identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

B5

[redacted]

DATE: APR 21 2011

Office: [redacted]

FILE: [redacted]

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, [redacted] 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 to classify the beneficiary 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, the beneficiary's grandmother, asserts that the beneficiary will work as a U.S. military medical doctor. As of the date of filing, the beneficiary had not worked as a physician for several years. Rather, his recent employment involved marketing pharmaceuticals. 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 beneficiary qualifies for classification as an alien of exceptional ability or a member of the professions holding an advanced degree. Rather, the director concluded 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, the petitioner submits a statement and evidence of the beneficiary's credentials. For the reasons discussed below, we uphold the director's determination that the petitioner has not established the beneficiary's eligibility for the benefit sought. Specifically, the petitioner has not submitted the required evidence necessary to establish eligibility under section 203(b)(2)(B)(ii) of the Act or documented that the beneficiary has the necessary track record in military medicine required for the discretionary waiver under section 203(b)(2)(B)(i) of the Act.

The petitioner has consistently asserted that the beneficiary's intent to serve in the U.S. military as a doctor, in and of itself, warrants a waiver of the alien employment certification. This assertion essentially argues for a blanket waiver for all alien physicians intending to join the military and serve as a military doctor. As will be discussed below, regardless of the petitioner's personal belief that her grandson will benefit the national interest as a military doctor, there is no blanket waiver covering the facts in this case.

Beyond the decision of the director, we further find that the petitioner has not submitted sufficient evidence of the beneficiary's advanced degree. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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)(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.

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(3)(i) states that evidence of an advanced degree consists of an "official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree" or an official academic record for a U.S. baccalaureate or foreign equivalent degree plus five years of post-baccalaureate experience.

The petitioner submitted an English-language transcript, diploma certificate and degree certificate [redacted] of Medical Sciences in [redacted] issued to the beneficiary. The petitioner did not submit the official foreign language documentation pursuant to 8 C.F.R. § 103.2(b)(3), which requires a certified English translation in support of a foreign language document, not instead of the foreign language document. The petitioner also failed to submit an evaluation explaining the U.S. equivalence of the beneficiary's education. As the petitioner has not submitted sufficient evidence of the beneficiary's education, we withdraw the director's finding that the petitioner has established that the beneficiary is 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. As set forth in section 203(b)(2)(B) of the Act, there are two means of seeking a waiver of the alien employment certification process in the national interest. The director discussed both means. Section 203(b)(2)(B)(ii) of the Act sets forth a program for physicians willing to work in an underserved area or a facility under the jurisdiction of the Secretary of Veterans Affairs. On its face, this program does not cover individuals proposing to join the military and work as a military doctor. Nevertheless, we will review the evidence under this provision below. Finally, section 203(b)(2)(B)(i) of the Act sets forth a more discretionary waiver. We will also address the evidence under this provision.

**I. Non-Discretionary Physician Waiver (Section 203(b)(2)(B)(ii) of the Act)**

The regulation at 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.

Section 212(a)(5)(B) of the Act provides that a graduate of a medical school not accredited by a Secretary of Education approved body who is coming to the United States principally to perform services as a member of the medical professions is inadmissible unless he has passed parts I and II of the National Board of Medical Examiners Examination (or equivalent examination as determined by the Secretary of Health and Human Services) and is competent in oral and written English.

The petitioner did not submit any of the above evidence. Rather, she submitted a letter from [redacted] Counselor for the U.S. Army Health Care Team of the Department of the Army in [redacted] a letter she wrote to the President of the United States; a response from the White House advising that her inquiry had been forwarded to the Department of Homeland Security; a response from the Department of Homeland Security providing general information on the employment based classifications; the beneficiary's transcript; the beneficiary's foreign medical license; the beneficiary's 2002 Test of English as a Foreign Language (TOEFL) scores; the beneficiary's 2006 International English Language Testing System scores reflecting scores of "7" in writing and speaking; and an unsigned letter from [redacted] Pharmaceuticals confirming that the

beneficiary has been working for that company as a sales representative and regional sales manager as of 2004.

In response to the director's request for additional evidence, which explained the above regulatory requirements, the petitioner submitted a personal letter asserting that her local Veterans Affairs hospitals have no openings and reiterating that her grandson intends to serve in the military. The petitioner also submitted an unsigned letter from the beneficiary stating:

1. I agree to work full-time (at least 40 hours per week) in a clinical practice for an aggregate 5 years. I will follow the arrangement of [redacted] Hospital and be willing to work in any place required.

2. I also agree to work in the general medicine, internal medicine as well as in my specialty areas of ENT and radiology as you may need.

