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NOTES

EMPLOYMENT-BASED PREFERENCES CATEGORIES: AN EFFORT TO SIMPLIFY HAS RESULTED IN MORE PAPERWORK

I. INTRODUCTION

With the passage of the Immigration Act of 1990¹ ("the Act"), employment-based and family-sponsored immigration underwent sweeping and dramatic reforms. By implementing new criteria for both these areas of immigration, the Act sought to realize its new policy of strengthening American competitiveness in the global economy and to reinforce its prior policy of favoring family reunification.² The Act, which was signed into law by President Bush on November 29, 1990, and went into effect on October 1, 1991, "represents the culmination of a decade-long reform process that began with the Select Commission on Immigration and Refugee Policy in 1979."³ The resulting legislation represents the most comprehensive revision of United States immigration law in sixty-six years, and like "previous attempts at immigration reform, the goals of the 1990 Act may be difficult to carry into practice."⁴

Prior to the passage of the 1990 Act, less than ten percent of the immigrants entering the United States did so based upon employment considerations.⁵ The Immigration and Nationality Act ("INA") had set aside two visa preference categories for employment-based immigration.⁶ Under the INA, only a mere 54,000 visas were available to aliens and their families who qualified under the third or sixth preference.⁷ This comparatively small number of visas resulted in large backlogs among those aliens

1. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

2. 136 CONG. REC. S17,106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy).

3. Miguel Lawson & Marianne Grin, Note, Recent Development 33 HARV. INT'L L.J. 255 (1992) (discussing the Immigration Act of 1990).

4. *Id.*

5. H.R. REP. NO. 723, 101st Cong., 1st Sess., pt. 1, at 36 (1990).

6. Immigration and Nationality Act, Pub. L. No. 414, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557) (1988) [hereinafter INA].

7. *Id.* § 1153(a)(3), (6).

who qualified under these categories.⁸ In response, the Act dramatically increased the number of available employment-based visas to 140,000 and restructured the preference categories into five groups.⁹ Although the increase has reduced the backlog of qualified aliens, the restructuring has heightened the complexity of employment-based visa petitions.

This note will explain the differences between the INA and the Act with regard to employment-based preference categories, specifically the priority worker and advanced degree categories under the Act. The note will also serve as a valuable resource for practitioners attempting to obtain visa approvals for their clients under these two categories.

II. LEGISLATIVE HISTORY AND OVERVIEW

Under the Immigration and Nationality Act ("INA"), the third preference category was designated for professionals and persons of exceptional ability¹⁰ while the sixth preference category was for skilled and unskilled workers.¹¹ Each category was allotted 27,000 visas out of a total of 54,000, and the petitioning worker's spouse and family were included in this number. Therefore, the number of workers in these categories who actually obtained immigrant visas was far less than the 54,000 available for

8. 67 *Interpreter Releases* 1469 (Dec. 21, 1990). The backlog noted at the time of the passage of the Act was almost two years for third preference and close to four years for sixth preference. *Id.*

9. Immigration Act of 1990, Pub. L. No. 101-649, § 101(a), 104 Stat. 4978, 4981 (to be codified at 8 U.S.C. § 1151(a)). This number could also increase above 140,000 if the total of family-sponsored visas were not distributed in the prior fiscal year.

10. The Act provides in pertinent part:

Visas shall . . . be made available . . . to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States, and whose services in the professions, sciences, or arts are sought by an employer in the United States.

INA § 203(a)(3), 8 U.S.C. § 1153(a)(3) (1988). The Act further provides " 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies or seminaries." *Id.* § 101(a)(32), 8 U.S.C. § 1101(a)(32). The INA does not specifically define the phrase "exceptional ability," but courts have interpreted the term to mean "more than what is usual, ordinary or common, and requires some rare or unusual talent, or unique or extraordinary ability in a calling which, of itself, requires talent or skill." *Matter of Frank*, 11 I. & N. Dec. 657 (Dist. Dir. 1966).

