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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 07 2010

SRC 07 267 51099

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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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 you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) 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 an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a general surgeon. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for classification as an alien of exceptional ability or a member of the professions holding an advanced degree. The director concluded, however, 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.

On appeal, counsel submits a brief. For the reasons discussed below, we uphold the director's ultimate conclusion that the petitioner has not demonstrated that an exemption from the job offer requirement is warranted in the national interest.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

At the outset, we note that the petitioner has filed two petitions in his own behalf in addition to the one before us. Specifically, on September 6, 2007, the petitioner submitted a petition in his own behalf seeking to classify himself as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. The director denied that petition on September 26, 2008. The petitioner did not appeal this decision. On December 10, 2008, the petitioner filed a second petition seeking the same classification pursuant to section 203(b)(1)(A) of the Act. Part 4, line 6 of the 2008 petition reflects that no petition had been previously filed in the petitioner's behalf despite the instant petition before us and the 2007 petition filed pursuant to section 203(b)(1)(A) of the Act. The petitioner signed the 2008 petition under penalty of perjury. In addition, counsel, who represented the petitioner in all three petitions, signed the 2008 petition as the preparer affirming that she had prepared the petition based on all the information of which she had knowledge. The concealment of the filing of prior petitions on the 2008 petition seriously reduces the credibility of both the petitioner and counsel. The director approved the 2008 petition, which seeks a classification higher than the one sought in the matter before us, on July 31, 2009.

We do not find that the director's approval of the 2008 immigrant visa petition mandates the approval of the visa petition filed under a lesser preference classification currently before the AAO. Each case

must be decided on a case-by-case basis on the evidence of record. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous.[1] *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). It would be absurd to suggest that U.S. Citizenship and Immigration Services (USCIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. The AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 petitioner holds a Master of Surgery from the Postgraduate Institute of Medical Education and Research in India. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

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[1] If that approval was based on the same or similar evidence to that presented with the instant petition, the approval would be gross error.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "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).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> 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 Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), 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. *Id.* at 217. Next, it must be shown 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.

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. *Id.* at 219. 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. *Id.*

The director did not contest that the petitioner works in an area of intrinsic merit, surgery, and we find that he does. The director did question whether the proposed benefits of the petitioner's work would be national in scope. In addressing this issue in *NYSDOT,* the AAO stated:

> [T]he analysis we follow in "national interest" cases under section 203(b)(2)(B) of the Act differs from that for standard "exceptional ability" cases under section 203(b)(2)(A) of the Act. In the latter type of case, the local labor market is considered through the labor certification process and the activity performed by the alien need not have a national effect. 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, n.3

In her original cover letter, counsel asserted that the petitioner's role as a physician "go[es] beyond serving the medical, scientific or research settings." Counsel states that the petitioner has made important contributions that benefit the greater medical community nationally and internationally through his research projects and teaching. We are not persuaded that a general surgeon, the position listed on the petition as the proposed employment, would have an impact discernible at the national level. Supervising local residents and interns, as the petitioner has done in the past as a chief resident, also has little discernible impact at the national level pursuant to the analysis set forth in the footnote quoted above regarding teachers. In light of the above, the petitioner has not established that the benefits of his employment as a general surgeon will 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. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

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. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The director concluded that the petitioner had not demonstrated his influence in the field, especially at the national level. On appeal, counsel asserts that the petitioner should be "exempt from the labor certification process" because his skills are so unique and because his clinical and research abilities cannot be easily articulated on an application for alien employment certification. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA

1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The record does not support counsel's assertions.

Counsel initially asserted that the record contains attestations of the petitioner's "exceptional abilities" and concludes that the petitioner's "experience and expertise" as well as his contributions "vastly outweighed NYSDOT's protectionist concern for the economic security of U.S. workers." First, by statute, "exceptional ability" is not, by itself, sufficient cause for a national interest waiver. *Id.* at 218. Thus, the benefit which the alien presents to his field of endeavor must greatly exceed the "achievements and significant contributions" contemplated for that classification. *Id; see also id.* at 222.

