

9 FAM 42.32(B) SECOND PREFERENCE PROFESSIONALS WITH ADVANCED DEGREES OR PERSONS OF EXCEPTIONAL ABILITY

*(CT:VISA-1340; 10-09-2009)
(Office of Origin: CA/VO/L/R)*

9 FAM 42.32 RELATED STATUTORY PROVISIONS

(CT:VISA-1340; 10-09-2009)

See INA 203(b)(2) [8 U.S.C. 1153(b)(2)]; INA 203(b)(2)(A) [8 U.S.C. 1153(b)(2)(A)]; INA 203(b)(2)(B) [8 U.S.C. 1153(b)(2)(B)]; INA 203(b)(2)(C) [8 U.S.C. 1153(b)(2)(C)]; and INA 203(d) [8 U.S.C. 1153(d)].

INA 203(b)(2)

(b) Preference Allocation for Employment-Based Immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as follows:

- (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.

INA 203(b)(2)(A)

(A) In general

Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraph (1), 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.

INA 203(b)(2)(B)

(B) Waiver of job offer

(i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

(ii) The Attorney General shall grant a national interest waiver pursuant to clause (i) on behalf of any alien physician with respect to whom a petition for preference classification has been filed under subparagraph (A) if-

(I) (aa) the alien physician agrees to work full time as a physician in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs; and

(bb) a Federal agency or a department of public health in any State has previously determined that the alien physician's work in such an area or at such facility was in the public interest.

(II) No permanent resident visa may be issued to an alien physician described in subclause (I) by the Secretary of State under section 204(b), and the Attorney General may not adjust the status of such an alien physician from that of a nonimmigrant alien to that of a permanent resident alien under section 245, until such time as the alien has worked full time as a physician for an aggregate of 5 years (not including the time served in the status of an alien described in section 101(a)(15)(J)), in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals or at a health care facility under the jurisdiction of the Secretary of Veterans Affairs.

(III) Nothing in this subparagraph may be construed to prevent the filing of a petition with the Attorney General for classification under section 204(a), or the filing of an application for adjustment of status under section 245, by an alien physician described in subclause (I) prior to the date by which such alien

physician has completed the service described in subclause (II).

(IV) The requirements of this subsection do not affect waivers on behalf of alien physicians approved under section 203(b)(2)(B) before the enactment date of this subsection. In the case of a physician for whom an application for a waiver was filed under section 203(b)(2)(B) prior to November 1, 1998, the Attorney General shall grant a national interest waiver pursuant to section 203(b)(2)(B) except that the alien is required to have worked full time as a physician for an aggregate of 3 years (not including time served in the status of an alien described in section 101(a)(15)(J)) before a visa can be issued to the alien under section 204(b) or the status of the alien is adjusted to permanent resident under section 245.

INA 203(b)(2)(C)

(C) Determination of exceptional ability

In determining under subparagraph (A) whether an immigrant has exceptional ability, 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.

INA 203(d)

(d) Treatment of Family Members -

A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101 (b)(1) of this title shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c) of this section, be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

9 FAM 42.32 RELATED REGULATORY PROVISIONS

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See 22 CFR 42.32(b).

Section 42.32 Employment-based preference immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as indicated below.

(b) *Second preference—Professionals with advanced degrees or persons of exceptional ability* — (1) *Entitlement to status.* An alien shall be classifiable as an employment-based second preference immigrant under INA 203(b)(2) if the consular officer has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(2).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based second preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.