The petitioner further submitted the beneficiary's 2008 passing scores on the [redacted] Medical Council examination. The petitioner failed to submit evidence that the U.S. Secretary of Health and Human Services has determined that the [redacted] examination is equivalent to the National Board of Medical Examiners Examination. In addition, the petitioner resubmitted the letter from [redacted] and the beneficiary's transcript.

The director concluded that the petitioner had not submitted the required evidence set forth in the above regulations. On appeal, the petitioner asserts that she did not knowingly apply under section 203(b)(2)(ii) of the Act and that the director failed to consider the beneficiary's willingness to serve in the U.S. Army. In addition, the petitioner submits a letter from her Reverend also asserting that the director incorrectly considered the petition under section 203(b)(2)(ii) and a letter from the beneficiary affirming that he "would be glad to work on my first jobs in US for at least 5 aggregated years." Subsequently, the petitioner submitted the beneficiary's post-filing credentials, none of which address the regulations quoted above. Moreover, the petitioner must establish the beneficiary's eligibility as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

The petitioner has not submitted a contract or a letter of commitment. The beneficiary's personal affirmation that he will work for five years does not fulfill this requirement. The petitioner also failed to submit the admissibility documentation required under section 212(a)(5)(B). Specifically, the petitioner did not submit the beneficiary's results of the National Board of Medical Examiners Examination or evidence that the Secretary of Health and Human Services has determined that the [redacted] exam is equivalent. Thus, the petitioner has not established the beneficiary's eligibility under section 203(b)(2)(B)(ii) of the Act. As the petitioner has asserted, however, that she did not mean to seek benefits under that provision, we will now consider the beneficiary's eligibility under the discretionary provision at section 203(b)(2)(B)(i) of the Act.

**II. General Discretionary Waiver (Section 203(b)(2)(B)(i) of the Act)**

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 that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show 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, 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 subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. We include the term "prospective" 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.*

It is the position of USCIS to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization. *Id.* at 217. Thus, there is no blanket waiver for physicians who affirm a desire to join the military.

We concur with the director that the beneficiary works in an area of intrinsic merit, medicine. The director then concluded that the petitioner had not demonstrated that the proposed benefits of the beneficiary's work a military doctor would be national in scope. On appeal, the petitioner states:

> [T]he benefit (of national nature) of this petition rests in the very outstanding & repeated emphasis that our primary objective is offering the beneficiary to work as a medical doctor in our US military service where medical doctors are always in need; that is what my request for NIW has always been based on.

The petitioner affirms that once the beneficiary arrives in the United States, "he will quickly begin his whole series of steps necessary for the eventual attainment of a US medical License (beginning with taking the step 1, step 2 tests of ECFMG)."

*NYSDOT*, 22 I&N Dec. at 217, n.3 provides examples of occupations that inherently provide benefits that are local 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.* Significantly, Congress is presumed to be aware of existing administrative and judicial interpretation of statute when it reenacts a 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, such as by applying the waiver to all physicians or general surgeons. Instead, Congress let the decision stand, apart from a limited exception for certain physicians working in shortage areas, as described in section 203(b)(2)(B)(ii) of the Act. As discussed above, the petitioner has not demonstrated that the beneficiary qualifies under that provision and, in fact, asserts that she is not applying under that provision. Because Congress has made no further statutory changes in the decade since *NYSDOT*, we can presume that Congress has no further objection to the precedent decision.

In light of the above reasoning in *NYSDOT*, the petitioner will not provide benefits that are national in scope. While a military doctor may move from one base to another and treat soldiers from different locations, the benefits at any one time are purely local.

It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. On appeal, the petitioner states:

> In the present discussion, the national benefit (or interest) is derived from the alien's successful participation of the proposed "process." If the alien's participation depends on his qualification for the NIW waiver, the labor certification requirement in this third factor could be a road block to his access to NIW, his participation in the process would then be denied, hence the national interest (or benefit) otherwise attributable to this alien would be adversely affected. QED.

The petitioner fails to understand the standard for the benefit sought. As stated above, there is no blanket waiver for physicians professing their intention to join the military to serve as a military doctor. Rather, 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 beneficiary's contributions in the field are of such unusual significance that he 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 that the beneficiary has a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

As of the date of filing, the petitioner had not worked as a physician for almost five years. Rather, according to the Form ETA 750B that he signed, he had been working as a medical representative and product manager for [redacted] promoting pharmaceuticals. The record lacks any evidence of the petitioner's specific prior medical accomplishments that have influenced the field of military medicine as a whole and thereby establish the beneficiary's ability to benefit the national interest. *See id.*

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.

**ORDER:** The appeal is dismissed.