

### **INA Section 203 (b)(5)**

(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:

(1) Priority workers. - Visas shall first 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 paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. - An alien is described in this subparagraph if -

(i) the alien 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,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

(B) Outstanding professors and researchers. -An alien is described in this subparagraph if -

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States-

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

(C) Certain multinational executives and managers. An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to

render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

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

(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.

(B) (i) 1/ 1a/ 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) (I) 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--

(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](#).

(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.

(3) Skilled workers, professionals, and other workers.-

(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 paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

(iii) Other workers. - Other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(B) Limitation on other workers. - Not more than 10,000 of the visas made available under this paragraph in any fiscal year may be available for qualified immigrants described in subparagraph (A)(iii).

(C) Labor certification required.- An immigrant visa may not be issued to an immigrant

under subparagraph (A) until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section [212\(a\)\(5\)\(A\)](#).

(4) Certain special immigrants. - Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section [101\(a\)\(27\)](#) (other than those described in subparagraph (A) or (B) thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section [101\(a\)\(27\)\(C\)\(ii\)](#), [2I](#) and not more than 100 may be made available in any fiscal year to special immigrants, excluding spouses and children, who are described in section [101\(a\)\(27\)\(M\)](#).

(5) Employment creation. -

(A) In general. - Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial [4I](#) enterprise (including a limited partnership)--

(i) [4I](#) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(ii) [4I](#) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

(B) Set-aside for targeted employment areas.-

(i) In general. - Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who [4I](#) invest in a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

(ii) Targeted employment area defined. - In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

(iii) Rural area defined. - In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

(C) Amount of capital required. -

(i) In general. - Except as otherwise provided in this subparagraph, the amount of capital

required under subparagraph (A) shall be \$1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

(ii) Adjustment for targeted employment areas.- The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than 1/2 of) the amount specified in clause (i).

(iii) Adjustment for high employment areas.-In the case of an investment made in a part of a metropolitan statistical area that at the time of the investment -

(I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate, the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (I).

(D) 4 Full-time employment defined.--In this paragraph, the term `full-time employment' means employment in a position that requires at least 35 hours of service per week at any time, regardless of who fills the position.

## **INA Section 216A**

Sec. 216A. [8 U.S.C. 1186b]

(a) In general.-

(1) Conditional basis for status.-Notwithstanding any other provision of this Act, an alien entrepreneur (as defined in subsection (f)(1)), alien spouse, and alien child (as defined in subsection (f)(2)) shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis subject to the provisions of this section.

(2) Notice of requirements.-

(A) At time of obtaining permanent residence.-At the time an alien entrepreneur, alien spouse, or alien child obtains permanent resident status on a conditional basis under paragraph (1), the Attorney General shall provide for notice to such an entrepreneur, spouse, or child respecting the provisions of this section and the requirements of subsection (c)(1) to have the conditional basis of such status removed.

(B) At time of required petition.-In addition, the Attorney General shall attempt to provide notice to such an entrepreneur, spouse, or child, at or about the beginning of the 90-day period described in subsection (d)(2)(A), of the requirements of subsection (c)(1).

(C) Effect of failure to provide notice.-The failure of the Attorney General to provide a

notice under this paragraph shall not affect the enforcement of the provisions of this section with respect to such an entrepreneur, spouse, or child.

(b) Termination of status if finding that qualifying entrepreneurship improper.-

(1) In general.-In the case of an alien entrepreneur with permanent resident status on a conditional basis under subsection (a), if the Attorney General determines, before the second anniversary of the alien's obtaining the status of lawful admission for permanent residence, that-

(A) the investment in 11 the commercial enterprise was intended solely as a means of evading the immigration laws of the United States,

(B) (i) 11 the alien did not invest, or was not actively in the process of investing, the requisite capital; or

(ii) 11 the alien was not sustaining the actions described in clause (i) throughout the period of the alien's residence in the United States; or

(C) the alien was otherwise not conforming to the requirements of section 203(b)(5), then the Attorney General shall so notify the alien involved and, subject to paragraph (2), shall terminate the permanent resident status of the alien (and the alien spouse and alien child) involved as of the date of the determination.

