LEGAL ISSUES IN HIGHER EDUCATION

OBTAINING LAWFUL RESIDENT ALIEN STATUS THROUGH EMPLOYMENT VISA

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The Immigration and Nationality Act (hereinafter the Act) provides five employment-based immigrant preference categories under which a foreign worker may qualify for permanent residence in the United States. The five preference categories include: priority workers (First Preference); workers with advanced degrees and those of exceptional ability (Second Preference); skilled workers, professionals, and other workers (Third Preference); certain special immigrants; including religious workers (Fourth Preference); and employment creation (Fifth Preference).

Numerical Limitations

The Act allocates 140,000 employment-based visas per year. 28.6% of the 140,000 total visa numbers (40,000) are allocated to each of the first three preference categories and 7.1% of the 140,000 total (10,000) are designated for each of the last two preferences. Within in each category, 7.0% of the total is designated a “ceiling” number which caps the number of visas allocated to individuals born in a specific country. Visas are charged against an individual’s country of birth rather than a place of citizenship, except in instances of cross-chargeability. Section 104 of the American Competitiveness in the 21st Century Act of 2000 (AC21) provides that if, in a calendar quarter, there are more visas available in all the employment based preferences than the number of qualified individuals who may be issued such visas, then the visas may be made available without regard to country of origin of the per-country ceilings for employment based first, second, and third preference cases.

Throughout the last several years, U.S. Citizenship and Immigration Services (USCIS) has experienced tremendous backlogs and delays in the adjudication process. To mitigate this problem, USCIS launched a new backlog reduction plan that rapidly exhausted the number of visa numbers available. As the U.S. Department of Labor continues to process its backlog of alien labor certification cases and approve new PERM cases, the immigrant visa situation has continued to deteriorate and by September 2014, immigrant visas in some categories were backlogged over ten years for some countries.
There has been no successful effort to reduce visa backlogs since President Bush signed into law an Emergency Supplemental Appropriations Package that amended § 106(d) of AC21 by placing the unused employment-based visa numbers from fiscal years 2001 to 2004 in the visa "bank" for use in future fiscal years when the demand for employment-based immigrant visas in the first, second, and third preference categories exceed the annual quota. The use of the "bank" visa numbers collected from fiscal years 2001 to 2004 were reserved for Schedule A immigrant worker petitions (Registered Nurses, Physical Therapists, and Exceptional Ability Aliens) and their family members accompanying or following to join. The total number of immigrant visas used from the "bank" could not exceed 50,000. The increase in numbers for Schedule A workers resulted in visas remaining available until November 2006 and then the Schedule A category once again experienced backlogs.

**FIRST PREFERENCE: PRIORITY WORKERS**

The first preference category includes: (1) aliens of extraordinary ability; (2) outstanding professors and researchers; and (3) certain multinational executives and managers. 8 U.S.C. § 1153 (b) (1).

**Aliens of Extraordinary Ability**

Aliens with extraordinary ability are defined as those who can demonstrate that they have "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". 8 U.S.C. § 1153(b)(1)(A)(I). The phrase "extraordinary ability" is defined as a "level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor." 8 CFR § 204.5(h)(2).

An alien seeking to qualify as an immigrant worker under the "extraordinary ability" classification does not need a job offer or an approved alien labor certification. 8 CFR § 204.5(h)(5).

The petitioner for an extraordinary ability alien must submit extensive documentation that the alien has sustained national or international acclaim and that the alien's achievements have been recognized in the field of expertise. 8 CFR § 204.5(h)3. The documentation must include evidence of a one-time achievement that is a major internationally recognized award, such as a Nobel Prize, or three other types of evidence, including: (1) receipt of lesser nationally or internationally recognized prizes or awards for excellence; (2) membership in associations in the field which require outstanding achievements of their members; (3) published material about the alien in professional or major trade publications; (4) evidence that the alien is a judge of the work of others; (5) evidence of the alien's original contributions of major significance in the field; (6) evidence of the alien's authorship of scholarly articles in the field; (7) display of the alien's work in the field at artistic exhibitions or shows; (8) evidence the alien has performed in a leading or critical role for organizations that have a distinguished reputation; (9) evidence that the alien has commanded a high salary in relation to others in the field; (10) evidence of commercial success in the performing arts; or (11) comparable evidence to establish...
eligibility if the above standards do not readily apply to the alien's field of endeavor. 8 U.S.C. § 204.5(h)(3) & (4), 8 CFR § 204.5(h)(3)(I)-(x).