Moreover, counsel's implication that *NYSDOT* is the original source of a "protectionist concern" is unfounded. Rather, it is Congress that determined that an alien seeking to perform skilled or unskilled work in the United States is inadmissible absent certification from the Department of Labor that there are insufficient able, willing and qualified U.S. workers and that the alien's employment will not adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A) of the Act. It was this congressionally mandated interest that *NYSDOT* took into account.

Congress is presumed to be aware of existing administrative and judicial interpretations of statute. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In this instance, Congress' awareness of *NYSDOT* is a matter not of presumption, but of demonstrable fact. In 1999, Congress amended section 203(b)(2) of the Act in direct response to the 1998 precedent decision. Congress, at that time, could have taken any number of actions to limit, modify, or completely reverse the precedent decision. Instead, Congress let the decision stand, apart from a limited exception for certain physicians, as described in section 203(b)(2)(B)(ii) of the Act. The petitioner in this matter is not applying under that limited exception. Thus, all concerns set forth in *NYSDOT* are applicable.

Counsel concluded that the petitioner's significant contributions, leading roles, knowledge, skill, selection into "prestigious" medical societies and publications demonstrate his "extraordinary talent." The petitioner submitted evidence of his membership in the American Medical Association, the Southeastern Surgical Congress, the Association of Surgeons of India, the Indian Medical Association and the Indian Association of Cardiovascular-Thoracic Surgeons. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. The record contains no evidence of the membership requirements for any of the above associations. Even if these memberships were indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field (and the record does not support such a finding), they would serve to meet one criterion for aliens of exceptional ability, set forth at 8 C.F.R. § 204.5(k)(3)(ii)(E), a classification that normally requires an alien employment certification. As stated above, by statute, "exceptional ability" is not, by itself, sufficient cause for a national interest waiver. *NYSDOT,* 22 I&N Dec. at 218.

According to his self-serving curriculum vitae, the petitioner is currently an attending surgeon. While he indicates that he previously worked as Chief of House Staff at the Bronx-Lebanon Hospital Center, the certificate from this institution lists his position as "Chief Resident in Surgery." The record does not confirm that these positions in and of themselves are particularly leading for the institutions for which the petitioner has worked.

While the petitioner is mentioned in a newspaper report, the publication is not identified and the story is about the presence of Indian doctors at North General Hospital rather than the petitioner's personal accomplishments. The petitioner also submitted evidence that does not appear to pertain at all to his abilities as a surgeon, such as his membership on a winning hockey team and participation in a camping program.

The petitioner submitted five published case studies, his unpublished thesis, two unpublished manuscripts documenting case studies and PowerPoint presentations with no indication as to where they were presented. The only evidence relating to conferences are certificates of participation rather than presentation and a letter from the Society of Black Academic Surgeons that, while thanking the addressee for a presentation, is addressed to the petitioner's coauthor (as indicated on the petitioner's self-serving curriculum vitae) and does not mention the petitioner at all. We will not presume the impact of a case study from the journal in which it appeared. The petitioner submitted no evidence of the impact of his published case studies, such as evidence that they have been widely cited or even cited at all.

The remaining evidence includes six letters. 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 evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also 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)).

In evaluating the reference letters, we note that letters containing mere assertions of talent, influence and recognition in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation *and who have applied his work* are, when supported by other objective evidence, the most persuasive.