(2) Hearing in removal proceeding.-Any alien whose permanent resident status is terminated under paragraph (1) may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that a condition described in paragraph (1) is met.

(c) Requirements of Timely Petition and Interview for Removal of Condition.-

(1) In general.-In order for the conditional basis established under subsection (a) for an alien entrepreneur, alien spouse, or alien child to be removed-

(A) the alien entrepreneur must submit to the Attorney General, during the period described in subsection (d)(2), a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information described in subsection (d)(1), and

(B) in accordance with subsection (d)(3), the alien entrepreneur must appear for a personal interview before an officer or employee of the Service respecting the facts and information described in subsection (d)(1).

(2) Termination of permanent resident status for failure to file petition or have personal interview.-

(A) In general.-In the case of an alien with permanent resident status on a conditional basis under subsection (a), if-

(i) no petition is filed with respect to the alien in accordance with the provisions of paragraph (1)(A), or

(ii) unless there is good cause shown, the alien entrepreneur fails to appear at the interview described in paragraph (1)(B) (if required under subsection (d)(3)), the Attorney General shall terminate the permanent resident status of the alien (and the alien's spouse and children if it was obtained on a conditional basis under this section or section 216) as of the second anniversary of the alien's lawful admission for permanent residence.

(B) Hearing in removal proceeding.-In any removal proceeding with respect to an alien whose permanent resident status is terminated under subparagraph (A), the burden of proof shall be on the alien to establish compliance with the conditions of paragraphs (1)(A) and (1)(B).

(3) Determination after petition and interview.-

(A) In general.-If-

(i) a petition is filed in accordance with the provisions of paragraph (1)(A), and

(ii) the alien entrepreneur appears at any interview described in paragraph (1)(B), the Attorney General shall make a determination, within 90 days of the date of the such filing or interview (whichever is later), as to whether the facts and information described in subsection (d)(1) and alleged in the petition are true with respect to the qualifying commercial enterprise.

(B) Removal of conditional basis if favorable determination.-If the Attorney General determines that such facts and information are true, the Attorney General shall so notify the alien involved and shall remove the conditional basis of the alien's status effective as of the second anniversary of the alien's lawful admission for permanent residence.

(C) Termination if adverse determination.-If the Attorney General determines that such facts and information are not true, the Attorney General shall so notify the alien involved and, subject to subparagraph (D), shall terminate the permanent resident status of an alien entrepreneur, alien spouse, or alien child as of the date of the determination.

(D) Hearing in removal proceeding.-Any alien whose permanent resident status is terminated under subparagraph (C) may request a review of such determination in a proceeding to remove the alien. In such proceeding, the burden of proof shall be on the Attorney General to establish, by a preponderance of the evidence, that the facts and information described in subsection (d)(1) and alleged in the petition are not true with respect to the qualifying commercial enterprise.

(d) Details of Petition and Interview.-

(1) 21 Contents of petition.--Each petition under subsection (c)(1)(A) shall contain facts and information demonstrating that the alien

(A)(i) invested, or is actively in the process of investing, the requisite capital; and  
(ii) sustained the actions described in clause (i) throughout the period of the alien's residence in the United States; and

(B) is otherwise conforming to the requirements of section [203\(b\)\(5\)](#).

(2) Period for filing petition.-

(A) 90-day period before second anniversary.-Except as provided in subparagraph (B), the petition under subsection (c)(1)(A) must be filed during the 90-day period before the second anniversary of the alien's lawful admission for permanent residence.

(B) Date petitions for good cause.-Such a petition may be considered if filed after such date, but only if the alien establishes to the satisfaction of the Attorney General good cause and extenuating circumstances for failure to file the petition during the period described in subparagraph (A).

