Chapter 4

Family-Based Immigration; Employment-Based Immigration

Introduction

In the foregoing chapters, you have seen sections of the law and the regulations dealing with immigrant and non-immigrant classes defined as "family based" or "employment-based" immigrants or non-immigrant visa classes granted permission to work in the U.S.A. You are also aware that there are strict numerical limits on immigrant visas for the various immigrant categories, whether family or employment based. You also recall seeing the "Priority Date" tables that show the currency of each preference category - sometimes backlogged by years or even decades!

I. Family Immigration

Family based immigration is a term that loosely refers to immigration to the United States on a permanent basis by an individual who has been sponsored by a qualifying family member. There are six categories of family based immigration. At the very top, and not subject to any quotas is the "immediate relative" of a US Citizen. That visa is not subject to any quotas or delays other than normal processing times by the USCIS and/or Department of State.

After that comes the family "preference" category starting with unmarried sons or daughters of US Citizens, being the first preference. Then we have spouses and children (under 21) of legal permanent residents (LPR's) as category 2-A. Following that is category 2-B which is unmarried sons or daughters of legal permanent residents. Thereafter we have married sons or daughters of US Citizens which is family based preference 3. Finally, we have brothers or sisters of US Citizens which is family based preference 4.

Please note that under the immediate relative category, children of the immediate relative cannot enter the USA. Their parents must first be granted immigrant status (ie, "green cards") and then only can the parents petition for their children. However, there is "derivative beneficiary" status as it is called in immigration law for children of the quota-restricted 5 preference categories.

The immigration law is very complex because Congress has over the years essentially created a patchwork quilt of laws - old laws, new laws and circumstances of any given economic and social period. The Congress also set forth strict numerical quotas in the law. Under these only a certain number of visas can be issued every year to each of the family preference categories. Obviously, many, many millions of people want to immigrate to the United States. Therefore, many qualifying relatives are waiting in line to enter. The line moves forward slowly every year when Congress authorizes the issuance of additional immigrant visas. The USCIS and the State Department then process those applications in the order in which they were received. Therefore, a limited number of immigrants is allowed to enter the USA. In the meantime even more immigrants have applied and so the line moves forward slowly and in some cases very slowly. For instance, for brothers or sisters of US Citizens, the wait can be upto 20 years or more for certain countries! Even some employment-based visa categories are backlogged for years!

Financial responsibility of U.S. Citizen or LPR Sponsors

A US Citizen sponsoring a relative must be willing to also accept financial responsibility for that immigrant either on his own or with a joint sponsor. That obligation remains until the immigrant becomes a US Citizen, that immigrant dies, or the immigrant has worked for 40 qualifying quarters in the United States, whichever comes first. Most family based immigration petitions whether filed

in the USA or processed at a consulate overseas require an affidavit of support (Form I-864). If the sponsor cannot meet the income or asset requirements for the number of immigrants being sponsored, a joint sponsor or co-sponsor can file another affidavit of support.

Marriage between a US Citizen spouse and an alien

Marrying a US Citizen in order to gain an immigration benefit is illegal. The marriage must be genuine and bonafide, based on bonds of love and trust as with any couple.

Under the Supreme Court's decision in United States v. Windsor, 133 S.Ct. 2675 (2013), the USCIS now recognizes same-sex marriages as long as the marriage was legally valid in the jurisdiction in which it was celebrated. The Windsor decision also applies to fiancee visas for same-sex couples.

Also recall that in the event that an "immediate relative" spousal relationship is broken due to the death of the U.S. Citizen spouse, the alien spouse can still claim immigration benefits for upto two years following the spouse's death.

Conditional Permanent Resident Status for spouses of US Citizens

Simply getting married to a US Citizen does not automatically make an alien a citizen or permanent resident. The permanent resident status is also known as the "green card". In the past the green card would be issued for 10 years for people who married US Citizen spouses. However, in 1986 Congress enacted a law to combat immigration fraud. That law, the Immigration Marriage Fraud Act or IMFA changed the validity period of the initial green card from 10 years to 2 years. Ninety days before that 2 year period ends, the couple must jointly file another application with the USCIS to prove that they are still married and seek to remove the conditions on the temporary green card and give the foreign spouse an unconditional or "permanent" green card which will be valid for 10 years. If the couple are no longer married to each other, then the alien spouse can choose to remove the conditions on his or her own.

Fiancee Visas - for love or for....?

A fiancé(e) visa is a very useful mechanism that the law provides for intending spouses of US Citizens to legally enter the USA. To be eligible for a fiancé visa, the couple must have met at least once in the two years prior to making the application for the visa. Once the fiancé(e) enters the USA, he or she is entitled to stay in the USA for upto 90 days. During that 90 days the couple can then cement their relationship, spend more time with one another and ultimately get married if that is their desire. However, at the end of the 90 days if the fiancé(e) has not married the US Citizen, the fiancé(e) is no longer in valid status in the USA and must leave. After 90 days, if not married, the foreign fiancé(e) technically becomes illegal in the USA and has overstayed his or her visa.

There is no extension to a fiancé(e) visa nor is a change of status to another immigrant classification allowed for a fiancé(e) visa. The only change allowed for a fiancé(e) visa is "adjustment of status" or application for a green card through marriage to the US Citizen fiance(e).

However, in order for the US Citizen fiancé(e) to file an approvable petition, he or she must

also show that he or she has not been convicted of any violent offenses including domestic violence or child abuse. If the US Citizen spouse and the foreign fiancé(e) made contact through a "marriage broker", then that broker's involvement in facilitating that relationship should also be disclosed. These were all recently enacted provisions to protect both US Citizen spouses as well as foreign fiancé(e)s from entering into abusive or fraudulent relationships.

