

## **9 FAM 42.32(b) NOTES**

*(CT:VISA-999; 09-03-2008)*  
*(Office of Origin: CA/VO/L/R)*

### **9 FAM 42.32(b) N1 PROFESSIONALS HOLDING ADVANCED DEGREES**

*(CT:VISA-680; 01-28-2005)*

An alien may qualify as an employment-based second preference immigrant if the alien is a member of the professions holding an advanced degree or the equivalent. The alien must be the beneficiary of a petition approved by the Department of Homeland Security. (See 9 FAM 42.32(b) N3.)

#### **9 FAM 42.32(b) N1.1 Definitions**

##### **9 FAM 42.32(b) N1.1-1 Defining "Advanced Degree"**

*(TL:VISA-54; 2-28-92)*

"Advanced degree" means any U.S. academic or professional degree (or foreign equivalent degree) above that of baccalaureate.

##### **9 FAM 42.32(b) N1.1-2 Master's Degree Equivalent**

*(TL:VISA-54; 2-28-92)*

The conference committee report (H.R. Rep. No. 101-955) states that a bachelor degree plus five years of progressive experience in the professions should be considered as the equivalent of a master's degree.

##### **9 FAM 42.32(b) N1.1-3 Doctorate Degree Equivalent**

*(CT:VISA-680; 01-28-2005)*

Although the Department of Homeland Security (DHS) will not evaluate the equivalence of education and experience to a doctorate, if a doctorate (or a foreign equivalent degree) is normally required by the specialty, the alien must possess such a degree.

##### **9 FAM 42.32(b) N1.1-4 Defining "Profession"**

*(CT:VISA-680; 01-28-2005)*

INA 101(a)(32) defines "profession" as including but not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries. DHS regulations also include any occupation for which a U.S. baccalaureate degree (or foreign equivalent) is the minimum requirement for entry into the occupation.

## **9 FAM 42.32(b) N1.2 Determining Professional Status**

*(TL:VISA-54; 2-28-92)*

Evidence to establish an alien as a member of the professions holding an advanced degree should be in the form of the following:

- (1) An official academic record showing possession of an advanced degree (or foreign equivalent); or
- (2) An official academic record showing possession of a baccalaureate degree (or foreign equivalent); and
- (3) A letter from current or former employer(s) showing at least five years of progressive post-baccalaureate experience in the specialty.

## **9 FAM 42.32(B) N2 ALIENS OF EXCEPTIONAL ABILITY**

*(TL:VISA-144; 6-28-96)*

An alien may qualify as an employment-based second preference immigrant if the alien has exceptional ability in the sciences, arts, or business, which will substantially benefit prospectively the national economy, cultural, or educational interests, or welfare of the United States. The alien's services in the sciences, arts, or business must be sought by an employer in the United States.

### **9 FAM 42.32(b) N2.1 Defining "Exceptional Ability"**

*(TL:VISA-144; 6-28-96)*

- a. "Exceptional ability" has been defined as something 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 that talent or skill. Individuals must have attained a status in their field wherein contemporaries recognize exceptional ability.
- b. The possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning or a license to

practice, or certification for a particular profession or occupation, shall **not**, by itself, be considered sufficient evidence of such exceptional ability.

## **9 FAM 42.32(b) N2.2 Evidence of Exceptional Ability**

*(TL:VISA-144; 6-28-96)*

To establish evidence of exceptional ability, the petition must be accompanied by at least three of the following:

- (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 area of exceptional ability;
- (2) Letter(s) from current or former employer(s) showing evidence the alien has at least ten years of full-time experience in the occupation;
- (3) A license to practice the profession or certification for a particular profession or occupation;
- (4) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
- (5) Evidence of membership in professional associations;
- (6) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations; or
- (7) Comparable evidence to establish the beneficiary's eligibility.

## **9 FAM 42.32(b) N3 PETITIONS**

### **9 FAM 42.32(b) N3.1 Who May File**

*(TL:VISA-144; 6-28-96)*

Any U.S. employer may file a petition for classification of an alien under INA 203(b)(2) as an alien who is a member of the professions holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business. If an alien is claiming exceptional ability and seeking an exemption from the job offer requirement under INA 203(b)(2)(B), then the alien, or anyone on the alien's behalf, may file the petition.

### **9 FAM 42.32(b) N3.2 Where to File**

*(CT:VISA-999; 09-03-2008)*

Petitions must be filed with the DHS service center having jurisdiction over the *place of permanent employment* in the United States, unless specifically designated for local filing by DHS/U.S. Citizenship and Immigrations Services for Examinations.

## **9 FAM 42.32(b) N4 JOB OFFER/LABOR CERTIFICATION**

*(TL:VISA-144; 6-28-96)*

Although a labor certification is generally required for the second preference category, a job offer from a U.S. employer, and thus a labor certification, may be waived if it has been determined that such waiver is in the national interest.

## **9 FAM 42.32(b) N5 NATIONAL INTEREST WAIVERS**

### **9 FAM 42.32(b) N5.1 General**

*(CT:VISA-999; 09-03-2008)*

A waiver is considered to be in the national interest if the petitioner can establish, *based on Matter of In Re: New York State Department of Transportation, 22 I&N Dec. 215 (Comm. 1998) ("NYSDOT")* that:

- (1) *The alien must seek employment in an area that has substantial intrinsic merit;*
- (2) *The waiver request is not based solely on local labor shortage, but rather the proposed benefit to be provided will be national in scope; and*
- (3) *It must be demonstrated that the national interest would be adversely affected if the employer is required to proceed with the labor certification process.*

### **9 FAM 42.32(b) N5.2 Certain Physicians**

*(CT:VISA-999; 09-03-2008)*

Section 5 of Public Law 106-95, the Nursing Relief Act, establishes special rules for national interest waivers filed by or on behalf of physicians who are willing to work in an area of the United States designated by the Secretary

of Health and Human Services (HHS) as having a shortage of health care professionals or at facilities operated by the Department of Veterans Affairs (VA). While it is unlikely that an alien applying abroad will have completed the necessary licensing and certification requirements, a physician living abroad who has met the necessary requirements may seek a national interest waiver of the job offer requirement. The legislation directs the Secretary of the Department of Homeland Security to grant a national interest waiver of the job offer requirement to any alien physician who:

- (1) Agrees to work full-time in a clinical practice for the period fixed by the statute (generally five years; *three* if the petition was filed prior to November 1, 1998);
- (2) Will provide service in HHS Medically Underserved Areas, Primary Medical Health Professional Shortage Areas, or Mental Health Professional Shortage Areas; or a VA facility; and
- (3) Provides a determination from HHS, VA, or another federal agency having knowledge of the physician's qualifications that the physician's work is in the public interest.

## **9 FAM 42.32(b) N6 DISPOSITION OF PETITION**

*(CT:VISA-680; 01-28-2005)*

If the beneficiary is outside of the United States, or in the United States but will apply abroad, the DHS will forward the approved petition to the National Visa Center (NVC).

## **9 FAM 42.32(b) N7 SPOUSE AND CHILDREN**

*(TL:VISA-54; 2-28-92)*

The spouse or the child of a marriage which existed at the time of the principal alien's admission into the United States is entitled to derivative status and may accompany or follow to join the principal applicant. A spouse or child acquired subsequent to the principal alien's admission is not entitled to derivative status.