11. "Visas shall . . . be made available . . . to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." INA § 203(a)(6), 8 U.S.C. § 1153(a)(C) (1988). Examples of popular skilled and unskilled workers include service occupations; precision, production, craft and repair occupations; executive, administrative, and managerial occupations; and operators, fabricators or laborers. Lawson & Grin, *supra* note 3, at 264 n. 68.

employment-based immigrant visas.¹² In addition, third and sixth preference workers were required to have their prospective employer file a labor certificate proving that the immigrant worker would not displace a domestic worker.¹³ Under the INA, the process was time consuming, and the waiting periods for the categories ranged from two to four years.¹⁴

The Immigration Act of 1990 (the "Act") almost triples the number of immigrant visas available to workers from 54,000 to 140,000.¹⁵ However, the 140,000 visas under the Act also include the worker's spouse and children.¹⁶ Therefore, as under the INA, the actual number of immigrating workers will be less than 140,000. One practitioner notes, "[f]ew employers would argue about the need for the increase . . . [and] [f]or individuals born in several countries, the wait often exceeded [two to four years] or became completely unavailable for a year at a time due to the quota pro-rating requirements of INA Section 203(e)."¹⁷ In fact, the House of Representatives noted that one reason for increasing the number of employment visas available was to help "meet current demands and reduce the backlogs which have hampered employers' ability to conduct business."¹⁸

The Act of 1990 eradicated the third and sixth preference categories and divided the 140,000 visas into five preference categories.¹⁹ The categories are: (1) priority workers;²⁰ (2) professionals holding advanced degrees and aliens of exceptional ability;²¹ (3) skilled workers, professionals holding bachelor's degrees, and other workers;²² (4) certain special immi-

12. See Stephen Yale-Loehr, *Labor Market Aspects of Legal Immigration Reform*, 4 GEO. IMMIGR. L.J. 249, 250 (1990).

13. 20 C.F.R. § 656 (1989) (setting forth the labor certification procedures).

14. *Interpreter Releases*, *supra* note 8.

15. See *supra* note 9 and accompanying text.

16. Immigration Act of 1990, Pub. L. No. 101-649, § 101(A) (1990).

17. Lenni B. Benson & Nancy B. Elkind, *Employment-Based Immigration: The First Three Preferences*, in 1991-92 IMMIGRATION & NATIONALITY LAW HANDBOOK 140 (R. Patrick Murphy et al. eds., 1991). The authors note that sixth preference visas were not even available throughout the fiscal year of 1991 for persons born in China-mainland, Hong Kong, India, Korea, Mexico and the Philippines. *Id.* at 140 n.1.

18. H.R. REP. NO. 723, 101st Cong., 2d sess. pt. 1, at 58 (1990).

19. Immigration Act of 1990, Pub. L. No. 101-649, § 121 (1990).

20. See *infra* notes 25-30 and accompanying text.

21. See *infra* notes 32-34 and accompanying text.

22. The third preference category has an annual allotment of 40,000 visas plus any visas not used in categories one and two. However, only 10,000 visas per year may be allotted to the "other workers" subcategory. "Skilled workers" are those who are "capable of performing skilled labor [requiring a minimum of two years of training or experience], not of a temporary or seasonal nature, for which qualified workers are not available in the United States." "Professionals" are those who have a baccalaureate degree accompanying their professional status. "Other workers" are those capable of performing "unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States." For this category, qualified workers must have a labor certification which indicates

grants;²³ and (5) investors.²⁴ For purposes of this article, only preference categories one and two will be examined in depth. The focus is on the first two categories because the latter three categories are not easily or widely available to a majority of the population of immigrants.

A. *First Preference*

The first employment-based preference category, priority workers, is entitled to 40,000 visas annually plus any unused visas from the third preference category. The "priority workers" preference category encompasses the following subcategories: (1) aliens with extraordinary ability; (2) outstanding professors and researchers; and (3) multinational executives and managers. Each of the three subcategories is equally entitled to the 40,000 visas, and no labor certification is required for applicants in this category.²⁵ The Act itself sets forth the broad criterion for each of the above subcategories.

An "alien with extraordinary ability" is one who has extraordinary ability in the sciences, arts, education, business or athletics. Such ability must be supported by "national or international acclaim," and the alien's achievements must have been recognized in the field through "extensive documentation."²⁶ Furthermore, the alien must seek to enter the United States to continue work in his area of extraordinary ability, and the alien's entry must be seen to "substantially benefit prospectively the United States."²⁷

An "outstanding professor and researcher," under the second subcategory of priority workers, is one who is "recognized internationally as out-

that there is an insufficient number of qualified United States workers to perform such work. Immigration Act of 1990, Pub. L. No. 101-649, § 121(a) (1990).

23. "Special immigrants" includes groups such as religious workers, certain overseas employees of the U.S. government, former employees of the Panama Canal Company and their families, some foreign medical graduates, and retired employees of international organizations and their families. 8 U.S.C. § 1101(a)(27) (1988). This employment preference category is allotted 10,000 visas annually, and if the allotment is not utilized the remaining visas are allotted to the first, second, and third preference categories respectively.