THE LAW
(Focus: Adoption of children by US Citizens)

"Children" under Immigration Law

101(b) As used in titles I and II--

> 101(b)(1) The term "child" means an unmarried person under twenty-one years of age who is--
>
> > 101(b)(1)(A) a child born in wedlock;
> >
> > 101(b)(1)(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred;
> >
> > 101(b)(1)(c) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation;
> >
> > 101(b)(1)(D) a child born out of wedlock, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother or to its natural father if the father has or had a bona fide parent-child relationship with the person;

Orphan Adoptions (includes battered adopted children and their siblings)

The Immigration and Nationality Act §101 (b)(1)(E) and (F) sets forth the basis for the adoption of an orphan overseas and the immigration of that orphan to the United States. The Code of Federal Regulations (CFR), at 8 CFR §204.3 sets forth in detail the specific procedures that must be followed in order to obtain the benefit of an orphan petition.

INA 101(b)(1)(E)

> 101(b)(1)(E)(i) a child adopted while under the age of sixteen years if the child has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years or if the child has been battered or subject to extreme cruelty by the adopting parent or by a family member of the adopting parent residing in the same household: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act; or
>
> 101(b)(1)(E)(ii) subject to the same proviso as in clause (i), a child who: (I) is a natural

sibling of a child described in clause (i) or subparagraph (F)(i); (II) was adopted by the adoptive parent or parents of the sibling described in such clause or subparagraph; and (III) is otherwise described in clause (i), except that the child was adopted while under the age of 18 years;

INA §101(b)(1)(F) (adoption of abandoned children by US couple or single US Citizen):

101(b)(1)(F)(i) a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: Provided, That the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act; or

101(b)(1)(F)(ii) subject to the same provisos as in clause (i), a child who:

101(b)(1)(F)(ii)(I) is a natural sibling of a child described in clause (i) or subparagraph (E)(i);

101(b)(1)(F)(ii)(II) has been adopted abroad, or is coming to the United States for adoption, by the adoptive parent (or prospective adoptive parent) or parents of the sibling described in such clause or subparagraph; and

101(b)(1)(F)(ii)(III) is otherwise described in clause (i), except that the child is under the age of 18 at the time a petition is filed in his or her behalf to accord a classification as an immediate relative under section 201(b)

(Sample: Orphan immigration)

8 C.F.R. 204.3(a) This section addresses the immigration classification of alien orphans as provided for in section 101(b)(1)(F) of the Act.

204.3(a)(1) Except as provided in paragraph (a)(2) of this section, a child who meets the definition of orphan contained in section 101(b)(1)(F) of the Act is eligible for classification as the immediate relative of a U.S. citizen if:

204.3(a)(1)(i) The U.S. citizen seeking the child's immigration can document that the citizen (and his or her spouse, if any) are capable of providing, and will provide, proper care for an alien orphan; and

204.3(a)(1)(ii) The child is an orphan under section 101(b)(1)(F) of the Act.

A U.S. citizen may submit the documentation necessary for each of these determinations separately or at one time, depending on when the orphan is identified.

204.3(a)(2) Form I-600A or Form I-600 may not be filed under this section on or after the Convention* effective date, as defined in 8 CFR 204.301, on behalf of a child who is habitually resident in a Convention country, as defined in 8 CFR 204.301. On or after the Convention effective date, USCIS may approve a Form I-600 on behalf of a child who is habitually resident in a Convention country only if the Form I-600A or Form I-600 was filed before the Convention effective date.

(*Note: Convention refers to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, entered into force April 2008)

As you can see, one of the key issues is whether the child is truly an orphan. The second issue is that the parents must have complied with the pre-adoption requirements, if any, of the child's proposed residence. The third is that the Attorney General be satisfied that proper care will be furnished to the child if the child is admitted to the United States. And finally, the natural parent or prior adoptive parent of such a child shall, because of the adoption by the US Citizen parent, not receive any benefit under the Immigration Act by virtue of their prior parentage of the adopted child.

Effects of International Treaty on Domestic Law

The United States has ratified the "Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption" and this action aligns US adoption practice in line with the other countries in the world that are also party members to the Convention. Along with the "United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", to which the US is also a party, the Adoption Convention is a good example of how public international law can impact on US immigration law and policy.

Unfortunately, thanks to the adoption of new regulations post-Hague, the adoption process has become so cumbersome and difficult that the net result has been an overall reduction in foreign adoptions!

For helpful guidance on the Hague Adoption Convention, visit http://travel.state.gov/content/adoptionsabroad/en/hague-convention.html

II. Employment-Based Immigration

While all family based-immigration typically ends in a benefit - Permanent Residency - the same is not true of employment-based applications. Some employees may seek only temporary employment, and return to their home countries once their work in the US is done. Others may seek to make a permanent home in the USA. The former and the latter may enter the USA in one of the several non-immigrant status. Then some may want to remain long term and commence the legal permanent immigration process.

Unfortunately, the magnet of jobs in the U.S.A. attracts many illegal aliens as well. This is a constant source of ammunition to anti-immigrant advocates, who sometimes characterize illegal immigration as a one-stop source for all the nation's ills (crime, pollution, welfare, fraud, etc.). While illegal immigration doubtless creates its own share of problems and demands its own solutions, that discussion is beyond the scope of this chapter. Instead, let us focus on legal immigration through employment.

"Employment based" simply refers to the fact that an alien is obtaining his or her green card (also called adjustment of status) through a job offered by a U.S. employer. For instance, an employer may require a highly skilled machine operator or a financial officer. The employer may not be able to find a qualified US Citizen or permanent resident worker who can do the job. Therefore, the employer hires a foreign worker to do the job. A foreign worker can only stay in the USA for a relatively short period of time, usually somewhere between 5 to 7 years. Once that period is over the foreign worker must leave the USA. If the employer has spent a lot of time and money in training the foreign worker and likes the quality of work that the foreign worker is doing, the employer may try to keep the foreign worker here permanently. That has to be done through a process called "Permanent Alien Labor Certification" or by filing an immigrant worker petition for the foreign employer. In both cases the petition has to be filed by the employer and not the foreign worker. Once the petition is approved the employee can then apply for a "green card" based on whether a priority date is available for the employee or not. Once again we go back to the preference system just as we had for the family based immigrants.

