York). Dr. Postel states "[s]ubsequent to the completion of her training . . . in July 2002, she shall have completed the mandatory three years of training requisite for licensure." Dr. Postel does not specify why it is that the petitioner would be eligible for licensure in 2002, when repeated previous statements

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[1] All national interest waiver applications must be accompanied by Form ETA-750B, Statement of Qualifications of Alien. On this form, the petitioner has left blank the section labeled "Work Experience," and by signing the form the petitioner has attested to its accuracy under penalty of perjury.

from himself and others indicated that the petitioner's training would not be complete until 2004. Dr. Postel adds that the petitioner "has significant family in New York where she intends to finally practice."

Dr. Wechsler, in her latest letter, dated June 15, 2001, states that the petitioner "has continued to demonstrate her intent to work in my practice as soon as she completes her licensure requirements which shall be in July 2002." Dr. Wechsler asserts that the petitioner was forced to travel to Louisville for training because "the process of obtaining a residency is computer algorithm based." Dr. Wechsler attests to the petitioner's character, stating that she has known her for years because the petitioner's father-in-law, an oral surgeon, operates a practice "across the hall" from Dr. Wechsler's own office, and she adds "I have seen how attached their family is and how committed they are in trying to keep the family in the same geographic area." The appeal submission contains a second letter from Dr. Wechsler, dated June 12, 2001, containing many of the same assertions found in her letter of June 15.

The record contains no documentation from the University of Rochester to confirm when (or even if) the petitioner initiated arrangements to transfer there. Letters from Dr. Wechsler, in New York City, and the faculty of the University of Louisville do not constitute documentary evidence of the petitioner's transfer to, or training at, the University of Rochester.

In an affidavit, the petitioner asserts that "[f]or any foreign medical graduate to become licensed to work in the United States, he or she must obtain an ECFMG certificate, and pass all three steps of the USMLE licensing examination." The petitioner's initial submission showed that she had passed the first two steps of the USMLE examination; the petitioner indicates on appeal that she will take step three of the examination "in December of 2001," illustrating another requirement of licensure that the petitioner had not met even as late as the time she filed the appeal in June 2001. Because the petitioner had not even taken this examination, it was entirely speculative (however well founded the petitioner's expectations) that she would even pass this examination.

Clearly, the director erred in approving the petition in September 1997, when it would be more than four years before the petitioner would even be able to demonstrate that she would be able to obtain a license to practice medicine. At the time she filed the petition, the petitioner was, for all practical purposes, not a physician but an aspiring physician, seeking a national interest waiver based on medical work that she had not yet shown eligibility to practice, and that under the best of circumstances she would be unable to practice for five to seven years after the filing date. We cannot find that it is in the national interest to secure the immediate admission of an alien based on work that cannot be performed until many years in the future, contingent even then on the alien's future ability to meet conditions that the alien had not yet met as of the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Beyond the above, another issue has arisen. In her affidavit on appeal, the petitioner asserts that "to practice in the state of New York one needs to have three years of training. I have

specifically transferred to a training program in New York, where I will be able to finish my third and final year of training prior to licensure, in New York." The petitioner states that "a major reason for our wanting to come to the United States" was so that she could practice near her father-in-law's practice, and that her "intention has always been to practice medicine at the offices of Cecile Wechsler, MD." The petitioner repeatedly stresses her intention to work for Dr. Wechsler in 2002, as soon as she obtains her license.

Subsequently, the Service has received a letter dated March 4, 2002, from Gerald Rosenberg, administration director of Hamdan Medical Center in Greenville, Florida. The letter reads, in pertinent part:

> On October 30, 2001, we advised this center that [the petitioner] would relocate to North Florida and join us to practice medicine at our medical center. We also filed an I-129 [nonimmigrant visa] application on her behalf. This application has since been withdrawn and [the petitioner] will not relocate. . . . [The petitioner] has decided to remain in New York City to practice medicine in a medically under-served area.

While the above letter indicates that the petitioner will not relocate to Florida after all, it remains that the letter shows that the petitioner was at least considering employment in Florida in October 2001, and possibly even later. The petitioner's apparent efforts to secure employment in Florida are, at best, inconsistent with her repeated prior assertions that her intention has always been to practice medicine in New York City.

Mr. Rosenberg states that the petitioner never received a copy of the Service's notice of intent to revoke the petition, and that the petitioner did not learn "that there was a problem" until after the petition was revoked in June 2001. We note, in this respect, that counsel's response to the notice of intent included a new letter from Dr. Wechsler. Both the petitioner and Dr. Wechsler have asserted that they are in frequent contact with one another, although Dr. Wechsler was plainly aware of the notice of intent, supposedly several months before the petitioner herself learned of it.

Mr. Rosenberg states "I agree with the decision of the INS to revoke [the petitioner's] I-140 petition," but asserts that the revocation arose from counsel's poor handling of the matter rather than any willful failing on the part of the petitioner. He claims that the petitioner first learned of the problem in June 2001, and "immediately remedied her infraction" by transferring to the University of Rochester. Still, if the petitioner was aware that her departure from New York was a basis for the revocation, and the petitioner desired to remedy that issue, it is far from clear why the petitioner then apparently sought employment in Florida, thereby reinforcing the Service's misgivings about the petitioner's intentions of remaining in New York.

For the reasons stated above, we concur with the director's finding that the petition was initially approved in error. The petition was premised on the petitioner's stated intention to work in New York City upon obtaining her license, and after the petition was approved it has come to light not only that the petitioner first left the New York City area first to train in Kentucky, and then sought

employment in Florida, but also that the petitioner was much farther from eligibility to practice medicine than her initial submission suggested. The petitioner cannot qualify for a 1997 priority date based on benefits that she could not even begin to confer on society until 2002 or 2004. In this respect, the petition appears to have been filed prematurely. Furthermore, the petitioner's specialty of radiology falls outside the scope of the regulations controlling national interest waivers for physicians in medically underserved areas. If Dr. Wechsler, Hamdan Medical Center, or some other facility is unable to locate a qualified U.S. radiologist, then the prospective employer should apply for a labor certification and file a new petition after the approval of the labor certification. A petition filed in such a manner would not require an additional showing of national interest, and any subsequent adjustment application filed by the alien would not be held in abeyance for six years as is the case with adjustment applications filed by physicians who obtain waivers under section 203(b)(2)(B)(ii) of the Act.

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.

Upon review, the petitioner has not presented sufficient evidence to overcome the grounds for which the director revoked the approval of the petition. The petitioner has not established eligibility pursuant to section 203(b)(2) of the Act and the petition may not be approved. 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. If the petitioner intends to file a new petition based on practicing medicine in an underserved area, the petitioner must meet the documentary requirements specified at 8 CFR 204.12(c).

ORDER: The appeal is dismissed.