CIS adopts the position that the above evidentiary lists were designed to provide for easier compliance by the petitioner and easier adjudication by the examiner and that an alien may establish that he or she is an extraordinary alien by meeting three of the referenced criteria. Memorandum dated July 30, 1992, from Lawrence J. Weinig, Acting Assistant Commissioner, and addressed to James M. Bailey, then Director of the INS Northern Service Center (emphasis added). A copy of this letter appears in the 69 Interpreter Releases, 1052-53 (Aug. 24, 1992). INS further recognizes that there is no need to satisfy more than three criteria provided the substance of the evidence provided is sufficient. However, the INS examiner must evaluate the evidence presented and not simply count pieces of paper. Weinig memorandum, supra (emphasis added).

Mr. Weinig's memorandum also explains the type of qualitative evidentiary distinctions considered by INS. Mr. Weinig stated as follows:

Generally, we maintain that a book by the alien published in vanity press, a footnoted reference to the alien's work without evaluation, an unevaluated listing in a subject matter index, or a negative or neutral review of the alien's work would be of little or no value. On the other hand, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals, testimony from other scholars on how the alien has contributed to the academic field, entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, or participation by the alien as a reviewer for a peer-reviewed scholarly journal would more than likely be solid pieces of evidence. We are also inclined to believe that thesis direction (particularly of a Ph.D. thesis) would demonstrate an alien's outstanding ability as a judge of the works of others. To repeat we expect the examiner to evaluate the evidence, not simply count it.

The position set forth in Mr. Weinig's memorandum was supported by a May 20, 1993, opinion letter from Edward H. Skerrett, Chief, Immigrant Branch, Adjudications, and addressed to Mary E. Ryan, 70 Interpreter Releases, 764-66 (June 7, 1993).

The statute additionally requires a showing that the extraordinary ability alien's admission will substantially benefit the United States. The regulations do not define substantial benefit. It must also be documented that the alien is coming to the United States to continue work in the area of expertise. This evidence can be in the form of support letters or affidavits from the prospective employer, evidence of prearranged commitments, such as employment contracts, or statements from the alien setting forth intentions to continue the work in the United States. 8 CFR § 204.5(h)5.

**Outstanding Professors And Researchers**

An alien seeking to qualify as an outstanding professor or researcher must be internationally recognized as outstanding in a specific academic area. Evidence that the alien professor or researcher has been recognized internationally as outstanding must include at least
two of the following: 1) receipt of major prizes or awards for outstanding achievements in the field; 2) membership in associations in the field which require outstanding achievements for its members; 3) published material in professional publications written by others about the alien's work in the field; 4) evidence of the alien's participation as a judge of the work of others in the same field; 5) evidence of the alien's original scientific or scholarly research contributions to the field; or 6) evidence of the alien's scholarly books or articles in journals with international circulation in the field. 8 CFR § 204.5(I)(3)(I)(4)(F).

The alien must also have a minimum of three years experience teaching or researching in that specific academic area and be entering the U.S. for a tenured or tenure-track teaching position or comparable research position at a university or institution of higher learning. 8 U.S.C. § 1153(b)(1)(B)(ii) and (iii). The requisite three years may include pre-degree research experience attained while working on the advanced degree, so long as the alien completed the degree and pre-degree research experience is similarly recognized as outstanding. Pre-degree teaching experience is acceptable if the individual has acquired the degree, and had full responsibility for the course. Any combination of teaching or research totaling three years will serve to meet the experience requirement.

The employer may also be a private company if the employer has at least three full-time research employees and has achieved documented accomplishments in the academic field in which the position is offered. 8 U.S.C. § 1153(b)(1)(B)(iii)(111).

NOTE: Nothing in the statute or regulations requires the researcher or professor to possess a doctorate degree.

Unlike extraordinary ability aliens, outstanding researchers and professors require an offer of employment from a prospective U.S. employer. 8 CFR § 204.5(I)(3)(iii). A labor certification is not required for this classification. 8 CFR § 204.5(I)(3)(iii). Research positions must be permanent. A permanent position is defined at 8 CFR § 204.5(I)(2) as tenured, tenure-track, or for a term of indefinite or unlimited duration with the expectation of continued employment, unless there is good cause for termination. An alien who qualifies as an outstanding professor can be offered a position as a researcher and vice versa.