Temporary non-immigrant visas - as we saw above, entry may permitted in any number of temporary non-immigrant visa classifications for purposes of temporary employment in the United States. This employment can range from being a fashion model to a star athlete to a rock musician or a farm hand. Likewise, permanent immigration status can be accorded to a number of categories ranging from unskilled workers to aliens of extraordinary ability including Nobel Prize winners.

A quick review of the the main non-immigrant work authorized visa classifications:

- H: Divided into three sub-categories - includes professional workers, skilled workers and unskilled workers.
- E: Treaty traders or treaty investors permitted to work in the U.S.A. for qualifying investments or international trade.
- J: Exchange visitors / researchers
- L: Intercompany transferees - permitted to work in affiliated companies in the United States of America as managerial level employees or special knowledge workers.
- O: Outstanding ability aliens able to work in their specific fields only.
- P: Performers - includes performers providing ethnic or culturally unique programs.
- Q: Cultural Exchange Visitors
- R: Religious Workers
- TN: Trade NAFTA workers (US, Canada and Mexico citizens only, limited to only certain occupations and professions - See: http://www.uscis.gov/working-united-states/temporary-workers/tn-nafta-professionals)

Addressing the "Threat" of Undocumented Aliens

Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

of 1996:

In addition to denying adjustment of status (obtaining of green cards) to individuals who have been in the United States in violation of their status after September 30, 1997, the IIRIRA also establishes the framework for a national employment verification system. Under the system, it is envisaged that employers will ultimately be able to input the social security numbers given to them by applicants and those inputs will be checked against a data base of valid numbers maintained by the Social Security Administration and the Immigration and Naturalization Service. Upon approval by the database, the employee will then be authorized to work for the employer. The program is being conducted on a pilot scale to start with and will gradually be expanded to cover the entire nation. The “e-verify” program has been rolled out nationwide and is used daily by employers, especially those obligated to do so under federal or state contract.

In conjunction with the program, the IIRIRA also authorizes a new and improved "border crossing identification card" and LPR “green card” which now contain biometric information in order to prevent counterfeiting, theft, or other misuse of these critical identity documents.

Permanent Employment Based Immigration

As we saw in prior chapters, there are several immigrant employment classifications, beginning with the EB-1 Extraordinary Alien to the EB-5 Investor.

Recall that the preference system is divided into five major categories for foreign nationals seeking a green card through employment. These categories are - first - aliens of extraordinary ability, outstanding professors and researchers or multi-national managers and executives. The second category is aliens holding advanced degrees or aliens of exceptional ability. The third category is: professionals (that is those holding a bachelors’ degree or its equivalent) or for skilled workers (that is someone having 2 or more years of experience). Below that is a subcategory: unskilled workers. The fourth category is for special immigrants including religious workers and the fifth and last employment based category is for alien entrepreneurs which are those seeking a green card by virtue of a substantial investment in the USA. Under the law that investment must be at least a million dollars and the creation of 10 full time US worker’s jobs. The million dollar requirement can be reduced to five hundred thousand dollars in certain cases, in “high unemployment areas” or under USCIS-approved “pilot programs”.

While the non-immigrant visa is still valid, the foreign worker must start on a process for his or her long term immigration to the USA to secure a green card. This could be done through an employer based petition either through “Labor Certification” or through classification as an “Extraordinary Ability or Alien of Outstanding Ability or as a Inter-Company Transferee or Manager” and so all of these processes are complex. They take a lot of time to process and of course they require both immigration processing filing fees as well as attorney’s fees. This is an issue that a foreign worker must deal with promptly after getting his or her non-immigrant visa if he or she desires to live and work permanently in the United States. If not they can work for the duration of their non-immigrant visa and then leave the USA to return to their home country or to go to some other third country to pursue other employment or personal opportunities.

> [Following please find an article I wrote on the basic labor certification process and the H-1B Visa process. These articles will give you a general procedural overview of the process without getting into any substantial details. Please note that the H-1B visa and the labor certification process is only one (although the most used) method of temporary and permanent immigration to the United States through employment.]

The Road Well Traveled: Immigration Through Employment

I have discussed employment-based visas, labor certification, H-1Bs, exceptional and extraordinary ability aliens, and L-1 transfers in various articles on my website. However, I wanted to write one article which would cover in general terms, the "nuts and bolts" of immigration for professionals and degree-holders or equivalent through the time-tested H-1b and Labor certification route. Be aware, due to natural limitations of space, this article is only an overview of the process, and covers only H-1b's and labor certification.

Typically, the process begins with an individual- lets say a recent college graduate - obtaining a job with a U.S. employer. The college grad is probably on a "optional practical training" status, meaning that he or she can work for up to one year for any employer in the United States in the specialty for which he or she was awarded the degree. Typically, during the optional practical training period, the student –obtains H-1b non-immigrant worker classification through an application filed by the employer. For students who have graduated with a degree in a "STEM" discipline, the OPT period has been increased by another 17 months, to 27 months in total. However, the USCIS has also created a rule (without promulgating a regulation, of course), that would prohibit an alien on OPT from continuing to remain in the USA under OPT status if the alien has accumulated an aggregate period of unemployment of 90 days or more.

Sometimes however, a student may for one reason or another not be eligible for the optional practical training. Students who cannot obtain optional practical training would have to switch from F-1 student status directly to H-1b student status. Furthermore, there may be aliens coming directly from overseas who will enter the United States on another non-immigrant status and thereafter switch to H-1b status, or directly as H-1b non-immigrant workers.

To recap, the first step in the long road toward immigration through the employment based preference starts for most aliens with the H-1b non-immigrant work visa. The H-1b visa application is made on form I-129 to the INS. The current filing fee is over $ 2,300 for employers with 50 or more employees. (University and certain non-profit entities are among those exempt from part of the fee, but not all).

The H-1b is filed with the INS depending on where the employee is going to work. There are four regional INS Service Centers – in Nebraska, Texas, California, and Vermont. Where the case is filed depends on which Service Center has jurisdiction over the particular state where the employee will work. The INS typically takes between 30 and 90 days to approve an H-1b application. Since Congress requires the USCIS to fund most of its operations through "user fees", the USCIS has generally been raising fees for most applications every two years. Congress also uses the temporary worker programs to raise funds for other programs, for example, to retrain U.S. workers.

