U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

March 9, 2016 **PM-602-0129**

Policy Memorandum

SUBJECT: *Matter of H-V-P-*, Adopted Decision 2016-01 (AAO Feb. 9, 2016)

This policy memorandum (PM) designates the attached decision of the Administrative Appeals Office (AAO) in *Matter of H-V-P-* as an Adopted Decision. Accordingly, this adopted decision establishes policy guidance that applies to and binds all USCIS employees. USCIS personnel are directed to follow the reasoning in this decision in similar cases.

Matter of H-V-P- clarifies that, in addition to primary care physicians, medical *specialists* who agree to practice in any area designated by the Secretary of Health and Human Services as having a shortage of health care professionals may be eligible for the physician national interest waiver under section 203(b)(2)(B)(ii) of the Immigration and Nationality Act.

Use
This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information
Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
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U.S. Citizenship and Immigration Services

ADOPTED DECISION

MATTER OF H-V-P-

ADMINISTRATIVE APPEALS OFFICE
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
DEPARTMENT OF HOMELAND SECURITY

February 9, 2016[1]

In addition to primary care physicians, medical *specialists* who agree to practice in any area designated by the Secretary of Health and Human Services as having a shortage of health care professionals may be eligible for the physician national interest waiver under section 203(b)(2)(B)(ii) of the Immigration and Nationality Act.

The Petitioner, a physician, seeks an immigrant visa petition as a member of the professions holding an advanced degree as set forth in section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In addition, the Petitioner seeks a "national interest" waiver (NIW) from the requirement of a job offer by a U.S. employer. Section 203(b)(2)(B)(ii) of the Act not only authorizes but requires that such a waiver be afforded to a physician who meets several conditions, most notably for our purposes: (1) that the physician would work in a medically underserved area as designated by the Secretary of Health and Human Services (HHS); and (2) that a Federal agency or State public health department certifies the physician's work is in the public interest.

The Director, Texas Service Center, denied the petition because he found that the Petitioner's past and prospective work as a specialty care physician did not make him eligible for the national interest waiver. The Director then certified the case to us for review.[2] The issue presented is whether eligibility for the physician NIW is available to medical specialists even though the HHS designations ostensibly are limited to only primary care physicians. Upon *de novo* review, we will withdraw the Director's decision and approve the petition.

[1] On March 9, 2016, U.S. Citizenship and Immigration Services designated this Administrative Appeals Office (AAO) decision as an Adopted Decision. The original AAO decision is *Matter of H-V-P-*, ID# 16270 (AAO Feb. 9, 2016).
[2] 8 C.F.R. § 103.4(a) permits Department of Homeland Security (DHS) components to certify their decision for further review by the appropriate appellate authority when the matter involves an unusually complex or novel issue of law or fact.

I. LAW AND POLICY

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

> (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.
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> (B) Waiver of job offer
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> (i) National interest waiver. Subject to clause (ii), the Attorney General[3] 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) Physicians working in shortage areas or veteran facilities.
>
> (I) In general. 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.

[3] Pursuant to section 1517 of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the DHS by the HSA "shall be deemed to refer to the Secretary" of DHS. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

The regulation at 8 C.F.R. § 204.12(a) requires a petitioner seeking a waiver under section 203(b)(2)(B)(ii) of the Act to establish the following:

> (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 geographical area or areas designated by the Secretary of Health and Human Services (HHS) as a Medically Underserved Area, a Primary Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area, *and in a medical speciality that is within the scope of the Secretary's designation for the geographical 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 or 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.

(Emphasis added.) The regulation at 8 C.F.R. § 204.12(c) goes on to set forth evidence that a petitioner must submit, including, in part, documentation that the physician will serve "[i]n a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals *and in a medical speciality that is within the scope of the Secretary's designation for the geographical area or areas*" (or in a VA facility). 8 C.F.R. § 204.12(c)(2) (emphasis added).[4]

In the preamble to the 2000 rule implementing the physician NIW, the legacy Immigration and Naturalization Service (INS) noted that HHS limited its medical care shortage designations to certain general areas of practice (which we will refer to as "primary medical care" or "primary care").[5] The INS accordingly stated that it would limit physician NIWs to these areas of primary care as well, notwithstanding the statute's use of the term "any physician." *See* National Interest Waivers for Second Preference Employment-Based Immigrant Physicians Serving in Medically Underserved Areas or at Department of Veterans Affairs Facilities, 65 Fed. Reg. 53889, 53890 (Sept. 6, 2000).