In a June 6, 2006 USCIS memorandum, Michael Aytes, Acting Director for Domestic Operations, provides field guidance on this issue. The memo states:

Adjudicators should not deny a petition where the employer is seeking an outstanding researcher solely because the actual employment contract or offer of employment does not contain a "good cause for termination" clause. The petitioning employer, however, must still establish that the offer of employment is intended to be of an indefinite or unlimited duration and that the nature of the position is such that the employee will ordinarily have an expectation of continued employment. For example, many research positions are funded by grant money received on a yearly basis. Researchers, therefore, are employed pursuant to employment contracts that are valid in one year increments. If the petitioning employer demonstrates, however, the intent to continue to seek
funding and a reasonable expectation that funding will continue (such as demonstrated prior renewals for extended long-term research projects) such employment can be considered “permanent” within the meaning of 8 CFR § 204.5(i)(2). Adjudicators should also consider the circumstances surrounding the job offer as well as the benefits attached to the position. A position that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the position normally continues beyond the term (i.e., if the funding grants are normally renewed).

The determination as to whether a position qualifies as a tenured or tenure-track position is not linked to the regulatory requirement that the position be “permanent” as defined in 8 CFR § 204.5(i)(2). 8 CFR § 204.5(i)(2) applies only to “research positions.” Adjudicators do not need to evaluate whether the employment contract for a tenured or tenure-track position has a “good cause for termination” clause, and should not deny a petition seeking an outstanding researcher for a tenured or tenure-track position on that basis alone. Adjudicators, however, should continue to evaluate whether the overall nature of the position is tenured or tenure-track. Note, USCIS will not equate tenured or tenure-track positions with those that are temporary, adjunct, limited duration, fellowships, or similar positions, where the employee has no reasonable expectation of long-term employment with the university.

**Certain Multinational Executives And Managers**

An alien seeking priority worker classification as a multinational executive or manager must document that he or she has been employed outside the United States in an executive or managerial capacity for a minimum of one of the three years immediately previous to seeking such classification, or, if the alien is already in the United States, one of the three years preceding entry to the U.S. as a Nonimmigrant. The regulations require that the previous employment must have actually been outside the United States. 8 CFR § 204.5(j)(3)(B). The past employment must have been with the same employer, a subsidiary, or affiliate thereof and the alien must be entering the United States to work as an executive or manager for a U.S. employer which is an affiliate, subsidiary, or the same employer as the firm, corporation or other legal entity which employed the alien abroad. 8 U.S.C. § 1153(b)(1)(e).

The U.S. petitioner must have been doing business for at least one year. 8 CFR § 204.5(j)(3)(I)(b). "Doing business" is defined as the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity which has employees requiring more than the mere presence of an agent or office. 8 CFR § 204.5(j)(2). An offer of employment from a prospective United States employer is required, but there is no labor certification requirement.

**Executive or Managerial**

"Executive capacity" is defined as an assignment within an organization in which the employee primarily: (1) directs the management of the organization or a major component or
function of the organization; (2) establishes the goals and policies of the organization, component, or function; (3) exercises wide latitude in discretionary decision making; and (4) receives only general supervision or direction from high level executives, the board of directors, or stockholders of the organization. 8 CFR § 204.5(j)(2).

"Managerial capacity" is defined as an assignment within a qualifying entity in which the employee primarily: (1) manages the organization or a department, subdivision, function, or component of the organization; (2) 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; (3) has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if other employees are directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (4) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. 8 CFR § 204.5(j)(2).

SECOND PREFERENCE: ALIENS WHO ARE MEMBERS OF THE PROFESSIONS HOLDING ADVANCED DEGREES OR ALIENS OF EXCEPTIONAL ABILITY IN THE SCIENCES, ARTS OR BUSINESS

The Second Preference Category is divided into two categories including aliens who are "members of the professions holding advanced degrees or their equivalent" and aliens "who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States". 8 U.S.C. § 1153(b)(2).

Members Of The Professions Holding Advanced Degrees

A United States employer may attempt to obtain an immigrant visa for an alien employee who is a member of the professions in this second preference classification when the job requires an advanced degree and the prospective alien employee possesses such a degree.

The term "profession" has been defined for such purposes as a position which requires advanced knowledge in a specific field of science or learning obtained by a prolonged course of specialized studies. Matter of Shin, 11 I&N Dec. 686 (Dist. Dir. 1966). The alien must be a member of the professions at the time the employer initiates the qualifying process. Diaz v. District Director, INS, 468 F.2d 1206 (9th Cir. 1972); Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971). Professions include, but are not limited to, those occupations cited in 8 U.S.C. § 1101(a)(32).