There is an annual quota for H-1Bs. Currently, the quota stands at a paltry 65,000 H-1b visas per year, plus another 20,000 H-1b slots for "US-issued advanced degree" applicants.

The H-1b visa is valid for up to three years. It may be renewed for another three years for a maximum of six years. That six-year maximum may be extended in certain cases pursuant to the "American Competitiveness in the 21st Century Act" (AC-21) enacted by President Bill Clinton on October 18, 2000. Various exceptions to the six-year maximum under the H-1b include having a labor certification application or immigrant petition pending for over one year with either the Department of Labor or the INS. Details on the AC-21 Act and its various benefits and exceptions to the 6-year cap are also available on my website.

Assuming now that the foreign worker is in the United States, working for his U.S. employer on his or her H-1b visa. The foreigner worker then evidences an interest to remain permanently in the United States. The H-1b is not going to accomplish this. It is merely a non-immigrant visa, specifically issued for employment with that one specific U.S. employer which applied for the visa. H-1b visas can not be "transferred". The process for an employee to begin working with another employer means that the new employer must commence the H-1b process and follow through all of the steps in the process as though a brand new H-1b visa was being requested.

While the H-1b visa is valid, the foreign worker typically begins the next stage of the application for permanent residency ("green card"). That process is typically through labor certification. Labor certification is a process by which the US job market is tested to determine whether there are any ready, willing, able and qualified US workers who can fill the job. The US Department of Labor attempts to protect the US worker from foreign competition through the labor certification process.

Labor certification used to follow one of two routes: labor certification through "Reduction In Recruitment", (RIR) or "regular" labor certification. The main difference between these two avenues to labor certification is that under "Regular" labor certification, the State Employment Services Agency (SESA) authorized the advertisement and recruitment for the position. In the case of "Reduction in Recruitment", the employer institutes advertising and recruitment prior to filing the application for labor certification and thereafter submits the entire application, including the recruitment results, to the SESA. Labor Certification has been streamlined through the PERM (Program Electronic Review and Management) process. The PERM process is akin to the RIR process but the application is filed electronically through the USDOL Foreign Labor Certification website.

Once labor certification has been approved by the US Department of Labor, the process is far from complete. The next step is filing the "Immigrant Petition for Alien Worker", form I-140, with the INS. The INS assesses two main issues in adjudicating the I-140 application: first, the INS will review whether the employer has the financial ability to pay the required prevailing wage to the foreign worker. Second, the INS will check whether the foreign worker has the necessary skills and qualifications for the position as required by the employer at the time that the application for Labor Certification was filed.

Once the I-140 application is approved, the final stage of the process is all that remains to be accomplished. At this point, the alien worker and his or her dependent family members, if any, apply for "Adjustment of Status". Adjustment of Status is an application to the INS for the "green card". It is made on Form I-485 and is accompanied by Form G-325 A, listing the aliens or the dependent family members' biographic information. The application is submitted by mail to one of the four INS Service Centers discussed earlier. In addition, at this time applications for Advance Parole (travel outside the United States while the Adjustment of Status application is pending) and applications for Employment Authorization for dependent family members can also be concurrently filed. Currently, the Adjustment of Status application is taking over just 4-6 months to be approved (provided the priority dates are current, which is another issue altogether for citizens of India and China). Therefore, along with the I-485, it is usually a good idea to apply for Advance Parole and for Employment Authorization for the principal alien and dependent family members who wish to work. The I-140 petition can be filed concurrently with the I-485 petition and related applications described above, provided a priority date is current.

Once the I-485 application is filed, the USCIS will send the applicant a notice. The notice will ask the applicant to proceed to the nearest USCIS "Application Support Center"

(ASC) to provide photographs, signature, and fingerprints ("biometrics") so that a background check can be processed. On successful completion of the background check ("No hits"), the Adjustment application can be approved and the "green card" can actually be produced and mailed to the alien.

Once the adjustment of status has been approved, the foreign worker becomes a legal permanent resident (LPR) of the United States with all the benefits and duties required of that status. Keep in mind that LPR's cannot vote and can be removed (deported) for most felonies and crimes. The "Legal Permanent Resident" alien can work for any US employer after the approval of the "green card".

The Law

Sample:

8 CFR 214.2(h) Temporary employees–

214.2(h)(1) Admission of temporary employees--

214.2(h)(1)(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. Under this nonimmigrant category, the alien may be classified as follows: under section 101(a)(15)(H)(i)(c) of the Act as a registered nurse; under section 101(a)(15)(H)(i)(b) of the Act as an alien who is coming to perform services in a specialty occupation, services relating to a Department of Defense (DOD) cooperative research and development project or coproduction project, or services as a fashion model who is of distinguished merit and ability; under section 101(a)(15)(H)(ii)(a) of the Act as an alien who is coming to perform agricultural labor or services of a temporary or seasonal nature; under section 101(a)(15)(H)(ii)(b) of the Act as an alien coming to perform other temporary services or labor; or under section 101(a)(15)(H)(iii) of the Act as an alien who is coming as a trainee or as a participant in a special education exchange visitor program. These classifications are called H-1C, H-1B, H-2A, H-2B, and H-3, respectively. The employer must file a petition with the Service for review of the services or training and for determination of the alien's eligibility for classification as a temporary employee or trainee, before the alien may apply for a visa or seek admission to the United States. This paragraph sets forth the standards and procedures applicable to these classifications.

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Sample: Intra company transferees: executive or manager?