In 2006, the U.S. Court of Appeals for the Ninth Circuit struck down several parts of the regulations relating to physician NIWs, but did not address a challenge to the requirement under 8 C.F.R. § 204.12(c) that the physician's service be within the scope of the HHS designation. *Schneider v.*

[4] Both regulatory provisions cited above use the term "speciality," whereas other agency materials use the term "specialty." We consider those terms to be interchangeable.

[5] Those areas of practice were family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. 65 Fed. Reg. 53889, 53890.

Chertoff, 450 F.3d 944, 959-960 (9th Cir. 2006). In the wake of the *Schneider* decision, United States Citizenship and Immigration Services (USCIS) issued a policy memorandum revising the USCIS Adjudicator's Field Manual (AFM) and providing interim procedures for adjudicating physician NIWs. This memorandum stated, "USCIS is expanding the fields of medical specialty that may qualify physicians for NIWs by accepting petitions on behalf of physicians who provide specialty care."[6] (Emphasis in original.) The Schneider Memorandum went on to note: "The Nursing Relief Act [creating the mandatory physician NIW] requires USCIS to recognize HHS designations of health professionals without limitation to primary care. In following HHS' designations of MUP [Medically Underserved Population] and PSA [Physician Scarcity Area], USCIS will now recognize NIW physicians in primary and specialty care." *Id.* at 7 (reference omitted).

II. PERTINENT FACTS AND PROCEDURAL HISTORY

The Petitioner filed Form I-140, Immigrant Petition for Alien Worker, seeking an immigrant visa petition under section 203(b)(2)(A) of the Act as a member of the professions holding an advanced degree, with an accompanying request for a national interest waiver under section 203(b)(2)(B)(ii). As supporting evidence, the Petitioner submitted a letter from the Illinois Department of Public Health in accordance with section 203(b)(2)(B)(ii)(I)(bb) of the Act, stating that the Petitioner's services are in the public interest, as well as documentation indicating that HHS designated his medical practice site as a Health Professional Shortage Area (HPSA) and a Medically Underserved Area/Population (MUA/P).

The Director issued a notice of intent to deny (NOID) the Form I-140, however, noting that the Petitioner's current field of practice (hematology-oncology) is a specialty practice area, and stating that only primary medical care practitioners are eligible for a physician NIW based on service in an HPSA, or MUA/P. The Director pointed out that HHS had designated the Petitioner's practice site as an HPSA as well as a MUA/P. These HHS designations, the Director observed, relate to a lack of primary medical care providers, while only HHS' Physician Scarcity Area (PSA) designation encompasses both primary care *and* specialty care. Citing the Schneider Memorandum, he stated that any service in a medical specialty must be performed in a PSA, not in an HSPA or MUA/P.

In a letter responding to the NOID, the Petitioner argued that the Director misconstrued the Schneider Memorandum because that memorandum states that service by a specialty care physician in *any* area HHS designates as having a shortage of physicians will qualify for the NIW, including service within an HPSA or MUA/P. The Petitioner also stated that HHS no longer maintains and updates shortage designation information for PSAs, submitting a publication by HHS' Centers for Medicare & Medicaid Services about the "sunset" of its PSA bonus payment program on January 1, 2008.

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[6] Memorandum from Michael Aytes, Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Interim guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of* Schneider v. Chertoff, *450 F.3d 944 (9th Cir. 2006) ("Schneider decision")* 2 (Jan. 23, 2007) http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/schneiderintrm012307.pdf (Schneider Memorandum).

The Director then denied the Form I-140, finding that the Petitioner's service as a hematologist-oncologist in an area designated as an HPSA and MUA/P is not qualifying service for the purpose of NIW eligibility. The Director noted that, under 8 C.F.R. § 204.12(a)(2), a physician must practice "in a medical specialty that is within the scope of the Secretary's designation for the geographical area or area," and that HHS does not consider specialty care physicians in its HPSA and MUA/P designations. The Director again cited the Schneider Memorandum as the basis for his decision, and certified his decision for our review under 8 C.F.R. § 103.4(a).

In his brief to us on certification, the Petitioner contends that the Director's decision is contrary to the purpose and structure of the statute, is contrary to the Schneider Memorandum, and represents a departure from agency practice in the years since the Schneider Memorandum. The Petitioner submits a letter from the Illinois Department of Public Health, stating that "the HPSA shortage designation system is the most reliable and accurate system for measuring shortages of physicians, both primary and specialty care, in communities in Illinois." The letter further explains that the "input for the HPSA is not just the number of primary care physicians in a particular area, but includes extensive and diverse demographic data on the community," and that specialists and primary care physicians "work side by side providing care to the same patients." The Petitioner also submits a letter from the chair of the department of medicine at Cook County Health and Hospitals System, who maintains that internists and specialists "function together as an integrated team" within the department "providing care for the same population of patients."