An advanced degree is defined as any United States academic or professional degree or foreign equivalent degree above the baccalaureate level. 8 CFR § 204.5(k)(2). A United States baccalaureate degree followed by a minimum of five years of progressive experience is deemed the equivalent of a Master's degree. 8 CFR § 204.5(k)(2). Progressive experience is demonstrated by advancing levels of responsibility and knowledge in the specialty. Detailed

**Aliens Of Exceptional Ability**

Second Preference classification is for an alien of exceptional ability in the sciences, arts, or business. The employer must establish that the individual has a degree of expertise significantly above the ordinary as shown by evidence satisfying at least three out of six criteria: (1) an official academic record showing a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the field of learning; (2) at least ten years of full-time experience in the occupation documented by letters from current or past employers; (3) a license to practice the profession or certification for the particular profession or occupation; (4) evidence that the alien has commanded a salary or other enumeration for services which demonstrates exceptional ability; (5) membership in professional associations; (6) recognition for achievements and significant contributions to the industry or field by peers, government entities, professional or business organizations; or other comparable evidence.

The "exceptional ability" standard for the second preference category is lower than the "extraordinary ability" standard in the first preference category.

**Labor Certification**

U.S. employer desiring to obtain an immigrant visa for an alien employee under second preference classification as a member of the professions holding an advanced degree or as an alien of exceptional ability must submit an approved labor certification from the U.S. Department of Labor, an application for Schedule A designation, or documentation establishing that the alien qualifies for one of the identified shortage occupations. 8 CFR § 204.5(k)(4)(I). Implementation of the PERM regulation has significantly changed the alien labor certification process.

On May 17, 2007, the Department of Labor (DOL) issued a final rule affecting the alien labor certification process. The rule became effective July 16, 2007, and according to DOL, seeks to enhance program integrity and reduce the incentives and opportunities for fraud and abuse in the labor certification and employment-based permanent residence process. 20 CFR Part 656; 72 Fed. Reg. 29704 (May 17, 2007). The rule was issued over the objections of numerous business immigration groups.

The new rule addressed several important issues:

- Under the new rule, employers must pay for the costs of the labor certification process, including attorney fees, for any transactions that occur after July 16, 2007. The new regulations strictly prohibit the employer from transferring its costs to the alien employee. The rule does allow an alien to pay his or her own personal costs incurred in connection with a labor certification, including attorney fees for personal
legal representation, but where the same attorney represents the alien and the employer, the costs must be paid by the employer.

Section 656.12(b) provides that an employer may not seek or receive payment of any kind for any "activity" related to obtaining a permanent labor certification (PERM), except from a party with a legitimate, pre-existing business relationship with the employer, and when the work to be performed by the alien beneficiary will benefit that party. "Payment" includes, but is not limited to, monetary payments; deductions from wages or benefits; kickbacks, bribes, or tributes; goods, services, or other "in kind" payments; and free labor.

Section 656.12(b) provides that "activity related to obtaining permanent labor certification," includes, but is not limited to, recruitment activity, the use of legal services, and any other action associated with the preparation, filing, or pursuit of an application for labor certification. Any reimbursement agreement that would require the employer to reimburse the employer for part of or all of the attorneys' fees incurred associated with preparing, filing and obtaining the labor certification, is in violation of the new rule.

An exception to payment of costs and fees by the alien exists if the payment obligation accrued before July 16, 2007. In such instance the employer has the right to seek payment after the effective date.

Under the previous regulation, an employer was allowed to substitute a new alien beneficiary for the one named on an approved labor certification if the new alien employee meets the criteria contained in the original labor certification. Under the PERM rule, employers are precluded from substituting different alien employees on previously approved labor certifications.

The rule also bars modifications to labor certification applications once filed. The rule provides that requests to modify requirements and duties in labor certification applications filed after July 16, 2007 are not allowed. Once a PERM application is filed, it cannot be amended. If a change must be made, the employer is required to withdraw the labor certification and re-file the corrected labor certification.

The rule provides that labor certifications will no longer be valid indefinitely. Under the previous regulations, labor certifications were valid indefinitely. Now, labor certifications are only valid for only 180 days after the application is approved. As such, the approved labor certification must be filed with Citizenship and Immigration Services together with an employment based immigrant visa petition (I-140) within 180 days of approval, otherwise the labor certification will no longer be valid and a new labor certification will need to be processed.

The DOL regulation specifically bans the sale, barter, or purchase of labor certifications by any parties.

On or after July 16, 2007, DOL may debar an employer, attorney or agent based on certain actions, including fraud, willful providing of false statements, or a pattern or practice of noncompliance with PERM requirements. Debarment prohibits an individual or entity from using the labor certification process for a specified period of time.
National Interest Waiver

The requirement that an alien's services in the professions be supported by a job offer from a United States employer may be waived under the second preference category if it is deemed to be in the "national interest". 8 CFR § 204.5(k)(4)(ii).