(C) Filing of petitions during removal.-In the case of an alien who is the subject of removal hearings as a result of failure to file a petition on a timely basis in accordance with subparagraph (A), the Attorney General may stay such removal proceedings against an alien pending the filing of the petition under subparagraph (B).

(3) Personal interview.-The interview under subsection (c)(1)(B) shall be conducted within 90 days after the date of submitting a petition under subsection (c)(1)(A) and at a local office of the Service, designated by the Attorney General, which is convenient to the parties involved. The Attorney General, in the Attorney General's discretion, may waive the deadline for such an interview or the requirement for such an interview in such cases as may be appropriate.

(e) Treatment of Period for Purposes of Naturalization.-For purposes of title III, in the case of an alien who is in the United States as a lawful permanent resident on a conditional basis under this section, the alien shall be considered to have been admitted as an alien lawfully admitted for permanent residence and to be in the United States as an alien lawfully admitted to the United States for permanent residence.

(f) Definitions.-In this section:

(1) The term "alien entrepreneur" means an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) under section [203\(b\)\(5\)](#).

(2) The term "alien spouse" and the term "alien child" mean an alien who obtains the status of an alien lawfully admitted for permanent residence (whether on a conditional basis or otherwise) by virtue of being the spouse or child, respectively, of an alien entrepreneur.

(3) [3l](#) The term `commercial enterprise' includes a limited partnership.



## FOOTNOTES FOR SECTION 216A

### INA: ACT 216A FN 1

**FN 1** Section [216A\(b\)\(1\)\(A\)](#) and [\(B\)](#) were amended by section [11036\(b\)\(1\)\(A\)](#) and [\(B\)](#) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002.

(c) Effective Date.--The amendments made by section [11036](#) shall take effect on the date of the enactment of this Act (Public Law 107-273 dated November 2, 2002) and shall apply to aliens having any of the following petitions pending on or after the date of the enactment of this Act:

(1) A petition under section [204\(a\)\(1\)\(H\)](#) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision), with respect to status under section [203\(b\)\(5\)](#) of such Act (8 U.S.C. 1153(b)(5)).

(2) A petition under section [216A\(c\)\(1\)\(A\)](#) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status.

### INA: ACT 216A FN 2

**FN 2** Section [216A\(d\)\(1\)](#) revised by section [11036\(b\)\(2\)](#) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002.

(c) Effective Date.--The amendments made by section [11036](#) shall take effect on the date of the enactment of this Act (Public Law 107-273 dated November 2, 2002) and shall apply to aliens having any of the following petitions pending on or after the date of the enactment of this Act:

(1) A petition under section [204\(a\)\(1\)\(H\)](#) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision), with respect to status under section [203\(b\)\(5\)](#) of such Act (8 U.S.C. 1153(b)(5)).

(2) A petition under section [216A\(c\)\(1\)\(A\)](#) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status.

**INA: ACT 216A FN 3**

**FN 3** Section [216A\(f\)\(3\)](#) added by section [11036\(b\)\(3\)](#) of the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107-273, dated November 2, 2002.

(c) Effective Date.--The amendments made by section [11036](#) shall take effect on the date of the enactment of this Act (Public Law 107-273 dated November 2, 2002) and shall apply to aliens having any of the following petitions pending on or after the date of the enactment of this Act:

(1) A petition under section [204\(a\)\(1\)\(H\)](#) of the Immigration and Nationality Act (8 U.S.C. 1154(a)(1)(H)) (or any predecessor provision), with respect to status under section [203\(b\)\(5\)](#) of such Act (8 U.S.C. 1153(b)(5)).

(2) A petition under section [216A\(c\)\(1\)\(A\)](#) of such Act (8 U.S.C. 1186b(c)(1)(A)) to remove the conditional basis of an alien's permanent resident status.