LEGAL ISSUES IN HIGHER EDUCATION

AN OVERVIEW OF EMPLOYMENT-BASED IMMIGRATION LAW

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EMPLOYMENT BASED IMMIGRANT VISAS

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 Supplement 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.

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 indication 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 showcases; (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).

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 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 qualifiy 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; 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 that specific academic area and be entering the U.S. for a tenured or tenure-track reaching 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)(III).

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(l)(3)(iii). A labor certification is not required for this classification. 8 CFR § 204.5(l)(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 of 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 durations 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 demonstrated, 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 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 Nonimmmigrant. 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 the 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) established 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 an leave authorization) if other employees are directly supervised, functions at 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 a purposes a 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. 1996). The alien must be a member of the professions at the time the employer initiates the qualifying process. 11 I&N Dec. 686 (Dist. Dir. 1996). 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 guidance on this issue is provided in a march 20, 2000 INS memo by Acting Assoc. Comm. Office of Programs, Michael Cronin, and Deputy Exec. Assoc. Comm. Field Operations William R. Yates (AILA Doc. No. 00032703).

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 demonstrated 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 organization, 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.

Alien Labor Certification ("PERM") is a process designed to ensure that US employers are not seeking to employ a foreign national when qualified U.S. workers are available to fill the position and to ensure that the US employer is not offering wages or working conditions to foreign nationals that would adversely impact the wages and working conditions of US workers. The purpose of the Alien Labor Certification process is to protect jobs, wages and working conditions of US workers.

20 CFR 656.2(c)(1) states “[t]he permanent labor certification role of the Department of Labor under the Act derives from section 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)), which provides that any alien who seeks admission or status as an immigrant for the purpose of employment under paragraph (2) or (3) of section 203(b) of the Act may not be admitted unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(i) There are not sufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United
States and at the place where the alien is to perform such skilled or unskilled labor; and

(ii) The employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

There are certain exceptions created for Institutions of Higher Education and positions involving teaching. This is known as the “Equally Qualified Standard” rule and “Special Handling” rule.

**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 resource; or
- A request from an interested U.S. Government agency.

On June 6, 1995, Legacy INC 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 degree 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 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 is 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 substantially greater degree than would an available U.S. worker having the same minimum qualifications.

**Physician National Interest Waiver**
USCIS may grant a national interest waiver if a physician agrees to work for a period of time in a designated underserved area.

Eligibility Criteria

- You must agree to work full-time in a clinical practice. For most physician NIW cases, the required period of service is 5 years
- You must work in a primary care (such as a general practitioner, family practice petitioner, general internist, pediatrician, obstetrician/gynecologist, or psychiatrist) or be a specialty physician
- You must serve either in a Health Professional Shortage Area (HPSA), Mental Health Professional Area (MHPSA – for psychiatrists only), a Medically Underserved Area (MUA), or a Veterans Affairs facility, or for specialists in a Physician Scarcity Area (PSA)
- You must obtain a statement from a federal agency or a state department of health that has knowledge of your qualifications as a physician and that states your work is in the public interest (This statement is known as an attestation)