Current CIS regulations provide no definition for national interest. The courts have interpreted the term "national interest" broadly in other contexts.

Several non-precedent CIS decisions have set forth the following criteria which may be used to determine the national interest, recognizing that not all of the criteria need be satisfied:

- Improving U.S. economy
- Improving wages and working conditions of U.S. workers
- Improving education and training programs for U.S. children and under-qualified workers
- Improving health care
- Providing more affordable housing for young and/or older, poorer U.S. residents
- Improving the environment of the United States and making more productive use of natural resources; or
- A request from an interested U.S. Government agency.

On June 6, 1995, Legacy INS proposed numerous significant amendments to the regulations governing "national interest waivers". Public comments on the proposed rule were completed on August 7, 1995. It has now been almost 15 years and CIS has not published Legacy INS’s final rule.

The proposed rule would allow professionals as well as advance degreed and exceptional ability aliens to seek a national interest waiver. The proposed rule would also provide a more complete definition of the term "national interest."

The proposed rule would require that the alien satisfy the following four elements to qualify for a national interest waiver:

- The alien must have at least two years of experience in the area in which he/she will benefit the U.S.
- The alien must document that the national interest waiver will not be based on local labor shortages. A "national interest" is an interest that benefits the entire country and not just a small area
- The alien must be involved in an undertaking that will substantially benefit "prospectively" the U.S. The waiver should be premised on an activity that will further an important national goal
- The alien must be functioning in a "significant role" in the activity that will benefit the U.S.
The Administrative Appeals Unit issued a precedent decision which impacted the effectiveness of the national interest waiver. In *New York State Department of Transportation*, EAC-96-063-51031 (August 7, 1998), hereinafter referred to as NYSDOT, the AAU held that a shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver. The AAU further ruled that general arguments regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish eligibility for a national interest waiver.

The AAU set forth a three prong test for adjudicating a National Interest Waiver Petition.

- First, NYSDOT requires that the alien must be seeking employment in an area of intrinsic merit. NYSDOT’s discussion of the first prong states that decisions are to be made on a case-by-case basis.
- The second prong requires the petitioner to demonstrate that the proposed benefit will be national in scope. The decision in NYSDOT requires a subjective determination in deciding whether specific employment serves a national benefit.
- Third, NYSDOT requires the petitioner to demonstrate persuasively that the national interest would be adversely affected if a labor certification was required for the beneficiary, i.e., that the national benefit offered outweighs the inherent national interest in the labor certification process. As clarification, the AAU suggest that the third prong of NYSDOT requires a showing that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making the position sought available to U.S. workers. The AAU indicates the third prong could also be satisfied by establishing 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.

**Physician National Interest Waiver**

Alien physicians working in medically underserved areas may also qualify for permanent resident status on the basis that their work is in the national interest. The law allows the approval of a national interest waiver petition filed on behalf of a qualified alien physician who meets the following criteria:

- The alien physician must agree to work full time as a specialty physician in either a geographical area or areas designated by the Department of Health and Human Services as having a shortage of doctors or at a health care facility run by the Department of Veterans Affairs”;
- A federal agency or the Department of Public Health for any State, which has previously determined that the foreign physician’s work in the area of the petitioning facility is in the public interest. The physician must not be subject to the J-1 two-year foreign residence requirement;
- Physicians may not be afforded lawful resident alien status until he or she has worked for an aggregate of five years (not including time spent as a J-1 visa holder) in an area designated by the Secretary of Health and Human Services as having a health professional shortage area or in a Veterans Administration
facility. If the physician already has authorization to accept employment (other than as a J-1 exchange alien), the physician must complete an aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date of approval of the form I-140. If the physician must obtain authorization to accept employment before the physician may lawfully begin working, the physician must complete the aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date the Service issues the necessary employment authorization document;

- Physicians approved for national interest waivers prior to November 1999 have less rigid requirements, but the majority of all such cases have probably been adjudicated. Physicians with pending NIW petitions submitted previous to November 1, 1999, are not bound by the five year provision, and need only work three years in the health professional shortage area or in a Veterans Administration facility. For everyone else, the five year requirement applies.

**THIRD PREFERENCE: SKILLED WORKERS, PROFESSIONALS AND OTHER WORKERS**

The third preference employment category includes: (1) skilled workers; (2) professionals; and (3) other workers. Like the first and second preference categories, the third preference category is allocated approximately 40,000 immigrant visas per year; however "Other Workers" within the third preference are limited to only 10,000 visas annually. This limitation has already resulted in unmanageable backlogs for "other workers." Thus, it is extremely important to qualify the alien as either a "skilled worker" or "professional" rather than as an "other worker."