INA Section 101(a)(44)

101(a)(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily--

> 101(a)(44)(A)(i) manages the organization, or a department, subdivision, function, or component of the organization;

101(a)(44)(A)(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

101(a)(44)(A)(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

101(a)(44)(A)(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

101(a)(44)(B) The term "executive capacity" means an assignment within an organization in which the employee primarily--

101(a)(44)(B)(i) directs the management of the organization or a major component or function of the organization;

101(a)(44)(B)(ii) establishes the goals and policies of the organization, component, or function;

101(a)(44)(B)(iii) exercises wide latitude in discretionary decision-making; and

101(a)(44)(B)(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

101(a)(44)(c) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

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Sample: Extraordinary and Exceptional Ability aliens:

INA 203(b)(1)(A) Aliens with extraordinary ability.--An alien is described in this subparagraph if--

203(b)(1)(A)(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

203(b)(1)(A)(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

203(b)(1)(A)(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

203(b)(1)(B) Outstanding professors and researchers.--An alien is described in this subparagraph if--

203(b)(1)(B)(i) the alien is recognized internationally as outstanding in a specific academic area,

203(b)(1)(B)(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

203(b)(1)(B)(iii) the alien seeks to enter the United States--

203(b)(1)(B)(iii)(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

203(b)(1)(B)(iii)(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

203(b)(1)(B)(iii)(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

203(b)(1)(C) Certain multinational executives and managers.--An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Regulations: 8 C.F.R. - **Alien of Exceptional Ability or Alien with Advanced Degree**

8 CFR § 204.5(k) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

204.5(k)(1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of the professions holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business. If an alien is claiming exceptional ability in the sciences, arts, or business and is seeking an exemption from the requirement of a job offer in the United States pursuant to section 203(b)(2)(B) of the Act, then the alien, or anyone in the alien's behalf, may be the petitioner.

204.5(k)(2) Definitions. As used in this section:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

204.5(k)(3) Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

204.5(k)(3)(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> 204.5(k)(3)(i)(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> 204.5(k)(3)(i)(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.
>
> 204.5(k)(3)(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:
>
> > 204.5(k)(3)(ii)(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
> >
> > 204.5(k)(3)(ii)(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
> >
> > 204.5(k)(3)(ii)(C) A license to practice the profession or certification for a particular profession or occupation;
> >
> > 204.5(k)(3)(ii)(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
> >
> > 204.5(k)(3)(ii)(E) Evidence of membership in professional associations; or

204.5(k)(3)(ii)(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

204.5(k)(3)(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Cases - Mississippi Phosphate, NYSDOT, Kazarian

Let's examine a case that, despite not being classified as a "precedent decision" by the Administrative Appeals Unit of the INS is an important decision in determining whether or not an alien should be accorded "exceptional ability" status and thereby permitted to immigrate permanently to the United States. The case is known as "Mississippi Phosphate" because the alien beneficiary was an executive with a fertilizer plant in Mississippi. The alien came into the USA to take over the troubled plant. In doing so, he saved the employees' jobs and contributed to the local economy. The Administrative Appeals Unit, in reviewing his application for permanent residency determined that it was in the "national interest" to permit this alien to reside permanently in the U.S.A. because of his contributions. Note that for this alien, there was no need to go through the process of "labor certification."

In Mississippi Phosphate, the Administrative Appeals Unit of the (then) INS agreed with the Service Center Director's decision to approve an EB-2 National Interest Waiver (NIW) application - hence the term "NIW".

The AAU, in reviewing Mississippi Phosphate, held that:

"While Service regulations do not specifically state what would be in the "National Interest", factors that could be considered in the national interest test to an alien of exceptional ability in business might include:

1. Improving the U.S. economy;
2. Improving wages and working conditions of U.S. workers;
3. Improving education and training programs for U.S. children and under qualified workers;
4. Improving healthcare;
5. Providing more affordable housing for young and/or older poorer U.S. Citizens;
6. Improving the environment of the United States and making more productive use of natural resources; or
7. A request from an interested U.S. agency."

The straightforward and reasonable interpretation of "exceptional" and the criteria needed for a waiver of labor certification "in the national interest" were laid out in the Administrative Appeals Unit decision in the "Mississippi Phosphate" case. That clear decision has now been

modified by another Administrative Appeals Unit decision, **Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998)**, discussed below.

NYSDOT:

In New York State, the Administrative Appeals Unit was examining the applicability of a national interest waiver for a Civil Engineer hired by the New York State Department of Transportation. The engineer was claiming to be an expert on bridge and highway reconstruction and repair. The AAU held that the "national interest" waiver could not be granted. While the facts of the case are clear, the AAU decision unfortunately is not. Far from adding to the body of law and clarifying the criteria for a national interest waiver, the AAU decision does nothing other than confuse the issue.

First of all, it appears that the AAU seems to take the position that most - if not all - national interest waivers are simply a strategy to evade the burdens of labor certification. While bypassing labor certification is certainly one of the advantages of the national interest waiver, it is by no means the only advantage that qualified aliens seek. Due to their advanced research and skills, most "exceptional ability" aliens would find it difficult, if not impossible, to quantify their skills in a labor certification application. Further, given the glacial speed of labor certification (and now even the PERM system is backlogged!), an exceptional ability alien's work and its immediate relevance will be old news by the time labor certification is approved.

Ignoring these obvious facts however, the AAU experienced a "knee jerk" reaction to the national interest waiver application. In New York State, the AAU continuously emphasized that the labor certification route must be taken. The AAU declared that the applicant must demonstrate why labor certification would be detrimental to the national interest. In setting up this barrier, the AAU has placed what may be an insurmountable burden on aspiring national interest applicants. Perhaps this reaction was only inevitable, given the fact that too many practitioners and too many aliens have filed "national interest" applications in borderline or even clearly inapplicable situations. Briefly, the USCIS requires that the "National Interest" must truly be "National". Regional benefits are not sufficient.

Reacting to the New York State decision, the four INS regional service centers which adjudicate the national interest waiver applications have begun returning applications pending at the service centers. Aliens must respond to lengthy lists of additional evidence in order to qualify for the NIV. For example, the Lincoln, Nebraska service center has listed the following six additional issues on which evidence needs to be presented:

- Evidence that the benefits of the proposed employment will be national in scope.
- Evidence that the employment is in an area of substantial intrinsic merit (which would be self-evident if the application was based on solid facts and qualifications).

- Evidence that the alien can perform the duties of the proposed employment position (this seems to be an unnecessary requirement, because obviously the alien would not be filing an application for a national interest waiver if he or she could not perform the duties of the proposed employment).

