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U.S. Department of Justice

Immigration and Naturalization Service

General Counsel's Office

Construction of "sciences" and "arts" in Section 203(b)(1)and (2): Reconsideration of our March 3, 1994, Legal Opinion

Terrance M. O'Reilly, Director, AAU

Office of the General Counsel

CO 203-P
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I. QUESTIONS

***1** Some months ago, we concluded that athletes could not qualify for second employment based preference (EB-2) immigrant visas as persons of exceptional ability in the arts. Our HQ 203-P Legal Opinion: Your July 16, 1993, Request for Advisory Opinion: Availability of Benefits under Section 203(b)(2) to Athletes as Aliens of Exception Ability in the Arts ("Our earlier opinion") (March 3, 1994). You have asked us to reconsider this opinion.

We note that the American Immigration Lawyers Association has also raised this issue. Letter from Naomi Schorr, Esq., and Theodore Ruthizer, Esq. to T. Alexander Aleinikoff ("AILA Letter") (April 12, 1994). AILA has also questioned your holding in Matter of X, EAC 92 042 50151 (Unpublished AAU decision. July 23, 1993), that the practice of law is not one of the "arts" or "sciences" for purposes of the first employment based preference (EB-1). AILA Letter at 8-9. You have asked us to address this issue as well.

II. SUMMARY CONCLUSIONS

A. In amending the employment based immigrant visa preferences, Congress did not make it clear whether the term "arts" should continue to include athletics. The Service may reasonably adhere to the interpretation of the term "arts" that the Service has followed since Matter of Masters, 13 I&N Dec. 125 (DD 1969).

B. The INA explicitly categorizes lawyers as professionals. Except for "outstanding professors and researchers," therefore, lawyers, as lawyers, do not qualify for EB-1 immigrant visas. The fact that an alien is a lawyer, or belongs to one of the other professions, would not necessarily foreclose the alien's EB-1 eligibility if the alien was also qualified as a person of "extraordinary ability" in an EB-1 occupation.

III. ANALYSIS

A. The Service May Adhere to Matter of Masters, and Hold that Athletes May Qualify as EB-2 Aliens

Before Section 121(a) of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, § 121(a), 104 Stat. 4978, 4987 (1990), took effect, up to ten percent of the immigrant visas available in each fiscal year were earmarked for

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 or educational 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.

8 U.S.C. § 1153(a)(3) (1988). At least since 1977, Labor Department regulations interpreted "the arts" to include the performing arts, in addition to the liberal and fine arts. See 42 Fed. Reg. 3,440, 3,442, 3,445 (1977) promulgating 20 C.F.R.§§ 656.10(b) and 656.21(a)(4). Since 1969, the Service had held that an alien with exceptional ability as an athlete could qualify as a person of "exceptional ability in . . . the arts." Matter of Masters, 13 I&N Dec. 125 (D.D. 1969). But in 1990, Congress revamped the employment-based immigrant visa categories. IMMACT § 121(a), 104 Stat. at 4987. In our earlier opinion, we concluded that an athlete could qualify for the new first employment-based category (EB-1), but not for the second (EB-2). The question, then, is whether Congress intended the term "the arts" to have a narrower scope after IMMACT than the term had before. This issue presents the problem of "determin[ing] what Congress would have thought about a subject about which it never thought." Wirth LTD v. S/S Acadia Forest, 537 F.2d 1272, 1276 (5th Cir. 1976).

***2** We begin, of course, with the text of the statute. See Mallard v. United States Dist. Ct. for South. Dist. of Iowa, 109 S.Ct. 1814, 1818 (1989); INS v. Phinpathya, 464 U.S. 183, 189 (1984); Richards v. United States, 369 U.S. 1, 9 (1962). The intent of Congress is to be found in text which the Congress actually passed and the President actually approved. See Thompson v. Thompson, 484 U.S. 174, 192 (Scalia, J., concurring in the judgment) (1988), citing INS v. Chadha, 462 U.S. 919 (1983). After IMMACT, EB-1 immigrant visas are available to an alien:
-- who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

-- who seeks to enter the United States to continue work in the area of extraordinary ability, and

-- whose entry into the United States will substantially benefit prospectively the United States.

Immigration and Nationality Act ("INA"), § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). EB-2 immigrant visas are available 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.