The Petitioner has also submitted an *amicus curiae* brief prepared jointly by the American Immigration Council, the American Immigration Lawyers Association, and the International Medical Group Taskforce.[7] In their brief, *amici* argue (1) that the statute mandates a non-discretionary waiver for "any alien physician" practicing in a designated shortage area, (2) that HPSAs and MUA/Ps are the most accurate and current indication of a shortage area, and (3) that, even though these HHS programs only look at primary care doctors in their calculation, other factors (such as distance and poverty) pertain equally to primary and specialty care. The brief was supported by sworn declarations from four immigration attorneys who attest to USCIS' practice of routinely approving NIWs for specialty care physicians since USCIS issued the Schneider Memorandum in 2007.

III. ANALYSIS

This matter requires us to resolve how to adjudicate an immigration law classification that depends upon certain findings by a sister department in its administration of a health care program.

Section 203(b)(2)(B)(ii) of the Act states that a NIW shall be granted to "any alien physician" who will work in an area designated as having a shortage of health care professionals, and makes no mention of limitations relating to the physician's practice area. In making this waiver mandatory in the Nursing Relief Act, Congress clearly intended to improve the accessibility of medical care in

[7] The AAO appreciates the thoughtful statements of *amici* who helped inform this certification.

underserved areas by providing a waiver of a job offer from a U.S. employer if the physician was willing to practice full time in such an area for five years or more. The framework it created to do so requires first that HHS has designated the area the physician intends to practice in as "having a shortage of health care professionals," and secondly, that a Federal agency or State department of public health has determined that the physician's services in that area are "in the public interest."

The regulation at 8 C.F.R. § 204.12(a)(2)(i) adds a requirement that the physician's area of medical specialty is within the scope of the HHS designation for that area. As noted above, HHS does not single out specialty areas of medical practice in its HPSA and MUA/P designations. While at one time it may have done so with PSAs, that program sunset in 2008 and those designations are no longer effective; the only designations that currently exist relate to primary medical care.

To read this regulation as requiring an affirmative HHS certification of a shortage of specialty care effectively bars all specialist physicians from ever receiving a NIW, no matter how urgently their services may be needed. Were we to construe the regulation to require an HHS designation only under a program that ended in 2008, we would frustrate the statutory scheme Congress enacted to improve access to medical care in underserved areas.

Moreover, the Petitioner has submitted persuasive arguments and probative evidence that the HPSA and MUA/P designations do not necessarily denote a shortage solely of primary medical care physicians. While the designations may only count primary care physicians in their calculus, this is reportedly due to the difficulty of incorporating an analysis that includes the availability of physicians practicing in a large number of specialties. We also note that the letter from the Illinois Department of Public Health mentioned above states that the HPSA designation is the best way to measure shortages of both primary and specialty care physicians in that State.

Finally, the Schneider Memorandum already acknowledged this broader set of relevant HHS programs to inform physician NIW adjudications. While the Director is correct that the Schneider Memorandum specifically referenced the PSA designation in certain instances, the Schneider Memorandum also stated that the statute "requires USCIS to recognize HHS designations of health professionals without limitation to primary care." Schneider Memorandum, *supra*, at 7. An accompanying update to the USCIS AFM instructed that USCIS would now accept petitions from both primary care and specialty care doctors who agree to work in shortage areas, "i.e. Health Professional Shortage Area (HPSA), Medically Underserved Area (MUA), Medically Underserved Population (MUP), and Physician Scarcity Areas (PSA)." Schneider Memorandum, at 11. Accordingly, USCIS began approving NIW petitions on behalf of specialty care physicians in all designation categories following the issuance of the Schneider Memorandum in 2007, and that practice has continued to this day.

IV. CONCLUSION

The Petitioner demonstrated that he is practicing in the specialty of hematology-oncology in an area designated by HHS as having a shortage of health care professionals. As the Petitioner has satisfied

the other applicable statutory and regulatory requirements, we conclude that he has demonstrated eligibility for immigrant classification as a member of the professions holding an advanced degree, as well as an accompanying physician NIW.

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met.

ORDER: The initial decision of the Director, Texas Service Center is withdrawn, and the petition is approved.

Cite as *Matter of H-V-P-*, Adopted Decision 2016-01 (AAO Feb. 9, 2016)