- Establish that the alien is not seeking a national interest waiver based on a shortage of qualified workers in a given field. (Here again, the national interest waiver was not intended to be a competitor to labor certification. It was not intended that the national interest waiver applicant be required to test the U.S. job market. Clearly, there are many researchers or many scientists in a given field. The issue is not whether there are qualified workers or not, the issue is whether the alien, based on his or her own independent merit, qualifies as an alien of exceptional ability)

- Demonstrate that any patent or innovation that the alien claims serves that national interest. (Many patents and innovations are purely fundamental in nature. They may not directly serve the national interest in any tangible or quantifiable fashion. Most fundamental research tends to be non-commercial in nature, since such research forms the basis for future research and further innovations that may ultimately lead to commercial applications).

- Establish a past record of specific prior achievement which justifies projections of future benefit to the national interest. (This requirements makes sense. Obviously, the track record of the exceptional ability alien must show a prospective future benefit is possible).

What is disconcerting about the current trend is the fact that the Nebraska Service Center has simply been issuing "requests for evidence" ("RFE") on pending petitions without reviewing them to first see if the petitions already meet the new criteria of the New York State decision. This buys the service center some time, since the alien then has to resubmit additional evidence or resubmit the existing evidence in the format requested by the service center. However, this creates an unnecessary extra burden for the alien and will also create an extra burden for the service center because they will now have two separate documents to review - first - the initial submittal, and second - the response by the alien.

None of this makes sense. The clear cut criteria set forth in Mississippi Phosphate are nowhere to be found in the New York State decision. The service centers have changed their requirements from the Mississippi Phosphate criteria to the cloudy and unclear language of the New York State decision. It also demonstrates that the immigration service is now taking a role that it was never required to do, which is protecting the U.S. work force. In this period, as the economy continues to flounder (2008-2014 and perhaps beyond), it is clear that "national interest" is significantly harder to prove. See the practice pointer box below.

Practice pointer: Make sure that your application meets or exceeds the regulatory standards. Borderline applications may attract a USCIS RFE (Request for Evidence), often a boilerplate recitation of the regulations, which require a response within a specified - usually short - period. This places a huge burden on you, as a practitioner, and on the client, to locate and assemble the relevant facts and evidence, often from experts who are far away, and respond by the USCIS-imposed deadline. The USCIS typically requires RFE responses on I-140 cases within 30-45 days. This does not give you a lot of time, especially on a complex case with a detailed RFE.

The Kazarian decision:

In March 2010, the 9th Circuit struck down some of the USCIS' more burdensome requirements in an RFE issued in an employment-based case [Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)]. The 9th Circuit held that absent either statutory authority or regulations promulgated through the appropriate procedures, the USCIS could not impose requirements on applicants that were above and beyond what the law and regulations permitted. In *Kazarian*, which arose out of the USCIS' denial of an EB-1 application filed by an applicant claiming to be an "Extraordinary Ability" alien, the 9th Circuit held: "...neither USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5."

Discussion

National Interest case sample: see the case at the end of this chapter - review this case in light of the Mississippi Phosphate decision and the NYSDOT decision. Try to understand the reasoning behind the USCIS' denial of the NYSDOT as well as the case sample. Do you believe this reasoning is justified across the board ? Does it make sense to raise the bar to "exceptional ability" aliens to the extent that the USA denies them entry and potentially drives them back to their home country or to a competing nation? Will we regret it when one day, they develop their science and expertise into a product or service that we, as the United States, could have had the opportunity to create had the USCIS given them the opportunity to do so? How truly exceptional is "exceptional"?

What do you think about the case sample? What do you think the USCIS is looking for? Despite substantial evidence, the application was denied. Would you have handled this case differently? How so?

IMMIGRATION TIDBITS: EMPLOYER OBLIGATIONS

Form I-9

All employers must use the current version of the form I-9, Employment Eligibility Verification, for all new hires. This new form can also be used for all re-verifications of previous I-9's where the employment authorization may have already expired. Such a re-verification would apply to permanent residents as well as aliens working in the USA on temporary visas, asylum applicants, aliens working under temporary protected status, F-1 students under optional practical training, and aliens pending adjustment of status working under an employment authorization document. Under the USCIS instruction, an employer may continue to use an existing form I-9 to re-verify employment eligibility. However, the employers have the option of using the new form I-9 for re-verification purposes. The USICE has recently intensified employer sanctions actions - for I-9 violations, including failure to complete I-9's for employees, failure to correctly fill I-9's, and for both innocent and knowingly hiring individuals without work authorization. Note: the form I-9 DOES NOT have to be filed with any government agency; it simply has to be completed and retained by the employer, to be produced to the USICE or any other inquiring US agency, on demand.

The revised form I-9 can be found at the USCIS website www.uscis.gov. , as can the latest versions of most USCIS forms, together with instructions and filing fees and locations. An employer is required to retain a form I-9 for three years after hire or one year after the date of termination, whichever is later.

The significant change to the form I-9 is that the DHS added an additional box to the form I-9 to avoid problems with understanding the employment eligibility status of an employee filing in the form. Now, a employee has an option to chose between 4 different statuses: citizen of the USA, a non-citizen national of the USA, a lawful permanent resident (one having a green card) or an alien authorized to work in the USA until a specific expiration date.

The requirement to provide a social security number on the form I-9 still remains voluntary. It is not mandated. There are three columns on the form I-9 listing the specific documents an employer may accept as proof of citizenship or employment authorization status. An employee may present just one document from list “A”, or if not able to do so, then one document from list “B” and one from list “C”.

Finally, the new form I-9 substantially truncates the list of acceptable documents that establish identity as well as employment authorization. A detailed listing of documents is

attached to the form I-9. Of note is that the US government issued "Certificate of Citizenship" is no longer an acceptable document to verify identity and employment eligibility! The DHS claims that our nation's Certificate of Citizenship can be easily counterfeited and is therefore no longer suitable documentation.

E-verify update

E-verify is an online database that permits employers to check the work-authorized status of a new employee. The law requires that the employer terminate the employee if the employee cannot satisfactorily prove his work-authorized status in the USA. Employees whose names are not approved through the DHS database are required to make attempts to rectify the missing or incorrect information. Since the DHS data is based on the Social Security database which is suspected to contain a high percentage of errors, there are serious concerns about the quality of the e-verify search.