Id. § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The text of neither statute explicitly states whether Congress intended to continue or to repudiate the administrative interpretation of the term "the arts" as including athletics. If the text of a statute cannot resolve the issue of the statute's proper interpretation, it is appropriate to consult the legislative history for guidance. See Davis v. Lukhard, 788 F.2d 973, 981 (4th Cir.), cert. denied 479 U.S. 868 (1986); Demby v. Schweiker, 671 F.2d 507, 510 (D.C.Cir. 1981). None of the committee reports, however, address whether the term "arts" in Section 203(b)(2)(A) should be read to include athletics. See H. Rep. No. 955, 101st Cong., 2d Sess. 121 (1990); H. Rep. No. 723, part 1, 101st Cong., 2d Sess. 41-42 and 59-60 (1990); S. Rep. No. 55, 101st Cong., 1st Sess. 14-16 and 19-21 (1989).

What these reports reveal is that the juxtaposition of Section 203(b)(1)(A) and Section 203(b)(2)(A) resulted from the combination, without substantive change, of two provisions that were crafted to have opposite effects. As we noted in our earlier opinion, Congress drew Section 203(b)(1)(A) from the text of H.R. 4300, § 102(a), 101st Cong., 2d Sess. (1990).

The House bill would have abolished the old Third Preference by setting the qualifications for the new EB-1 category so high that "only that small percentage of individuals who have risen to the very top of their field of endeavor" could qualify. H. Rep. No. 723, part 1, supra, at 59. Neither as introduced, H.R. 4300, supra, § 102(a), nor as reported, H. Rep. No. 723, part 1, supra, at 3-5, did the House bill have a provision similar to the old Third Preference. Instead, aliens who might have qualified for the old Third Preference, but who could not meet the EB-1 standards, would have been classed as "other employment-based immigrants." H.R. 4300, § 102(a), supra; H. Rep. No. 723, part. 1, supra, at 4. This change would have been deliberate, since the change was crafted to provide that "there [would be] no higher preference given an engineer than an auto mechanic." H. Rep. No. 723, part 1, supra, at 61.

***3** The Senate bill, by contrast, would have retained the old Third Preference. S. 358, § 103(a), 101st Cong., 1st Sess., as adopted by the Senate, reprinted in Immigration Act of 1989 (Part 1): Hearings on S.358, H.R. 672, H.R. 2448, and H.R. 2646 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 4, 21, 24-26 (1989). The Senate bill would have tightened the eligibility requirements for members of the professions, by requiring them to have advanced degrees, or the equivalent. Id. The Senate bill would also have broadened the old Third Preference somewhat, by making aliens of exceptional ability in "business" eligible. Compare id. with 8 U.S.C. § 1153(a)(3) (1988). Apart from these changes, the Senate proposal was basically a restatement of the current statute.

The House bill would have abolished the old Third Preference. The Senate bill would have retained it. The bill that Congress finally enacted and presented to the President included both provisions. IMMACT, § 121(a), 104 Stat. at 4987. The net result is that there is one immigrant visa category for aliens who can meet the standards of the old Third Preference, and another category, with a higher priority, for those of even greater distinction. [1] But this does not resolve the issue whether "arts" includes athletics.

There are principles that can help to guide the interpretation of a statute that Congress has left unclear. One such principle, as we noted in our earlier opinion, is that
[t]he inclusion of terms in one part of an enactment and their omission from another part of the same enactment, especially when they are different paragraphs in the same subsection, implies that the omission was intentional.

Our earlier opinion at 5. For example, the Supreme Court has held that the "interest" that may be subject to forfeiture under the Racketeer Influenced and Corrupt Organizations statutes, 18 U.S.C. § 1963(a)(1), is not limited to an interest in the corrupt enterprise itself. Russello v. United States, 464 U.S. 16, 23 (1983). The Court noted that Section 1963(a)(2) is explicitly limited to the forfeiture of an interest in a corrupt enterprise. 18 U.S.C. § 1963(a)(2). Since Congress included "any enterprise . . ." in Section 1963(a)(2), but not in Section 1963(a)(1), the Court held that Section 1961(a)(1) authorized forfeiture of an individual's interest in any form of property, if the acquisition of the interest was the fruit of the corrupt enterprise. 464 U.S. at 23. More recently, the Second Circuit had to decide whether Congress meant the courts to exclude foreign offenses in determining a defendant's base offense level under the Sentencing Guidelines. United States v. Azeem, 946 F.2d 13, 17-18 (2d Cir. 1991). The Sentencing Guidelines make foreign convictions relevant in determining whether to depart from a presumptive sentence. Id. The Guidelines are silent concerning the effect of foreign offenses on the base offense level. Id. Given these factors, the Second Circuit held that foreign offenses are not to be included in determining the base offense level. Id.