24. In order to qualify as an "investor," the alien must establish a new commercial enterprise and invest between \$500,000 and \$3 million in the enterprise. The alien must either have invested his or her money after November 29, 1990, or be in the active process of investing money. The investment must create at least 10 full-time jobs for U.S. citizens, permanent residents or other immigrants legally authorized to be employed in the U.S., and the 10 workers cannot include the investor or his or her immediate family. Immigration Act of 1990, Pub. L. No. 101-649, § 121(a) (1990). This preference category is allotted 10,000 visas annually, but there is no pass-down provision to the other categories should the total amount not be utilized.

25. Immigration Act of 1990, Pub. L. No. 101-649, § 121(a) (1990) (creating INA § 203(b)(1))(1990).

26. *Id.* § 203(b)(1)(A)(i).

27. *Id.* § 203(b)(1)(A)(ii)-(iii).

standing in a specific academic area" and who has at least three years of experience in teaching or research in the academic area.²⁸ Moreover, the alien must be seeking to enter the United States for a tenured, tenure-track, or comparable position with a university, institute of higher education, or a private employer who has achieved "documented accomplishments in an academic field" and employs at least three full-time persons in research.²⁹

The third subcategory, "certain multinational executives and managers," includes aliens who within three years prior to the application had been employed for at least one year by a "firm or corporation or other legal entity or an affiliate or subsidiary thereof . . ."³⁰ In addition, the alien must be seeking to enter the United States in order to continue rendering services to the "same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive."³¹

B. *Second Preference*

The Act allocates forty thousand visas to the second employment-based preference category, "professionals holding advanced degrees or aliens of exceptional ability." This category is open 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.³²

Under this category, the Attorney General may waive the requirement that the alien's services be sought by an employer in the United States.³³ Also, the possession of an advanced degree is not in and of itself sufficient evidence of exceptional ability.³⁴

III. CLARIFICATION OF THE ACT BY THE IMMIGRATION AND NATURALIZATION SERVICE

Although the body of the Immigration Act of 1990 lays out the substantive provisions of the preference categories, it is not clear what types of documentary evidence satisfy the enumerated criteria. Such terms as "ex-

28. *Id.* § 203(b)(1)(B)(i)-(ii).

29. *Id.* § 203(b)(1)(B)(iii).

30. *Id.* § 203(b)(1)(C).

31. *Id.*

32. *Id.* § 203(b)(2)(A).

33. *Id.* § 203(b)(2)(B).

34. *Id.* § 203(b)(2)(C).

traordinary," "substantial prospective benefit," and "national interest" remained undefined after the Act. Thus, following the passage of the Act on November 29, 1990, it became the job of the Immigration and Naturalization Service (hereinafter the "Service" or the "INS") to interpret the legislative history of the Act to provide a practical working standard for the terms in the new employment preference categories.

The INS responded with an administrative answer to the questions that arose with the passage of the Act.³⁵ The Service intended its regulation to implement section 121 of the Immigration Act of 1990 and to "clarify, for the general public and businesses, requirements for classification and admission for these new immigration classifications. This rule is necessary to help American businesses hire highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found."³⁶ This final rule from the Service became effective on November 29, 1991.³⁷ The Service began the process by publishing a proposed regulation based upon legislative history followed by a request for comments from interested parties. The INS then reviewed the comments and incorporated some of them into the final regulation.³⁸ This process allowed the INS to discover the areas of concern from practitioners and other interested parties and address those areas in the final regulation.

A. *Priority Workers: (1) Aliens of Extraordinary Ability*

1. The Service's Standards

The legislative history for this provision clearly indicated the kind of documentation necessary to show extraordinary ability.

Documentation may include publications in respected journals, media accounts of the alien's contributions to his profession, and statements of recognition of exceptional expertise by qualified organizations In short, admission under this category is to be reserved for that *small percentage of individuals who have risen to the very top of their field of endeavor*.³⁹

From the legislative statements, the Service defined extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor."⁴⁰ In addition, the commentators asked the Service to distinguish between extraordinary ability and exceptional ability which is used in the second preference category and the Department of Labor's Schedule A/Group

35. 56 Fed. Reg. 60,897 (1991) (to be codified at 8 C.F.R. § 204.5).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Supra* note 18, at 59 (emphasis added).

40. 8 C.F.R. § 204.5(h)(2)(1991).