[redacted] a professor at the University of Arizona, does not explain how he knows of the petitioner's work, but we note that he is a listed coauthor of one of the petitioner's case studies. [redacted] notes that the petitioner has experience both as a clinician and as a researcher. The petitioner's

research, however, appears limited to case studies of his own patients. [redacted] discusses the petitioner's ability to perform "the most innovative diagnostic and treatment procedures related to various subspecialties of surgery," but does not identify any of these procedures or explain how the petitioner's skill in these procedures has impacted the field. [redacted] further acknowledges that cardiothoracic surgeons in general "have sophisticated knowledge of state-of-the-art procedures" but concludes that, based on the petitioner's "multiple publications," he is "one of the best." The record contains no evidence to support [redacted] implication that five published case studies could only be produced by "one of the best" cardiothoracic surgeons. While the petitioner need not demonstrate that he is one of the small percentage at the top of the field for this classification, we note that [redacted] curriculum vitae, submitted by the petitioner, indicates that he has authored 194 articles, 14 book chapters and 90 abstracts. This information appears to seriously undermine [redacted] contention that the petitioner's publication record alone is evidence that the petitioner is one of the top cardiothoracic surgeons.

[redacted] at Bronx-Lebanon Hospital Center, asserts that he is basing his evaluation on a review of the petitioner's curriculum vitae, even though he is a former colleague of the petitioner. [redacted] asserts that the petitioner has "played a leading role in numerous research studies that have been selected for presentation in leading forums." As stated above, the petitioner has merely coauthored five case studies. [redacted] further asserts that the petitioner "boasts" prestigious medical association memberships although, as stated above, the record contains no evidence that these associations, while possibly prestigious as a whole, require anything other than professional accreditation for membership. The only specific example of innovation provided by [redacted] is his assertion that the petitioner was the first to prove that laparoscopic cholecystectomy offers advantages of less intraoperative bleeding, post operative morbidity and faster recovery in patients with cirrhosis of the liver. The record contains no evidence that the petitioner pioneered this procedure. While [redacted] praises the conference at which this work was apparently presented, he provides no examples of an increased use of this procedure with such patients at independent institutions following the petitioner's presentation. Finally, [redacted] discusses the petitioner's strictly internal review responsibilities at Bronx-Lebanon Hospital Center without explaining how these duties demonstrate his national impact.

The remaining letters are from doctors who appear independent of the petitioner and affirm that their opinion is based on a review of the petitioner's curriculum vitae and publications. These letters mostly attest broadly to the petitioner's impact without providing any concrete examples. Specifically, [redacted], an Emeritus Assistant Professor of Anesthesiology at the Mayo Clinic, asserts that the petitioner "has had a *direct* impact on the future of the field throughout the world." (Emphasis in original.) In support of this broad assertion, [redacted] attests to the petitioner's "numerous research projects" but does not reconcile this claim with the petitioner's mere five published case studies. [redacted] second example of the petitioner's contributions constitutes the petitioner's "ability to judge accomplished physician-scientists." The certificate from the Bronx-Lebanon Hospital Center, however, indicates only that the petitioner was a chief resident. The record does not explain how the petitioner's supervision of his immediate subordinates, other residents who are completing

their training in the field, has impacted the field at the national level. Finally, [redacted] asserts that the petitioner's rare ability to perform innovative invasive and noninvasive procedures and the general shortage of cardiothoracic surgeons warrants a waiver of the alien employment certification process in this case. It cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. at 221.

[redacted] a staff physician at the University of California, [redacted] claims to base his letter on a review of the petitioner's credentials and his "stellar reputation in the field." We note, however, that according to [redacted] curriculum vitae, he previously worked at the Bronx-Lebanon Hospital Center, although his time there did not overlap with the petitioner's employment there. [redacted] lists Transmyocardial Laser Revascularization as a novel innovative procedure that the petitioner has mastered. The record contains no evidence, however, that the petitioner has been invited to hospitals nationwide to instruct other cardiothoracic surgeons as to how to do this procedure. Thus, the impact of the petitioner's ability to perform this procedure is undocumented.

Finally, [redacted] of the Indian Association of Cardiothoracic and Vascular Surgeons, asserts that the petitioner was able to treat a high risk patients referred to him by other surgeons and that he has mastered Video Assisted Thoracic Surgery (VATS). The record contains no evidence that the petitioner pioneered VATS. Once again, the national impact of the petitioner's ability to perform the skills necessary to treat his patients developed by other surgeons is undocumented.

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 alien employment 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, 8 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 an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.