

request further extensions of up to one year each, but there is no limit to the number of extensions that she may be granted.

On January 3, 2002, OED received Petitioner's application to take the examination. By letter dated February 20, 2002, OED informed petitioner that her application to take the examination to practice before the USPTO had been approved. In this letter, OED informed Petitioner that because she is a nonimmigrant alien with a limited right to work in the United States, if she were to take and pass the exam, she would not be registered as a patent attorney or agent, but rather, would be eligible for limited recognition under §10.9(b). Petitioner took the exam on April 17, 2002. By letter dated June 3, 2002, OED notified Petitioner that she had passed the exam, but that further documentation was necessary to determine whether to grant her limited recognition. Petitioner provided the requested documentation in a June 17, 2002, letter. In that letter, Petitioner also petitioned pursuant to 37 CFR § 10.170 for a suspension of § 10.9(b) and requested full recognition under § 10.6(a).

On July 8, 2002, OED issued a decision denying the petition. The OED Director noted that recognition of a resident alien under § 10.6(a) must not be inconsistent with the terms under which the alien entered and resides in the United States. The OED Director concluded that granting Petitioner full recognition under § 10.6(a) would be inconsistent with the terms of her visa. Full recognition, according to the OED Director, provides a license to practice before the USPTO unrestricted in terms of for whom the practitioner may work or when. The OED Director reasoned that such an unrestricted license

conflicts with Petitioner's visa which restricts her to working for one firm for a limited period of time.¹

On August 6, 2002, Petitioner filed a petition for review of the OED Director's decision under 37 CFR § 10.2(c).

II. LEGAL STANDARD

Title 35 U.S.C. § 2(b)(2)(D) states in pertinent part that the USPTO "may establish regulations, not inconsistent with law, which . . . may govern the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office. . . ."

37 CFR § 10.6(a), which implements the statute above, states in pertinent part:

[w]hen appropriate, any alien who is an attorney, who lawfully resides in the United States, and who fulfills the requirements of this part may be registered as a patent attorney to practice before the Office, provided: Registration is not inconsistent with the terms upon which the alien was admitted to, and resides in, the United States and further provided: The alien may remain registered only (1) if the alien continues to lawfully reside in the United States and registration does not become inconsistent with the terms upon which the alien continues to lawfully reside in the United States or (2) if the alien ceases to reside in the United States, the alien is qualified to be registered under paragraph (c) of this section. See also § 10.9(b).

37 CFR § 10.9(b), to which 10.6(a) refers, states that "[w]hen registration of a resident alien under paragraphs (a) or (b) of § 10.6 is not appropriate, the resident alien may be given limited recognition as may be appropriate under paragraph (a) of this section."

¹ The OED Director also concluded that Petitioner is ineligible for limited recognition of foreigners under 37 CFR § 10.6(c), but Petitioner does not raise this issue in her Petition or seek the limited recognition authorized by § 10.6(c).

The USPTO's November 3, 1999, General Requirements Bulletin addresses recognition of aliens and states that "[q]ualifying nonimmigrant aliens within the scope of 8 CFR § 274a.12(b) or (c) are not registered upon passing the examination. Such aliens will be given limited recognition under 37 CFR § 10.9(b) if recognition is consistent with the capacity of employment authorized by the INS."

Pursuant to 37 CFR § 10.2(c), the OED Director's decision is reviewed based upon the record in this matter.

III. OPINION

A. Issues

Petitioner argues that she meets the requirements for full recognition under § 10.6(a). Petitioner argues that the OED Director improperly read a requirement of permanent residency and unrestricted employment opportunity into § 10.6(a). Petitioner reasons that since § 10.6(a) states that an alien may remain registered only "if the alien continues to lawfully reside in the United States and registration does not become inconsistent with the terms upon which the alien continues to lawfully reside in the United States," the regulation anticipates that full recognition can be granted despite the time and employment restrictions imposed by her TN visa. According to Petitioner, until she seeks other employment or fails to renew her TN visa, full recognition is not inconsistent with her visa. Petitioner also argues that the residency requirement she alleges the OED Director to have established is unnecessary and irrational under Frazier v. Heebe, 482 U.S. 641 (1987), and that denial of full recognition because of her alien status denies her equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