II.⁴¹ The Service concluded that Congress intended “extraordinary ability” to be comparable to the Department of Labor’s “exceptional ability” as set out in Schedule A/Group II.⁴² In addition, the Service found that “exceptional ability” as used by Congress in the second preference category was intended to be less restrictive than “extraordinary ability” and Schedule A/Group II “exceptional ability.”⁴³

The Service divides the eligibility criteria into ten categories and requires that the applicant submit evidence which satisfies three of the ten criteria in order to be considered an alien of extraordinary ability.⁴⁴ The criteria include prizes for excellence in the field, membership in associations which require outstanding achievement, published work by or about the alien, judging another’s work in the field, original findings or contributions, display of the alien’s work, lead performances, and high remuneration.

41. 20 C.F.R. § 656.10 (1989). The Department of Labor’s Schedule A/Group II exempts certain aliens who are considered to be of “exceptional ability” from the need to undergo the lengthy and time consuming process of labor certification.

42. *Supra* note 18 at 59.

43. The Service concludes, “[d]espite the undesirable confusion, however, the Service must use the terms selected by Congress.” 56 Fed. Reg. 60,898 (1991). Therefore, the standard governing “extraordinary ability” is comparable to the standard governing Schedule A/Group II “exceptional ability,” and the standard of second preference “exceptional ability” is less restrictive than both of the aforementioned. *See id.*

44. The alien can also submit evidence of a one-time major international award. The ten criteria are:

(i) Documentation of the alien’s receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(ii) Documentation of the alien’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien’s work in the field for which classification is sought. Such evidence shall include the title, date and author of the material, and any necessary translation;

(iv) Evidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;

(v) Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

(vi) Evidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

8 C.F.R. § 204.5(h)(3)(1991).

neration.⁴⁵ The Service was careful to word the criteria broadly to be applicable to those applicants with extraordinary ability in the science, art, education, athletic, and business communities. If the standards do not readily apply to the applicant's occupation, he may submit comparable evidence to establish his eligibility.⁴⁶

Although the Service sought to define some of the more concrete terms of this subcategory, the Act leaves undefined what is meant by "the alien's entry into the United States will *substantially benefit prospectively* the United States."⁴⁷ Unfortunately, there are no cases which expound upon what factors would qualify an applicant under this standard.⁴⁸ As such, the practitioner bears the burden of predicting what factors rise to the level of substantial prospective benefit necessary for entry.⁴⁹

2. Practitioner's Note⁵⁰

When filing a petition for an alien of extraordinary ability, the practitioner should remember to document every piece of evidence. If the criterion asks for published work, include a copy of the work. If the standard is published work by others commenting on the alien's work, include a copy of the other author's work. The applicant should highlight and explain the significance of the mention by the original author. In order to show that the alien is "one of that small percentage who have risen to the very top of the field" and will offer "substantial prospective benefit to the United States," the practitioner can submit letters from established authorities in the field on the applicant's behalf. The credibility of the author's opinions can be established by including the author's resume and/or curriculum vitae such that the authority of the writer is unquestioned.

One can demonstrate "original work" by an explanatory letter from a noted authority in the field. It is important for the authority to explain to the reader, an INS employee and usually a lay person, the practical sig-

45. *Id.*

46. *Id.* § 204.5(h)(4). This provision is important in keeping with the Congressional intent that aliens of extraordinary ability in the sciences, arts, education, business and athletics be equally considered.

47. Immigration Act of 1990, Pub. L. No. 101-649, 121 § 121(b)(1)(A)(iii) (1990).

48. The case of *In the Matter of* [name not provided], File no. A29-98-422, Southern Service Center (March 27, 1992) found that the petitioner submitted appropriate evidence of substantial prospective benefit in golf to qualify as an alien with extraordinary ability. However, the discussion did not discuss the type of evidence presented by the petitioner to prove the substantial prospective benefit.

49. One could argue that the factors set forth for "national interest" under the Second preference "exceptional ability" category may be paralleled with the standard for substantial prospective benefit. See *infra* note 91 and accompanying text.

50. The practitioner's note for this subcategory is limited to applicants with ability in the scholarly or scientific realm.

nificance of the applicant's work and how it fits into the particular field. To demonstrate the alien's work has been on display, the "comparable evidence"⁵¹ standard may be used, and proof of poster presentations at national and international conferences may be submitted. In addition, evidence of the alien's supervision of a Ph.D. thesis may be submitted to satisfy the criteria that the alien has judged the work of others.⁵² Through these evidentiary tips, the practitioner should be able to qualify a doctorate, degree-holding immigrant in research or education under five of the ten enumerated criteria,⁵³ easily qualifying him for extraordinary ability status.