Immigrant visas under the third preference employment category are based on a job offer for permanent employment. 8 U.S.C. § 1135(b)(3)(I)(iii). The determination as to whether a job position is permanent focuses on the employer's need rather than the nature of the duties to be performed. As such, a job position previously filed under a Nonimmigrant temporary employment visa may become permanent in nature if the employer is able to document that it has been unable to hire or train a lawful permanent resident or United States worker for the position.

**Skilled Workers**

Skilled workers are defined as qualified aliens who are capable of performing skilled labor requiring a minimum of two years of training or experience in a position not temporary or seasonal in nature. Relevant post secondary education may be considered as training. 8 CFR § 204.5(1)(2).

A determination as to whether the skilled labor requires two or more years of training or experience often depends on the qualifications for a particular occupation and whether the job matches a position in the O*Net occupations and that the Job Zone be at least a 3.

**Professionals**
An alien attempting to qualify for third preference classification as a professional must possess, at a minimum, a baccalaureate degree or foreign equivalent, and the employer must demonstrate that such a degree is the normal requirement for entry into the profession.

Not every alien who has graduated from an accredited college or university with a baccalaureate equivalent is eligible for classification as a member of the professions, Matter of Medina, 13 I&N Dec. 581 (Reg. Comm. 1970), because the CIS adopts the position that certain occupations require a degree above the baccalaureate level to qualify as a profession. Matter of Liagan, 13 I&N Dec. 106 (Regional Comm. 1968).

Conversely, the occupation will not be deemed a profession if the attainment of a degree is not a realistic prerequisite for performing the job responsibilities. As such, the mere fact that the employer desires college graduates for the position does not render the occupation a profession if the job does not realistically require a degree.

The Act specifically eliminated provisions for a baccalaureate equivalency based upon a combination of education and experience.

Other Workers

Other workers are simply those aliens in positions which require less than two years of higher education, training, or experience to perform job responsibilities not of a seasonal or temporary nature. Again, the current backlog for the other workers category has been so troublesome that the possibility for immigration in this category is dismal.

IMPORTANT CONSIDERATIONS

Priority Date

If an alien labor certification is required, the priority date is the date the request for labor certification is accepted for processing. Otherwise, the priority date is the date the I-140 visa petition is properly filed with USCIS. The priority date attaches to the foreign national upon approval of the I-140 immigrant petition. Approved I-140 petitions are valid indefinitely unless revoked.

Retaining Priority Dates

The regulations governing priority dates for employment-based petitions are codified at 8 CFR §§ 204.5(d), (e), and (f).

As previously discussed, the general rule for employment-based cases is that the priority date is the date the labor certification application is accepted for processing by Department of Labor. If no labor certification is required, then the priority date is the date the petition (I-140) is properly filed with the CIS.
If the alien employee loses the job or job offer while the alien labor certification is pending, or prior to approval of the petition (I-140), he or she will lose the original priority date. It should be noted however, that if the alien employee changes jobs after the I-140 is approved, the individual can retain the old established priority date. However, the alien employee must file a new labor certification and new I-140 petition and recapture the priority date of the first I-140 petition.

The regulations specifically allow the alien employee to retain the original priority date and transfer it to any subsequently approved petition (I-140) submitted under the first, second, or third preference. The “retention” is processed by filing a copy of the I-140 approval notice from the original job, together with the subsequent I-140 and new labor certification for the later job. The new filing should specifically reference the earlier priority date and request that the original date be “recaptured.” CIS has historically placed the old priority date on the approval notice for the new petition.

This strategy may be particularly important over the next several years because of existing or anticipated backlogs in various employment based categories.

**Ability to Pay Wage**

The number of I-140 denials based on ability to pay has risen significantly over the last five to six years. All immigrant petitions filed by U.S. employers must include evidence that the employer was able to pay the offered wage as of the alien’s priority date, whether it be the filing of the alien labor certification or the actual petition for non-ALC cases. The evidentiary documentation may include the employer’s annual report, federal income tax return, or audited financial statements. If the petitioner has more than 100 employees, a statement from the entities’ financial officer may be sufficient, subject to a request for additional evidence from the CIS examiner.

The evidentiary requirement can cause difficulty for start-up companies showing substantial growth between the date of filing and the completion of the adjudication process. The regulations allow for some flexibility because they permit petitioners to submit additional evidence such as profit/loss statements, bank account records, or personnel records.