***4** The EB-1 immigrant visa category explicitly includes "athletics" as one of the fields of endeavor in which extraordinary ability can qualify for an EB-1 visa. INA § 203(b)(1)(A), 8 U.S.C. § 203(b)(1)(A). "Athletics" is not included among the fields of endeavor covered by EB-2 visas. Id. § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). Under the principle that "inclusion here and exclusion there" is a guide to interpretation, "the short answer" to whether athletes are eligible for EB-2 visas "is that Congress did not write the statute that way." United States v. Naftalin, 441 U.S. 768, 773 (1979).

Another common guide to interpretation of statutes, however, contradicts this conclusion. If a term in a statute has acquired a settled interpretation, and Congress then reenacts the term without substantial change, it is reasonable to conclude that Congress intended to incorporate the settled interpretation. Lorillard v. Pons, 434 U.S. 475, 580-81 (1978). At least since 1977, the Labor Department had interpreted "the arts" to include the performing arts. 42 Fed. Reg. at 3,445 promulgating 20 C.F.R. § 656.21(a)(4). The Service had long construed "the arts" to include athletics. Matter of Masters, supra. In the absence of any clearly expressed intent in Congress to upset this settled interpretation, it is reasonable to conclude that "the arts" in sections 203(b)(1)(A) and (2)(A) include athletics as a performing art. Lorillard, supra.

The Service is faced, then, with a statute that is less than clear and principles of interpretation that seem to point to different conclusions. But the issue whether athletes may qualify for EB-2 visas must be resolved, since you must not only decide these cases, but give reasoned explanations of your decisions. 8 C.F.R. § 103.3(a)(2)(x) (1994). Neither the interpretation we adopted in our earlier opinion, nor the interpretation that you favor, is clearly compelled by the statute. Nor is either of them expressly out of bounds. Adopting your interpretation has the advantage of maintaining a body of precedent that has been long settled. Indeed, since we do not believe that the 1990 amendments clearly establish that athletes cannot be classified as EB-2 immigrants, it is likely that Matter of Masters remains controlling. 8 C.F.R. § 103.3(c).

B. Other than for Outstanding Professors and Researchers" EB-2 Is the Proper Immigrant Visa Category for Lawyers

A qualified alien who is a member of the professions and who holds an advanced degree qualifies for an EB-2 immigrant visa. INA § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The practice of law is a profession for purposes of eligibility for the EB-2 immigrant visa. Id. § 101(a)(32), 8 U.S.C. § 1101(a)(32). The practice of a profession is not one of the fields within the EB-1 category. Id. § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). AILA maintains that the practice of law is also contemplated in the terms "sciences" or "arts," so that lawyers of extraordinary ability may qualify for EB-1 visas as well. AILA Letter at 8-9. You have already decided against this position in the unpublished decision in Matter of X-, supra.

***5** As with the issue of athletics, Congress has not explicitly addressed this issue. Unlike the issue of athletics, we are aware of no precedent decision that addresses whether the practice of law is one of the "arts" or "sciences." No doubt the issue never arose, since lawyers, as lawyers, clearly qualified for the old Third Preference. 8 U.S.C. § 1153(a)(3). It is clear, still, that the reasoning of Lorillard, supra, does not apply here. Instead, we believe that there is no reason here not to follow the principle that "inclusion here means exclusion there." Russello, supra. Since Congress included members of the professions in sections 203(b)(2)(A) and 203(b)(3)(A)(ii), we conclude that the omission of members of the professions from Section 203(b)(1)(A) disposes of the issue.