B. *Priority Workers: (2) Outstanding Researchers and Professors*

3. The Service's Standards

After examining the legislative history, the Service still had three main areas to clarify with regard to the outstanding researchers and professors subcategory. The first was with regard to the type of position the applicant must be pursuing for employment. The Service determined that the alien must be entering the country for a "permanent" position which would include a tenured, tenure-track, or other position for a "term of indefinite or unlimited duration . . . in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination."⁵⁴ This language reflects the concerns of the commentators that the wording of the Act did not take into account the actual situation of many potential applicants. The commentators pointed out that it was unusual for American colleges and universities to place researchers in tenured or tenure-track positions. Typically such institutions offer research positions based upon an annual contract subject to renewal contingent upon available funding and the ability of the applicant. Therefore, it is significant that the Service recognized this consideration and amended the final rule to include a provision for those researchers who have a permanent position which is not necessarily tenured or tenure-track.⁵⁵

The second area requiring clarification was the factors which would establish that an alien is "recognized internationally as outstanding in a specific academic area."⁵⁶ The criteria which the Service established for international recognition⁵⁷ are less rigorous than that for "extraordinary

51. 8 C.F.R. § 204.5(h)(4) (1991).

52. 69 *Interpreter Releases* 1038 (Aug. 24, 1992).

53. Criteria (iii), (iv), (v), (vi), and (vii). *See supra* note 44.

54. 8 C.F.R. § 204.5(i)(2) (1991).

55. 56 Fed. Reg. 60,899 (1991).

56. Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(1)(B)(i) (1990).

57. The regulation requires that the alien submit evidence of two of the following:

ability." In order to establish international recognition, the applicant must submit evidence to satisfy two of six enumerated criteria. These criteria include receipt of prizes or awards, membership in associations, material published by or about the alien, participation in judging the work of others, and original work by the alien.⁵⁸

Finally, the commentators asked the Service to allow research performed while the applicant was working towards an advanced degree to count towards the three-year requirement of teaching and/or research experience.⁵⁹ Once again, the Service recognized the validity of the commentator's suggestions, and the final rule reflects this concern. However, the research can be applied to the three-year requirement only if the advanced degree was actually acquired, . . . the research is recognized within the academic field as outstanding or if the alien had full responsibility for the courses taught.⁶⁰

After the promulgation of the final rules, James M. Bailey, Director of the INS Northern Service Center, asked the Service for further clarification on the types of evidence the Service was looking for in adjudicating petitions under the outstanding researchers and professors subcategory. Mr. Bailey requested an explanation of the standards for acceptable evidence in both the outstanding researchers and professors subcategory as well as the extraordinary ability subcategory.⁶¹

First, Mr. Bailey noted that there were two schools of thought which had evolved amongst the INS examiners. One school held that if the alien

(A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;

(B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;

(C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;

(D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;

(E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or

(F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

8 C.F.R. § 204.5(i)(3)(i) (1991).

58. *See id.*

59. 56 Fed. Reg. 60,899 (1991).

60. 8 C.F.R. § 204.5(i)(3)(ii)(1991).

61. The letter noted that although some of the criteria for extraordinary ability are applicable to outstanding researchers and professors, the inquiry and response would focus on the latter category because the inquiry specifically asked for explanation with regards to applicants who were professors and researchers. *See id.* Since some of the criteria are similar, the response is applicable to professors and researchers who apply for immigrant visas under the outstanding researchers and professors subcategory as well as the extraordinary ability subcategory. 69 *Interpreter Releases* 1037 (Aug. 24, 1992).

submits evidence of two out of six criteria for outstanding professors and researchers (three out of ten criteria for extraordinary ability), then the alien has made the requisite showing for qualification under the subcategory. The other school of thought believed that after the requisite showing, the alien was still required to make a showing that the alien "stands out from the regular, garden-variety type of professor or researcher."⁶² In response, the INS Acting Associate Commissioner for Adjudications, Lawrence J. Weinig, issued a July 30, 1992 memo.⁶³ Mr. Weinig's answer concurred with the first school of thought, concluding that after meeting the required number of criteria, "this is sufficient to establish the caliber of the alien."⁶⁴

Mr. Bailey noted a second area of confusion with regard to what types of evidence would be appropriate to establish evidence of published work by others about the alien's work, evidence of the alien's participation as a judge of the work of others, evidence of the alien's original work and evidence of the alien's publication of scholarly work. Mr. Weinig replied,

Generally, we maintain that a book by the alien published by a "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 work of others.⁶⁵

Mr. Weinig's response indicated that the Service was looking for quality documentary evidence, rather than mere quantity. The documentation must directly show the value and importance of the petitioner's work, rather than just facially satisfy the enumerated criteria.

