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**16. National Interest Petition: Non Shortage Area Case: An Analysis of**

**in re New York State Dept. of Transportation**

Section 203(b)(2) of the Immigration and Nationality Act of 1990 permits the filing of an employment-based second-preference immigrant visa petition for an alien who is “either a member of the professions holding an advanced degree” or “of exceptional ability in the sciences, arts or business”. The petition incorporates a request for a waiver of the requirement of a job offer (the labor certification requirement), on the grounds that the candidate would benefit the national interest of the United States.

In 1998, after approving numerous National Interest Petitions for different professions, especially physicians who agreed to serve in Health Professional Shortage Areas, the Administrative Appeals Office of the Immigration and Naturalization Service issued a decision denying a National Interest Petition for an Engineer employed by the New York State Department of Transportation (hereinafter referred to as “NYSDOT”). The decision has been accepted as a precedent in the area of establishing what would truly be deemed as being in the "National Interest". This case has no impact on National Interest Petitions for physicians who will be employed for 5 years in a qualifying shortage or underserved area.

Until “NYSDOT”, immigration adjudicated National Interest Petitions without a regulatory definition of what factors are to be considered in adjudicating a “national interest waiver.” However, the decision established tough guidelines for determining whether an individual is truly going to be serving the “National Interest of the United States”.

The decision outlines three factors to be considered when evaluating a request for a national interest waiver:

1) A showing that the alien seeks employment in an area of substantial intrinsic merit. This cannot be accomplished by showing that the beneficiary’s field of endeavor has intrinsic merit nor can the petitioner establish qualification based solely on the importance of the alien’s occupation. (USCIS will not entertain blanket waivers for entire fields of specialization!)

2) A showing that the proposed benefit will be national in scope.

3) The alien must persuasively show that the national interest would be adversely affected if a labor certification were required. The alien seeking an exemption from the labor certification process must present a national benefit which outweighs the national interest inherent in the labor certification process. Stated another way, the petitioner must establish that the alien will serve the national interest to a substantially higher degree than would an available U.S. worker with the same minimum requirements.

In elaborating on the third factor, the AAO strongly stressed the preference for the labor certification process: “the job offer waiver based on national interest is not warranted solely for the purpose of ameliorating a local labor shortage, because the labor certification process is already in place to address such shortages.”

In addition to setting forth an analytical process for adjudicating national interest waivers, the AAO drew the following noteworthy conclusions. First, the AAO stated that “because the statute and regulations contain no provision allowing a lower national interest threshold for advanced degree professionals than for aliens of exceptional ability,” the national interest standard set forth in the opinion, must apply “whether the alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree.”

Second, the AAO stated that the candidate’s past record must justify projections of future contributions. In this regard applicants should be prepared to present strong evidence of their previous and present accomplishments, as opposed to any prospective accomplishments. Proof of the accomplishments if national in scope should be included in any national interest waiver application.

The Schedule A, Group II blanket labor certification for “aliens of exceptional ability” may still be a viable option. Group II covers aliens with exceptional ability in the sciences and the arts.

In summary, NYSDOT has tightened the objective standards for adjudicating national interest waivers. Clearly, US CIS preference is for the applicant to go through the labor certification process and consistent with NYSDOT, it is recommended that national interest waiver applicants file for labor certification. However, there are numerous times were the labor certification process will not be a viable option and hence the National Interest Petition or other options must be considered and possibly pursued.

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