All federal contractors and subcontractors were required by executive order to begin following the e-verify regulations and registration beginning January 15, 2009. However, by lawsuit filed December 23, 2008 (Chamber of Commerce of the United States of America, et al v. Chertoff, et al, US District Court, District of Maryland, Southern Division, Case No. 8:08-cv-03444-AW), the parties agreed to extend the e-verify applicability date to May 21, 2009. Accordingly, federal contractors will have significant responsibilities under e-verify beginning May 21, 2009 unless the e-verify rule is stayed or modified before that date. A new memorandum of understanding between the Department of Homeland Security and the employer can be found on the USCIS website www.uscis.gov. A significant issue is that the e-verify agreement allows the DHS substantial access to the employer's internal confidential personnel records.

In a detailed article on my website at www.immigration-america.com, I had discussed the details of the e-verify program and possible problems as well as my analysis of whether an employer should register for e-verify unless mandated by the government. Due to the space limitations adherent in this publication, it is not possible to reproduce that entire analysis here. However, it may be a helpful resource for those interested on deciding whether or not to register to implement e-verify within their organization.

It is going to be interesting to see whether the federal government's attempt to change immigration procedures by regulation and executive fiat rather than by representative legislation will succeed in this instance.

Self-Check

There is now also a link to the US government database that can be accessed by anyone who wishes to verify his or her employment eligibility status in the USA - the link can be found at the USCIS website, www.uscis.gov.

Export Controls In Immigration Law

Also relatively new to the H-1b, L, and O employment context is the DHS' requirement that every petitioning employer determine if hiring a foreign employee exposes that employee to information, technology, or equipment that is restricted from export under the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR). If so,

the employer requires an export license before that foreign employee may be exposed to such information or technology. A detailed article on this issue is also found on my website.

Emerging Issues:

- Presidential Memo "Buy American-Hire American": increased scrutiny on all non-immigrant work authorized visa classification applications; new "Pre-Acceptance" H-1b selection process.
- USCIS will NOT give deference to prior decisions involving the same petitioner and same beneficiary; in other words, no precedential reliance on prior applications filed for the same position.
- Increased reliance on undefined third party resources such as credit agencies, Business reporting entities such as D&B, the USCIS' own "VIBE" data gathering algorithm, and other public sources of information, INCLUDING social media!
-

Problems

1. This is your first brush with immigration law: a client gives you a call on a Friday morning - the INS, he said, raided his restaurant the night before. They picked up Juan, his head cook. They said that Juan didn't have the necessary employment authorization.

Your client is worried. He asks your advice. What should he do? What should you do?

2. Same employer as before. Only now, having learned his lesson the first time around he comes to you before hiring an employee. He says he doesn't know whether the employee is "legit" or not. What should he do? What should you do?

3. Your good restaurant client gives you a call (again). Eventually you've given him good advice the last two times. Besides, he pays his bills on time and the food is good. This time, he wants to know if he needs to bother filling out that pesky Form I-9 for an employee who claims she is a U.S. Citizen. He's seen her driver's license and Social Security Card, he says and they appear to be good. What's your advice?

4. Your restaurant client calls you. (He's a good client and he does have a lot of problems - just the kind we like). An employee who he terminated because of failure to provide documents that your client wanted to see as proof of employment authorization has turned around and filed suit against your client for discrimination. What are the possible grounds for such a lawsuit? What defenses does your client have? How would you advise your client to avoid problems like this one in the future?

Cases

Following is the Administrative Appeals Office decision denying the petition for an EB-2 National Interest Waiver petition.

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, D.C. 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 05 2009

LIN 07 038 51496

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:

[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).

John F. Grissom, Acting Chief
Administrative Appeals Office

www.uscis.gov

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter 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 a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a doctoral student at Rice University, Houston, Texas. After completing his degree, the petitioner became a postdoctoral researcher at the same university. 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. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has 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 brief from counsel.

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.

(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 the pertinent 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., 1 st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] 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. 21 5 (Commr. 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 also note that the regulation at 8 C.F.R. 204.5(k)(2) defines "exceptional ability" as **"a** degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Several witness letters accompanied the petitioner's initial submission. _____of Lamar University, Beaumont, Texas, where the petitioner earned his master's degree, stated:

I am very enthusiastic about [the petitioner's] research because it greatly advanced our understanding of biodegrading process of chlorinated benzenes in groundwater by injection of Oxygen Releasing Compound (ORC) into a contaminated aquifer. . . . [The petitioner] conducted thus far the most detailed investigation on the natural attenuation of chlorinated benzenes in groundwater incorporating injection of Oxygen Releasing Compound. Firstly, he creatively developed one-dimensional and two-dimensional models of the transport and degradation of contaminants in groundwater to access existence of natural attenuation of the contaminants from a test site. [The petitioner] is extremely knowledgeable in the field of numerical modeling. He worked as a primary researcher and planner to develop a program coupling a regression of concentration versus distance for stable plumes and an analytical solution for one-dimensional, steady-state, contaminant transport. By doing so, he accurately quantified total decay rate constants based on monitored field data. . . . The results and findings from his first-stage project is no doubt a breakthrough in our research, which also significantly contributes to the national and international hydrogeologic modeling field. [The petitioner's] results provide a theoretical platform for all hydrogeologic modelers to understand how contaminated groundwater flows and what are the key factors influencing biodegradation rate in the subsurface. Therefore, cost-effective remediation strategies for any groundwater-

contaminated site in the nation can be designed based on his findings in order to clean up the site in a shorter duration, and protect Americans in a safer way.

. . . He discovered that total remediation duration for recovering the contaminated site could be shortened from forty-two years to three and a half years by injecting Oxygen Releasing Compound into the groundwater.

The record does not continue that the petitioner continued his research into groundwater remediation after he completed his master's degree in 2003.