4. Practitioner's Note⁶⁶

It is important to note that many of the criteria for outstanding researchers and professors are similar to the criteria for aliens with ex-

62. *Id.* at 1049.

63. Both memos are published in 69 *Interpreter Releases* 1037-38, 1049-53 (Aug. 24, 1992).

64. *Id.* at 1052. "However, please note that the examiner must evaluate the evidence presented. This is not simply a case of counting pieces of paper." *Id.*

65. *Id.* at 1053.

66. See *supra* note 50 and accompanying text.

traordinary ability.⁶⁷ Therefore, if an alien qualifies as an outstanding researcher and professor, he may also qualify as an alien with extraordinary ability, and an additional petition should be submitted. Because the documentary requirements are much less stringent for outstanding researchers and professors, the practitioner should note that the main areas of concern in this subcategory are with the permanence of the job offer from the university and the three-year experience requirement.⁶⁸ Since many researcher positions are conditioned upon the receipt of private and public funding, the language of the regulation stating that the employee "will ordinarily have an expectation of continued employment unless there is good cause for termination"⁶⁹ should be utilized in the petition. Although the employer may not be willing to state that the job is permanent, she may agree to mirror this wording in a letter. In addition, it may be necessary for the practitioner to utilize the supplementary provision in the regulation which allows pre-doctorate experience to count towards the three year requirement.⁷⁰ Once again, a letter from the a noted authority, supported by his curriculum vitae, would be adequate to show that the alien's pre-doctorate work was "outstanding."⁷¹ This letter would be adequate to allow the experience to count towards the three-year research criterion.

C. Priority Workers: (3) Certain Multinational Executives and Managers

1. The Service's Standards

This subcategory is viewed as the one most likely to be used in the first preference category of priority workers.⁷² Before the Act, aliens who had been managers or executives both overseas and in the United States could receive a blanket labor certification from the United States Department of Labor. These applicants did not have to undergo the time consuming, individual labor certification process. However, the applicants would sometimes only qualify for the sixth preference category because they lacked the credentials necessary to be considered as a third preference professional. Under the Act, these same multinational executives and managers are able to shorten their wait from four years to a couple of months.⁷³

67. See *supra* "Practitioner's note" at paragraph III(A)(ii).

68. Immigration Act of 1990, 8 U.S.C. § 1153(b)(1)(B)(ii)-(iii) (1993).

69. 8 C.F.R. § 204.5(i)(2) (1993).

70. See *id.* § 204.5(i)(3)(ii).

71. See *id.*

72. 67 *Interpreter Releases* 1471 (Dec. 21, 1990).

73. *Id.*

The legislative history of this subcategory "notes the need of multinational business to transfer key personnel around the world as nonimmigrants is paralleled in this category to allow a basis upon which these individuals may immigrate."⁷⁴ In accordance with this policy, the Service promulgated liberal standards with regard to this subcategory. The Act itself is quite general, requiring that within three years prior to the time of the alien's application, the alien must show that he has been employed for at least one year with a company and that he seeks to enter the United States to continue work with the same company, or for an affiliate or subsidiary thereof, in a managerial or executive capacity.⁷⁵ As a result, the Service was charged with defining such terms as "affiliate,"⁷⁶ "subsidiary,"⁷⁷ "managerial capacity,"⁷⁸ and "executive capacity."⁷⁹ In addition,

74. *Supra* note 18 at 60.

75. Immigration Act of 1990, 8 U.S.C. § 1153(b)(1)(C) (1993).

76. The Service heeded the advice of the commentators and adopted a broad definition of affiliate based upon an already existing definition found in 8 C.F.R. § 214.2(l)(1)(ii)(L) (1993).

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; or

(C) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

8 C.F.R. § 204.5(j)(2) (1993).

77. *Subsidiary* is liberally defined as:

a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

Id.

78. The Service merely codified the definition of managerial capacity based upon the explicit statements of Congress. *See supra* note 18 at 60. As a result, managerial capacity means an assignment within an organization in which the employee primarily:

(A) Manages the organization, or a department, subdivision, function, or component of the organization;

(B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function with the organization, or a department or subdivision of the organization;

(C) 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,

the Service set forth requirements for a multinational executive or manager⁸⁰ which not only restate the provisions of the Act, but also add the requirement that the United States employer have been doing business in the country for at least one year.⁸¹ Presumably, the one-year doing business requirement is to prevent an organization from establishing a "shell" operation in order to defraud the INS.