The AAO has expanded its view of the “ability to pay” by holding that as long as the employer is actually paying the proffered wage when the priority date is established, the petition should not be denied for lack of financial ability to pay the proffered wage.

An extremely important memorandum from former USCIS Deputy Director, William R. Yates dated May 4, 2004 (AILA Doc. No. 04051262), provided guidance indicating that CIS officers should make a positive ability to pay finding in any one of the following circumstances:

- Net income – Petitioner’s net income is equal to or greater than the proffered wage;
- Net current assets – Net current assets are equal to or greater than the proffered wage; or
- Employment of the Beneficiary – The filing contains verifiable evidence that the Petitioner is not only employing the Beneficiary but also has paid or is presently paying the proffered wage.

Consistent with the Yates guidance, CIS officers should make a favorable determination if the foreign worker has been employed by the employer and copies of payroll checks, W-2 forms, and/or the Beneficiary’s tax returns all substantiate that the foreign worker has actually been paid the proffered wage. Practitioners should be cautioned that if the foreign worker has been employed without authorization, the petitioner could be exposed to an I-9 investigation. (See complex discussion of ability to pay in the AILA article, “Small Business and the Ability to Pay” by Romulo E. Guevara with Yolanda Gallagher, found in the AILA 2005-2006 annual handbook.)

**Concurrent Filing**

An interim rule was published by the legacy INS allowing for concurrent filing of the I-140 immigrant visa petition with the foreign national’s I-485 application for adjustment of status when an immigrant visa is immediately available to the foreign national, or would be immediately available if the I-140 petition were approved on the date of filing. Practitioners should now be cautious! With retrogression of employment-based categories, one must be careful to determine visa availability prior to utilizing concurrent filing procedures.

**Portability of Certain Green Card Cases in Final-Stage (Form I-485) Processing**

The generous provisions of AC21 § 106(c) generally permit employment-based adjustment of status applicants, who have had I-485 applications pending for more than 180 days and which remained unadjudicated, to change jobs and/or employers as long as the applicants remain in the same or a similar occupational classification. As such, an applicant with an I-485 may “port” to another employer or location provided the still-pending I-485 remains unadjudicated for 180 days or more.

Fortunately, the agency has amended its earlier position that if a petition (I-140) and I-485 application were filed concurrently, the petition (I-140) must have been approved before an alien was allowed to “port” to a similar job classification or new employer. According to the May 12, 2005 Yates memorandum, the petition (I-140) now remains valid even if the alien employee changes jobs or employers while remaining employed in the same or a similar job classification provided the I-485 application has been pending 180 days or more. In “porting” circumstances, CIS officers have now been instructed to determine whether the petition (I-140) is or was approvable but for the ability to pay issue and, if so, officers are instructed to approve the petition (I-140), adjudicate the I-485 application, and then determine if the new position filled by the alien employee is in the same or similar job classification.

The May 12, 2005 Yates memorandum also provides the following:
• CIS will look to the DOT code and/or SOC code to determine “same or similar” job classification;
• The actual geographic location of the new job becomes irrelevant;
• The wage offered for the new job is not relevant unless it is so significant as to suggest that the new position may not be the “same or similar” occupation;
• The portability provisions of AC21 are applicable to EB-1 multinational managers and executives, and apply to unrelated business;
• “Ability to pay” becomes irrelevant with regard to the new employer; however, the officer may review the issue to determine whether the new job offer is a bona fide job opportunity;
• The alien employee can “port” to self-employment, but such a move could raise an issue about whether the parties actually intended the job offer to be a bona fide opportunity at the time of filing the application for alien labor certification;
•Porting prior to the time the I-485 application has been pending more than 180 days cannot be the sole basis for denial. Once again however, such a move could present issues at the time of filing the application for labor certification;
• The petition (I-140) becomes invalid for purposes of porting if it is withdrawn before the I-485 application has been pending 180 days or when it is denied or revoked at any time, unless the revocation was based on a withdrawal made after the I-485 had been pending 180 days; and,
• A new job offer is required in the “same or similar” job classification at the time the CIS officer is adjudicating the I-485 application under the AC21 adjustment portability provisions.

Many practitioners continue to advance the argument that although the petitioner must intend to employ the alien employee through the approval of the I-140 petition, there is no requirement that the alien actually be employed until permanent residence is authorized, and that it is therefore possible the alien employee to qualify for the pending provisions of § 106(c) even if the alien has never been actually employed in the initial position identified in the petition (I-140).

