

U.S. Department of Homeland Security
P.O. Box 852841
Mesquite, Texas 75185-2841



U.S. Citizenship
and Immigration
Services

TO:

DATE:

MAR 17 2010

Petition: Form I-140

File Number: SRC-
Beneficiary:

DECISION

Your Form I-140, Immigrant Petition For Alien Worker, has been denied for the following reason(s):

See Attachment

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed with this office at the address at the top of this page within 30 days of the date of this notice (33 days if this notice was mailed to you). Your appeal must be filed on Form I-290B. A fee of \$585.00 is required, payable to U. S. Citizenship and Immigration Services with a check or money order from a bank or other institution located in the United States. If no appeal is filed within the time allowed, this decision will be the final decision in this matter.

In support of your appeal, you may submit a brief or other written statement for consideration by the reviewing authority. You may, if necessary, request additional time to submit a brief. Any brief, written statement, or other evidence not filed with Form I-290B, or any request for additional time for the submission of a brief or other material must be sent directly to:

U. S. Citizenship and Immigration Services
Administrative Appeals Office
Washington, D.C. 20529-2090

Any request for additional time for the submission of a brief or other statement must be made directly to the Administrative Appeals Office, and must be accompanied by a written explanation for the need for additional time. An extension of time to file the appeal may not be granted. **The appeal may not be filed directly with the Administrative Appeals Office. The appeal must be filed at the address at the top of this page.**

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Roark".

David L. Roark, Director
Texas Service Center

Officer# XM0251

cc:

Enclosure: Form I-290B

DECISION

The self-petitioned I-140 petition was filed with this office under Section 203(b)(2) of the Immigration and Nationality Act (Act) as a member of the professions with an advanced degree. In addition, you are requesting a national interest waiver (NIW) of a job offer and the correlating labor certification from the Department of Labor, as an alien physician serving in a medically underserved area or a VA facility.

Title 8, Code of Federal Regulations (CFR), Section 204.5(k)(4)(ii) states, in pertinent part:

The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest.

Section 203(b)(2) of the Act states, in pertinent part:

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. ... the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Title 8, CFR, Section 204.12 states:

How can second preference immigrant physicians be granted a national interest waiver based on service in a medically underserved area or VA facility?

(a) Which physicians qualify? Any alien physician (namely doctors of medicine and doctors of osteopathy) for whom an immigrant visa petition has been filed pursuant to section 203(b)(2) of the Act shall be granted a national interest waiver under section 203(b)(2)(B)(ii) of the Act if the physician requests the waiver in accordance with this section and establishes that:

(1) The physician agrees to work full-time (40 hours per week) in a clinical practice for an aggregate of 5 years (not including time served in J-1 nonimmigrant status); and

(2) The service is:

(i) In a geographic area or areas designated by the Secretary of Health and Human Services (HHS) as a Medically Underserved Area, a Primary

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Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area, and in a medical specialty that is within the scope of the Secretary's designation for the geographic area or areas; or

- (ii) At a health care facility under the jurisdiction of the Secretary of Veterans Affairs (VA); and
- (3) A Federal agency of the department of public health of a State, territory of the United States, or the District of Columbia, has previously determined that the physician's work in that area or facility is in the public interest.

On December 14, 2009, you were sent a letter requesting additional evidence. The letter requested the following:

You are seeking classification as a pediatric pathologist. You submit evidence that [redacted] Medical Center, and the [redacted] School of Medicine and the Department of Pathology is in a Medically Underserved Area (MUA), however, you have not shown that you will be practicing primary care medicine. Primary care medicine is defined as family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. Submit evidence that [redacted] Medical Center, and the [redacted] School of Medicine and the Department of Pathology has been designated by the Department of Health and Human Services as a Physician Scarcity Area (PSA).

A response to our letter was received. You state that [redacted] Medical Center, and the [redacted] School of Medicine and the Department of Pathology are not located in a PSA, however; they are located in a MUA. According to a USCIS Headquarters memo, dated January 23, 2007, Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in a medically underserved areas in light of Schneider v. Chertoff, 450 F.3d 944 (9th Cir, 2006), USCIS expanded the fields of medical specialty that may qualify physicians for NIW classification by accepting petitions filed by physicians who provide specialty care. The memo indicates, however, that physicians who provide specialty care must work in areas that have been designated by the Secretary of Health and Human Services as having a shortage of medical specialists for the PSA program.

You submit a document from the U.S. Department of Health and Human Resources stating services are eligible to receive the PSA bonus through June 30, 2008. You do not submit evidence that the Secretary of Health and Human Resources no longer designates areas as PSA, and that USCIS no longer requires specialty care physicians to provide evidence that they will work in an area designated as a PSA.

You do not establish that you will practice primary care medicine at [redacted] Medical Center, and the [redacted] School of Medicine and the Department of Pathology, or that [redacted] Medical Center, and the [redacted] School of Medicine and the Department of Pathology is in a PSA. For these reasons, your petition cannot be approved.

In reviewing an immigrant visa petition, Citizenship and Immigration Services must consider the extent of the documentation furnished and the credibility of that documentation as a whole. The petitioner bears the burden of proof in an employment-based visa petition to establish that it will employ the beneficiary in the manner stated. See Matter of Izdebska, 12 I&N Dec. 54 (Reg. Comm. 1966); Matter of B. Semerjian, 11 I&N Dec. 751 (Reg. Comm. 1966).

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. In visa petition proceedings, the petitioner has the burden of establishing eligibility for the benefits sought. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). The petitioner has not sustained this burden. The petition is hereby denied.