2. Practitioner's Note

This category is probably one of the easiest to establish with evidence. This is due mainly to the fact that most of the criteria can be objectively proven. For instance, affiliate and subsidiary status of a company can be

functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

8 C.F.R. § 204.5(j)(2) (1993).

79. As with the definition of managerial capacity, the Service also codified the legislative directive with regard to the definition of executive capacity. *See supra* note 18, at 60. Executive capacity is defined as:

an assignment within an organization in which the employee primarily:

(A) Directs the management of the organization of a major component or function of the organization;

(B) Establishes the goals and policies of the organization, component, or function;

(C) Exercises wide latitude in discretionary decisionmaking; and

(D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

8 C.F.R. § 204.5(j)(2) (1993).

80. The regulation, 8 C.F.R. § 204.5(j)(3), provides that a petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning U.S. employer which shows that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary or such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

Id. § 204.5(j)(3)(i).

81. The Service received comments against the one year requirement asserting that it went beyond the language of the 1990 Act. Nevertheless, the Service included the requirement in the final rule and noted that the "one-year time limit is important as a measure of viability of the United States employer." *Id.* § 204.5(j)(3)(i)(D)A.

shown through a corporate flow chart or letter from the employer. Also, managerial and executive status can be shown through an employment contract or an employer letter. The requirement that the employer be doing business in the country for at least one year can be proven through incorporation documents and relevant tax returns.

D. *Aliens with Advanced Degrees or Exceptional Ability*

1. The Service's Standards

The Service set forth different standards for advanced degree candidates⁸² and for those with exceptional ability.⁸³ For the advanced degree subcategory, the Service simply mirrored congressional intent and allowed for an alien to hold the equivalent of an advanced degree in a profession.⁸⁴ In other words, the Service defines an advanced degree⁸⁵ or the

82. In order to show that an alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(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.

Id. § 204.5(k)(3)(i).

83. An application by an alien of exceptional ability in the sciences, arts, or business must be accompanied by evidence of at least three of the following:

(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;

(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;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

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

Id. § 204.5(k)(3)(ii). It is interesting to note that the exceptional ability category is not available to those involved athletics or education like extraordinary ability. *See supra* note 44.

84. Compare H.R. CONF. REP. No. 955, 101st Cong., 2d Sess., at 121 (1990) with 8 C.F.R. § 204.5(k)(3)(i)(B) (1991).

85. An advanced degree is defined as:

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

equivalent as "at least five years of progressive post-baccalaureate experience in the specialty."⁸⁶ For aliens of exceptional ability, the regulation⁸⁷ reflects legislative intent and encompasses "persons who are particularly qualified in their callings, not simply to persons who have callings."⁸⁸ Therefore, the criteria set forth in the statute are above those required for a showing of "advanced degree," but are significantly less stringent than the showing of "extraordinary ability." Such was the congressional intent.⁸⁹

The unique characteristic of this second preference category is that although it requires an individual labor certification, the need for such certification may be waived for "aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest."⁹⁰ Congress did not specifically define "national interest." Moreover, the Service expressly declined to define the term, but noted that the showing required for "national interest" is significantly greater than the showing required for "prospective national benefit," as used in the Act's definition of exceptional ability.⁹¹ Therefore, for an alien to demonstrate exceptional ability, he must show that his ability is of prospective national benefit. In order to be exempted from the requirement of providing an individual labor certification, he must show that such an exemption is in the national interest.⁹²

The Immigration and Naturalization Service Administrative Appeals Unit (the "AAU") recently shed light on criteria which may be "possible factors" in determining national interest. The AAU relied upon the Ser-

customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Id. § 204.5(k)(2).

86. *Id.* § 204.5(k)(3)(i)(B).

87. *See supra* note 81.

88. S. REP. NO. 55, 101st Cong., 1st Sess., 20 (1989).

89. *See supra* notes 40-42 and accompanying text.

90. 8 C.F.R. § 204.5(k)(4)(ii) (1991). The Service derived this regulation directly from the wording of the Act. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 121(b)(2)(A) 104 Stat. 4978, 4987 (1990).

91. The Service notes:

Congress has not provided a more particular definition of the phrase in the national interest. The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the standard must make a showing significantly above that necessary to prove prospective national benefit. "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 will be judged on its own merits."