_____ , who supervised the petitioner's doctoral studies at Rice, described the petitioner's work at that university:

The primary focus of [the petitioner's] research is to develop and enhance a radar-based flood warning system to achieve more accurate, and timely flood forecasts for Houston and other flood-prone areas in the U.S. Since his joining my research group, [the petitioner] has been playing a major role in developing the next-generation flood alert system. This system has been operational during the last 30 storm events and successfully provided precise and timely information to governmental emergency center. By directly utilizing available radar (NEXRAD) rainfall data coupled with the real-time hydrologic model, [the petitioner's] new system is able to provide visual and quantitative identification of severe storm rainfall, as well as a linkage between the rainfall and likelihood of flooding. It is a major step forward from traditional flood alert methods.

Counsel identified two of the initial witnesses as being independent of the petitioner. Louisiana State University Associate _____ stated:

Although I have only met [the petitioner] on a couple of occasions, I am fully aware of the importance of his research. His work on real-time modeling of hydrologic and hydraulic responses provides a completely novel approach in the real-time flood warning and prevention fields. . . .

[The petitioner's] pioneering' work is the first to provide accurate flood warning information with two to four hours of lead time under extreme weather conditions. . . . His work will not only provide a better understanding of the flood inundation process in urban areas under extreme weather conditions but also offers key decision making information for urban planning and design.

_____ a consultant with Houston's Public Works and Engineering Department, stated:

I was very impressed by [the petitioner's] research results from the advanced flooding warning system that the presented at the Annual Conference of American Water Resources Association (AWRA) in Houston, Texas in May of this year. . . .

[The petitioner] developed the advanced techniques necessary to provide warnings and flood prediction at specific urban locations affected by the complex interaction between local and riverine flooding, and hydrodynamics of storm surge and sea level rise. . . .

[The petitioner's] advanced flood warning system can protect critical infrastructures from rainfall and storm surge flooding and wind associated with severe storms. His system is also able

to provide better design information to prevent the release of chemicals from at-risk facilities during potential catastrophic events.

The petitioner submitted copies of his writings, including a co-authored chapter from *Coastal Hydrology and Processes*, one journal article, a paper for the Texas Water Resources Institute, and abstracts of eight conference presentations. The petitioner did not establish the extent to which these published and presented works have influenced his field. On a related note, the petitioner's initial submission did not include evidence of implementation of the petitioner's flood warning system except at the most local level, at certain specified sites in Houston.

On February 7, 2008, the director issued a request for evidence, instructing the petitioner to submit evidence of "a degree of influence on [the] field that distinguishes [the petitioner] from other Engineering researchers with comparable academic/professional qualifications." The director specifically requested "copies of additional published articles [by other researchers] that cite or otherwise recognize [the petitioner's] research achievements."

In response to the director's notice, the petitioner submitted copies of newer writings by the petitioner, but no evidence of citations by other researchers. The petitioner also submitted additional independent witness letters. _____a Research Associate and Program Manager at the University of Texas at Austin, credited the petitioner with "a significant contribution to the real-time flood warning and floodplain mapping field." _____ asserted that the system "has great potential to be used as a prototype in other areas in the United States," but the only example of existing implementation that _____ named was "the advanced hydraulic prediction feature for a critical evacuation corridor (State Highway 288)."

_____ a Principal Engineer at the South Florida Water Management District, stated:

As an associate editor of ASCE's *Journal of Hydrologic Engineering*, I firstly became familiar with [the petitioner] and his research work through my review of a technical manuscript that he submitted to the journal. . . . [The petitioner] furthered a unique hydraulic prediction tool - Floodplain Map Library (FPML) to dynamically provide hydraulic inundation information to local emergency agencies. [The petitioner's] FPML system will provide end users with comprehensive understanding of dynamic flood response allowing emergency personnel to promptly determine likelihood of road inundations and begin flood preparations with as much lead time as possible. His research work is a remarkable milestone in the area of real-time floodplain mapping. The FPML system is a very novel and important tool for flood alert purpose, and will find great applications in the field.

Other witnesses also discussed the FPML system in varying levels of detail. The AAO can find no mention of implementation of the FPML system in the petitioner's initial submission. Even when Prof. Bedient discussed the petitioner's work with maps, he did not specifically discuss FPML or indicate that the petitioner's efforts had yielded a functional system. The documents submitted in response to the request for evidence indicate that the FPML system was introduced in mid-2007, several months after the petition's November 2006 filing date.

The beneficiary of an immigrant visa petition must be eligible at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The 2007 introduction of a "prototype" version of FPML cannot establish that the petitioner already qualified for a national interest waiver in 2006.

The director denied the petition on May 1, 2008. In the decision, the director acknowledged the intrinsic merit and potential national scope of the petitioner's work, but found that the petitioner's submissions failed to establish that the petitioner's work has, thus far, had significant impact and implementation within the field. On appeal, counsel argues that Matter of New York State Dept. of Transportation requires only "some degree of influence on the field as a whole," and that the petitioner has met this standard by submitting letters and other materials that establish "some degree of influence." The cited passage, quoted more fully, reads:

The alien . . . clearly must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. The Service here does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole. . . . In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest.

Id. at 219 n.6. In context, it is clear that the use of the word "some" was not meant to rule or to imply that an alien qualifies for the waiver simply by showing more than no influence. Also, the petitioner has not established that the petitioner has influenced "the field as a whole." Rather, the petitioner has established tentative, limited testing of a prototype version of a system introduced after the filing date.

Counsel cites letters from witnesses who stated that they have adopted the petitioner's findings into their own work. These letters, submitted in response to the request for evidence, relate to the implementation of work that dates from after the petition's filing date. Even then, the petitioner's impact appears to be heavily (although not entirely) concentrated in coastal Texas and adjacent areas. The record affords little basis for an objective comparison between the petitioner's achievements and those of others in his field.

The **AAO** has not disregarded the witness letters and other materials submitted in support of the petition, but the record as it stands indicates that the petitioner's impact has been limited, and even then much of that impact post-dates the petition's 2006 filing. The **AAO** finds that, while the petitioner's career is certainly not without potential, the filing of the petition while the petitioner was still a student was premature at best.

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. *5* 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 a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

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