The May 12, 2005, Yates memorandum makes clear that the interim guidance will only be in effect until CIS regulations are published as a final rule and that “the proposed rule may take a more restrictive position than this memorandum.” Practitioners should follow these developments closely when setting out future strategies for their clients. As with many strategies designed around nonbinding CIS memorandum, they could be “here today and gone tomorrow”.

**Labor Certification Substitutions**

Effective July 17, 2007, an employer may no longer substitute an alien beneficiary into a labor certification previously approved for another foreign worker.

**FOURTH PREFERENCE: SPECIAL IMMIGRANTS**
The fourth employment-based category is reserved for "special immigrant" status. The Act provides approximately 10,000 visas annually for this category. The category is for the benefit of three sub-groups: (1) ministers of religion; (2) professionals working in religious vocations or occupations; (3) and workers in religious vocations who work for United States non-profit religious organizations or non-profit religious organizations affiliated with qualified religious denominations.

The alien must have been a member of a religious denomination which has had a bona fide non-profit religious organization in the United States for at least two years immediately preceding the application. The alien must be entering the United States to work as a minister of religion for an organization in a religious capacity, or for the organization or a related non-profit entity in another professional capacity. The alien must have been carrying on such work as a minister, professional or other worker for at least two years preceding the application. The alien must have at least a baccalaureate degree to qualify as a religious professional. A combination of experience and education may not be substituted for a baccalaureate degree.

**FIFTH PREFERENCE: EMPLOYMENT CREATION VISAS**

The Act also provides for an investor/employment category of immigrant visas. The Act provides approximately 10,000 visas annually for aliens who invest $1 million ($500,000 for target areas) in a new commercial enterprise which employs at least 10 full-time U.S. workers and provides the alien with a policy-making role.

The Act provides that investor/employment creation visas will be issued conditionally for a two-year period in an effort to deter fraud. After two years, the U.S. Attorney General must determine if the applicant has actually established a legitimate commercial enterprise. The Act also provides that establishing a commercial enterprise for the purpose of evading immigration laws is a felony punishable by up to five years imprisonment.

An alien desiring to qualify for an investor/employment creation status is afforded four methods to establish a new commercial enterprise. The alien may: (1) create an original business; (2) purchase and restructure an existing business; (3) expand and substantially increase the number of employees or net worth of a business; or (4) invest in a troubled business and increase the net worth or number of employees by at least 40 percent.

The alien must have invested after November 29, 1990, and any for-profit entity created to continually conduct lawful business may serve as the new commercial enterprise. However, the term new commercial enterprise does not include noncommercial activity.

Specific rules regulate investments in troubled businesses. The rules were adopted to encourage investments in United States companies experiencing financial problems. A troubled business is a for-profit entity which has been in existence for at least two years and has incurred a net loss for accounting purposes throughout the 12 or 24 month period prior to the priority date and the loss for such period must be at least equal to 20 percent of the entity’s net worth prior to the loss. 8 CFR § 204.6(e). The alien must also show at least 10 employees existed at the time of
the investment in the troubled business and that existing employees will be maintained at no less than the pre-investment level for at least two years.

The term investment means to contribute capital. Capital is defined as cash (and cash equivalents), equipment, inventory, other tangible property, or indebtedness secured by assets owned by the alien and incurred for the purposes of the investment.

The Act requires that the investments benefit the U.S. economy. The Act provides no guidance on which investments are deemed to be for the benefit of the economy.

The investment must also create full-time employment for at least 10 U.S. citizens, lawful permanent residents or other immigrants lawfully authorized to be employed in the United States, not including the investor, his spouse, and children. Other immigrants include conditional residents, temporary residents, asylees, refugees, and aliens granted suspension of deportation. An employee includes any individual other than independent contractors, who provides services or labor for the new commercial enterprise and receives wages or other remuneration directly from the new commercial enterprise.

The Act set aside 3,000 of the 10,000 visas for aliens who invest $500,000 in target areas. 8 U.S.C. § 1153(b)(5)(B). A target area is defined as a rural area which has experienced a high unemployment rate of at least 150 percent of the national average. 8 CFR § 204.60(6)(1).

The Act establishes provisions for the termination of an investor alien's immigrant status during the two-year conditional period. The alien's immigrant status will be terminated if the CIS determines that the new commercial enterprise was created to evade the immigration laws of the United States; the investor did not establish a new commercial enterprise; the alien failed to invest (or was not in the process of investing) the requisite capital; the investor failed to sustain the investments during the two-year conditional period; or if the investor was otherwise not conforming to the requirements of the employment creation provisions of the Act.