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IN THIS ISSUE

THE NATIONAL INTEREST WAIVER: UNDERSTANDING ITS HISTORY AND NAVIGATING ITS TERRAIN

by Paul Herzog*

There is a bipartisan consensus that the U.S. should amend its immigration laws to retain highly skilled foreign nationals, especially those with advanced degrees in sciences and engineering.[1] And no wonder—the majority of advanced degrees in engineering (and a third of those in science and mathematics) are awarded to noncitizens,[2] and many of these are employed in critical positions in "sunrise" industries, such as nanotechnology, biotechnology, and development of alternative fuels. But congressional action is mired in political gridlock, and observers are only cautiously optimistic that reform will be enacted during the current session.[3]

In the meantime, there is one route for scientists and engineers to pursue a green card: the national interest waiver (NIW). First enacted by the U.S. Congress in 1990, the NIW allows aliens with advanced degrees or exceptional ability[4] to receive a waiver of the labor certification requirement if they can show that granting such a waiver would be "in the national interest." The particular appeal of the NIW stems from the fact that, in obtaining the waiver, aliens can "self-sponsor" themselves and don't have to rely on an employer to petition for them. But in implementing this provision, U.S. Citizenship and Immigration Services (USCIS) has taken foreign nationals and their lawyers on a roller coaster.

Congress gave scant guidance as to its intent when it enacted this provision, making no reference to it during the floor debate.[5] In the absence of such guidance, the Immigration and Naturalization Service (INS) initially enunciated broad principles to govern adjudications through its 1992 appellate decision *Matter of Mississippi Phosphate*.[6] The Administrative Appeals Unit (AAU) [now the Administrative Appeals Office (AAO)] listed seven factors that could be considered for determining how an

* *Paul Herzog, J.D. The author gratefully acknowledges the invaluable assistance of Ms. Tess Sadowsky in the preparation of this article.*

11. In Nonprecedent Decision, AAO Grants INA § 212(i) Waiver to Son Based on Extreme Hardship to LPR Father

The Administrative Appeals Office (AAO) has issued a nonprecedent decision sustaining an appeal by a native and citizen of China who was denied a waiver of inadmissibility under INA § 212(i) [8 USCA § 1182(i)] by a U.S. Citizenship and Immigration Services (USCIS) field office director who found that the applicant failed to establish extreme hardship to a qualifying relative. The applicant, who had entered the U.S. in November 1996 using a photo-substituted passport, was found to be inadmissible pursuant to INA § 212(a)(6)(C)(i) [8 USCA § 1182(a)(6)(C)(i)] for willful misrepresentation of a material fact to procure an immigration benefit. His wife is a U.S. citizen, and his parents are lawful permanent residents (LPRs).

The AAO found that the applicant's father would suffer extreme hardship whether he remains in the U.S. without his son or moves to China with his son. He is 65 years old and lives with his son, his daughter-in-law, and their two children. He came to the U.S. in 1989 when he was granted asylum and fears returning to China. He also worries that his son would be persecuted by the Chinese government because he left China without permission and that his son would be sterilized due to China's one-child policy. The father would have to sell his Chinese restaurant in the U.S. and worries that he could not find a job in China because of his age.

The AAO held that cumulatively these factors established extreme hardship and that the noncitizen merits a waiver of inadmissibility as a matter of discretion.

The AAO's decision is reproduced in Appendix V of this Release.

The applicant was represented by Alan Lee, Esq., of New York City, New York, who provided this decision to Interpreter Releases. Similar submissions, including unpublished AAO and BIA decisions, may be directed to Beverly Jacklin, Principal Attorney Editor, beverly.jacklin@thomsonreuters.com. ■

12. Agencies Seeks Comments on Information Collections

The Department of State (DOS) and the Department of Homeland Security's (DHS') U.S. Immigration and Customs Enforcement (ICE) has solicited public comments on information collections that require review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. For space reasons, we list the information collections below, along with the Federal Register cites where the notices can be found, but do not reproduce them in the print version. They are available on Westlaw®. Comments from the public on these information collections are invited by the OMB or the agency and should be directed to the persons or locations set forth in the notices. The collections are:

DOS

Form DS-156K, Nonimmigrant Fiancé(e) Visa Application. The form is used by consular officers to determine the eligibility of an alien applicant for a nonimmigrant fiancé(e) visa. The DOS estimates that 35,000 respondents use this form each year. This is an extension of a previous comment period.[66] Comments are due by October 23, 2013. 78 Fed. Reg. 58377 (Sept. 23, 2013).

ICE

Form I-246, Application for Stay of Deportation or Removal. ICE uses this form to determine an applicant's eligibility for a stay of deportation or removal. ICE estimates that 10,000 respondents use this form each year. Comments should be submitted by November 25, 2013. 78 Fed. Reg. 59366 (Sept. 26, 2013).

Notes

[66] Comments were originally due by June 18, 2013. See 78 Fed. Reg. 23623 (Apr. 19, 2013), discussed in 90 Interpreter Releases 943 (Apr. 22, 2013). ■

13. Position Opening

Georgetown University's Center for Applied Legal Studies (CALS) is now accepting applications for its annual fellowship program in clinical legal education. CALS will offer one lawyer a two-year teaching fellowship (July 2014 to June 2016), providing a unique opportunity to learn how to teach law in a clinical setting.

At CALS, the two fellows and faculty members work as colleagues, sharing responsibilities for designing and teaching classes, supervising law students in their representation of clients, selecting and grading students, administering the clinic, and all other matters. In addition, the fellow will undertake independent legal scholarship, conducting the research and writing to produce a law review article of publishable quality.

This fellowship is particularly suitable for lawyers with some degree of practice experience who now want to embark upon careers in law teaching. Most of CALS previous fellows are now teaching law or have done so for substantial portions of their careers.

Since 1995, CALS has specialized in immigration law, specifically in asylum practice, and its docket focuses on presenting asylum claims in immigration court. Applicants