AILA argues that the ordinary meaning of the terms "sciences" and "arts" necessarily includes the practice of law. AILA Letter at 8-9. We do not dispute their contention that the common meaning of these terms would embrace fields of intellectual endeavor in which colleges customarily grant degrees. But colleges do not grant degrees enabling one to take the examination required to enter the practice of law; law schools grant such degrees. See Black's Law Dictionary at 239 (definition of "college") (5th ed. 1979). No doubt the practice of law shares some elements of the liberal arts and the social sciences. We believe, nevertheless, that your conclusion that law is not one of the arts and sciences is reasonable.

There are four related issues to note. First, although most lawyers are properly classified as EB-2 immigrants, a legal scholar of great distinction could well qualify for an EB-1 immigrant visa as an "outstanding professor or researcher." INA § 203(b)(1)(B), 8 U.S.C. § 1153(b)(1)(B). Secondly, an alien who is of extraordinary ability in business or in some other EB-1 endeavor would not be ineligible for EB-1 classification simply because the alien is also a lawyer, or a member of any of the other professions that are more properly considered EB-2 endeavors.

The third issue concerns a lawyer who holds a Bachelor of Laws (LL.B.) degree, which the lawyer obtained without first obtaining a baccalaureate from a college. Having graduated from college, most law school graduates now receive the

degree Doctor of Laws (J.D.). See R.B. Charles, "Legal Education in the Late Nineteeth Century, Through the Eyes of Theodore Roosevelt," 37 Am. J. Leg. Hist. 233, 239, n. 43 (1993). Although perhaps no longer common, it is still possible to receive the LL.B. degree without having graduated from college, even in the United States. See, e.g., Bulletin of Duke University School of Law at 37 (1993-94). A member of one of the professions must hold an "advanced degree or the equivalent" to qualify for an EB-2 visa. Id. § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). Without the advanced degree, a member of the professions qualifies only as an EB-3 preference immigrant. Id. § 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). A person who holds an LL.B., without having first obtained an undergraduate baccalaureate, would seem to qualify as an EB-3 preference immigrant, unless the alien can show at least "five years of progressive experience." 8 C.F.R. § 204.5(k)(2). If the alien first acquired an undergraduate baccalaureate, then the LL.B. degree would properly be considered an advanced degree, as would the somewhat more common J.D.

***6** Finally, most States allow only graduates of ABA-approved law schools to sit for the bar exam. R. Olsen, D. Lueck, M. Ransom, "Why Do States Regulate Admission to the Bar?" 14 Geo. Mason L. Rev. 253, 257, 283 (1991). The purpose of the EB-2 and EB-3 immigrant visas is to facilitate an alien professional's coming to the United States to practice his or her profession. INA § 203(b)(2)(A) and (3)(A)(ii), 8 U.S.C. § 1153(b)(2)(A) and (3)(A)(ii). The petitioner bears the burden of proof in visa petition proceedings, Matter of Ma, Int. Dec. 3160 (BIA 1991); Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). An alien with a degree from a foreign law school would have to show that the alien is eligible to be licensed to practice law in the United States, in order to qualify for an EB-2 or EB-3 immigrant visa as a member of the profession.

The most common way to prove this eligibility may entail showing that the alien has taken, or is eligible to take, the bar exam in the State where the alien intends to live. But in some cases a foreign attorney who cannot obtain a regular license to practice law may still be eligible for an EB-2 or EB-3 immigrant visa as an attorney. In at least some States, a foreign attorney may, without taking the State bar exam, obtain a license to practice as a "foreign legal consultant." See Calif. Rules of Ct. 988; Conn. Super. Ct. Civ. Rules § 24B; D.C. Ct. App. Rule 46(c)(4); Ha. Sup. Ct. Rule 14; N.Y. Ct. Rules §§ 521.1 and 521.3. An attorney with this form of license must generally limit his or her practice to matters concerning the law of the country where the attorney is licensed. Id. But this activity would still involve the practice of law. If the alien attorney intends to practice law with this form of license in a State that allows alien attorneys to do so, the Service may properly find that the alien is coming to the United States to practice his or her profession. INA § 203(b)(2)(A) and (3)(A)(ii), 8 U.S.C. § 1153(b)(2)(A) and (3)(A)(ii).

/s/ TAAT. Alexander Aleinikoff
General Counsel

Footnotes

1 An alien who practices a profession, but who does not have an advanced degree or the equivalent, qualifies for the new third employer-based immigrant visa preference, not for the EB-2 immigrant visa that is the successor of the old Third Preference. INA § 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii)

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