56 Fed. Reg. 60,900 (1991).

92. The quandary is further complicated when one considers the question of what "substantial prospective benefit" entails when used in the context of the extraordinary ability subcategory. Unfortunately, both Congress and the Service have refrained from addressing the differences in these standards. *See supra* notes 46-48 and accompanying text.

vice's language calling for flexibility in determining national interest. The AAU cited seven factors: (1) improving the United States economy; (2) improving wages and working conditions of United States workers; (3) improving education and training programs for United States children and under-qualified workers; (4) improving health care; (5) providing more affordable housing for young and/or older, poorer United States residents; (6) improving the environment of the United States and making more productive use of natural resources; or (7) a request from an interested United States government agency.⁹³

This list is not exclusive and may prove useful to practitioners in determining whether an alien has exceptional ability which deserves a waiver of a labor certification based on national interest. The practitioner can determine how the alien's exceptional ability will affect one or more of these seven factors and provide documentation thereof in the form of letters from noted authorities in the field. In this way, the practitioner can provide more objective evidence regarding the benefit of the alien's work to the national interest.

2. Practitioner's Note⁹⁴

The most effective and efficient way to obtain approval under this preference category is to prove that an alien is of exceptional ability and then to establish that the alien is entitled to a waiver of labor certification in the national interest. By avoiding the lengthy labor certification process, the practitioner will be able to obtain an immigrant visa for his client much more quickly. In order to obtain approval, the attorney must show that his client satisfies three of the enumerated criteria under exceptional ability. An official academic record can be established with a certified copy of the alien's Ph.D. or Master's degree diploma.⁹⁵ Membership in professional organizations is standard for applicants in science fields.⁹⁶ Evidence of recognition in a field can be provided by letters from other reputable scientists in the field, with support given by the scientists' curriculum vitae.⁹⁷ Also, to prove that the alien has a license to practice in the profession, the "comparable evidence"⁹⁸ standard may be utilized. In a letter from the employer, the author need only state that a Ph.D. or a Master's degree is the equivalent of a license in the profession.⁹⁹ By using these suggestions, the practitioner will be able to assist his client in satis-

93. Matter of [name not provided], EAC 92-091-50126 (NYC) (July 21, 1992).

94. Again, this area is reserved to obtaining immigrant visas for aliens with exceptional ability in the sciences.

95. This satisfies criterion (A). See 8 C.F.R. § 204.5(k)(3)(ii)(A) (1991).

96. This satisfies criterion (E). See 8 C.F.R. § 204.5(k)(3)(ii)(E).

97. This satisfies criterion (F). See 8 C.F.R. § 204.5(k)(3)(ii)(F).

98. 8 C.F.R. § 204.5(k)(3)(iii).

99. This satisfies criterion (C). See 8 C.F.R. § 204.5(k)(3)(ii)(C) (1991).

fyng four of the criteria necessary to qualify as an alien of exceptional ability.

In order to obtain a waiver of labor certification based on national interest, the alien can again obtain letters from noted professionals in the field. These letters, supported by lengthy resumes, can illustrate the importance of the alien and his work and can also show "national interest." The wording of these letters is very similar, if not identical, to letters which show "substantial prospective benefit" under the extraordinary ability category. Once again, the wise practitioner should file multiple petitions for his client, since many of the evidentiary requirements are similar. By filing multiple petitions, the client's chances for a visa approval are increased without a substantial increase in work to the attorney.

IV. CONCLUSION

The employment-based preference categories created by the Immigration Act of 1990 reduced the backlog of immigrant visas created by the third and sixth preference categories of the INA. Although the Service attempted to clarify the terms and phrases in the Act, there remain terms which are open to interpretation. Therefore, it is vital for the practitioner to be able to understand the interplay between the Act and the administrative guidance given by the INS. In addition, practitioners are still requesting further clarification of the documentary and evidentiary requirements for the first and second preference categories. As a result, the practitioner must keep abreast of the daily clarifications from the INS.

Although Congressional intent to improve the country's global competitiveness and reduce backlogs is admirable, it may have created a series of unworkable standards for employment-based immigrants. Traditionally, one of the noteworthy aspects of immigration law has been the alien's meaningful choice of whether to submit an application *pro se* or to retain an attorney. The practical result of the Act's changes in the employment-based preference categories is more complexity in the application process and a greater need for the services of an attorney. Unfortunately, the Act has eluded many practitioners as well. Therefore, it is vital that the Service provide continuing guidance regarding the evidence required for approving petitions under the first and second employment-based preference categories.

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