AAO NONPRECEDENTS SEEM TO BE EMPHASIZING THE BASICS LATELY

By Joseph P. Whalen (Monday, May 11, 2015)

As I have been perusing recent postings on the USCIS-AAO website, I have noticed that *basic concepts* are being reemphasized and reasserted. I like what I am seeing. The phrase "as a *preliminary* matter" is quite prevalent. Also, discussions seem to focus more on the *prerequisites* and; **if** the necessary *foundation* is not laid, **then** subsequent & more significant elements are not substantively addressed to any great degree, if at all.

In my opinion, what I am seeing is the flipside of the "case preparation and presentation" *regimen*[1] on which I have focused many discussions in my many articles, essays, and briefs. AAO is not just regurgitating the regulations the way they and the field offices had been doing for years. The decisions are improving in quality which may be a part of USCIS' "quality workplace" initiative. As an example, let's have a look at the AAO *non-precedent* H1-B Dismissal of April 28, 2015, which includes the following on page 4:

"**III. ISSUE NOT ADDRESSED BY THE DIRECTOR'S DECISION**

Employer-Employee Relationship with the Beneficiary

> We reviewed the record of proceeding in its entirety. As a preliminary matter, we will discuss an issue, beyond the decision of the director that precludes the approval of the petition. We find that the petitioner has not established that it meets the regulatory definition of a United States employer. *See* 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id*."

Buzzwords in the above excerpt that jumped out at me are highlighted but to make my point clearer I will expound upon my reasons for emphasizing

[1] I emphasize doing your homework, staying on topic, being thorough but as succinct as you can, and never using the "kitchen-sink" approach to evidence selection and inclusion.

them. I view these words as making it clear that AAO is placing a higher value on *prerequisites* and *conditions precedent*, as well as the need for placing the progressive steps of an inquiry within their *proper context(s)*. Here is a glimpse into the inner workings of my thought process. I interpret the "*preliminary … issue … that precludes … approval*" as also precluding petition filing in the first place.

In the above excerpt, the issue is squarely focused solely upon the petitioner failing to meet a *condition precedent*. The petitioner failed to establish through a factual demonstration that it qualified as a United States employer. The petitioner was found not to be properly situated to would have the required *employer-employee relationship* with the beneficiary. Any unqualified petitioner is undeserving of obtaining any further *findings-of-fact* in any petition proceeding. In my opinion, it would be superfluous, i.e., serve no valid or useful purpose whatsoever; for any proceeding to move forward once an insurmountable obstacle has been reached.

To illustrate the above points further, please consider an AAO Dismissal of an EB-3 for a *Professional with a Baccalaureate Degree*, dated April 14, 2015. In that case, the preliminary issue that halted consideration related to the proffered position as described on the labor certification. The position as described and certified by the Department of Labor (DOL) did not qualify for the requested *visa classification as defined* by statute. The position described on ETA Form 9089, Application for Permanent Employment Certification (labor certification), "did not meet the standard for classification as a professional because section H.14 of the labor certification indicated that the petitioner "will accept three (3) years relevant college education combined

with three (3) years work experience in the job opening or related occupation in lieu of degree requirement."" *Id.* at p. 2

In AAO's April 28, 2015, Sustained Appeal of an EB-1A (extraordinary ability) visa petition (I-140), AAO re-weighed evidence and in so doing found that the *antecedent procedural evidentiary requirement* had been met. Specifically, where the director below found only two evidentiary criteria had been met, AAO found that a third criterion had also been met. After finding that the *initial evidence* requirement had been met, AAO was able to proceed to the final merits determination stage of the adjudication. Obviously, they found that the *overarching qualitative questions* were answered in the affirmative.

> "The petitioner has submitted qualifying evidence under at least three of the ten evidentiary criteria and has established that he has a "level of expertise indicating that [he] is one of that small percentage who have risen to the very top of the field of endeavor" and "sustained national or international acclaim." The petitioner's achievements have been recognized in his field of expertise. The petitioner has shown that he seeks to continue working in the same field in the United States. The petitioner has also established that his entry into the United States will substantially benefit prospectively the United States. Therefore, the petitioner has established his eligibility for the benefit sought under section 203 of the Act."

Id. at p. 7

Dated this 11th day of May, 2015.

X Digitally signed by Joseph P. Whalen
DN: cn=Joseph P. Whalen, o, ou, email=joseph.whalen774@gmail.com, c=US
Date: 2015.05.11 22:08:35 -04'00'

/s/ Joseph P. Whalen

That's my two-cents, for now!