B. Discussion

The OED Director properly concluded that Petitioner should not be granted full recognition under § 10.6(a). Petitioner's argument that the OED Director improperly read a requirement of permanent residency and unrestricted employment opportunity into § 10.6(a) is unpersuasive. Section 10.6(a) permits registration of an alien only if registration is not inconsistent with the terms upon which the alien was admitted to and resides in the United States. The OED Director properly concluded that granting Petitioner full recognition would be inconsistent with the terms of her TN visa. That visa limits Petitioner to working for a single employer, and is limited in duration, but recognition under § 10.6(a) would have no similar restrictions. With full recognition under § 10.6(a), Petitioner would be authorized to represent any party before the USPTO with no set ending date. Recognition under § 10.6(a) would provide Petitioner with USPTO approval of work that she cannot lawfully do under her TN visa, making that recognition inconsistent with the terms of her visa.

The fact that Petitioner's visa already contains restrictions and that the INS may take action against Petitioner for violations of those restrictions does not mean that the OED Director should ignore them in deciding whether to grant recognition. If the OED Director were to grant Petitioner recognition under § 10.6(a) and she subsequently were to represent someone other than a [law firm] client, or represent a [law firm] client after failing to extend her visa, Petitioner would violate her visa, but not the terms of her recognition. The authority granted to the OED Director to afford limited recognition under § 10.9(b) is well tailored to prevent this result.

At its core, recognition before the USPTO is recognition to represent applicants or other parties before the USPTO. Unlimited recognition, which in no way limits the applicants or parties the registrant may represent, is not consistent with Petitioner's visa. Petitioner focuses on the restrictions contained in her visa as sufficient protection against unlawful representation before the USPTO. In granting recognition, however, the OED Director is not looking for guarantees from other sources that the work Petitioner will do before the USPTO is proper. The OED Director must assure that the terms of the recognition itself provide the guarantee. In this case, full recognition devoid of explicit limitation would not provide that guarantee and would be inconsistent with the terms of Petitioner's visa.

The OED Director did not read any improper requirements into § 10.6(a) as Petitioner argues, but was consistent with the USPTO's interpretation of how § 10.6(a) is applied to nonimmigrant aliens. The General Requirements Bulletin provides interpretive rules construing, *inter alia*, the regulations contained in 37 CFR §§ 10.5, 10.6, and 10.7. See Premysler v. Lehman, 71 F.3d 387 (Fed. Cir. 1995). The General Requirements Bulletin states that “[q]ualifying nonimmigrant aliens within the scope of 8 CFR § 274a.12(b) or (c) are not registered upon passing the examination. Such aliens will be given limited recognition under 37 CFR § 10.9(b) if recognition is consistent with the capacity of employment authorized by the INS.” Petitioner is a nonimmigrant alien within the scope of 8 CFR § 274a.12(b)(19). In fact, Petitioner was told in the February 20, 2002, notice of admission to take the April 17, 2002, examination that her status as a nonimmigrant alien would preclude her from full recognition even if she passed the

exam. The OED Director's decision was consistent with this notice and with the USPTO's longstanding interpretation of how § 10.6(a) is applied to nonimmigrant aliens.

Petitioner argues that "the availability of limited recognition status is not a reasonable alternative because it prevents Petitioner from holding herself out and practicing on the same terms as a registered patent attorney," but that is precisely the point behind the limited recognition. Petitioner cannot hold herself out on the same terms as a registered patent attorney because of the restrictions imposed by her TN visa. If she were given full recognition, Petitioner could hold out that her registration is the same as any other registered patent attorney, as her argument suggests she wishes to do, even though her TN visa would prohibit her from working as any other patent attorney works. The USPTO has a legitimate interest in ensuring that it does not provide Petitioner with the cover to hold herself out as something she truly is not.

Petitioner cites Frazier v. Heebe, 482 U.S. 641 (1987), for support of her position that the OED Director's decision is irrational. In Frazier, the Supreme Court invalidated a local rule of the U.S. District Court for the Eastern District of Louisiana that required members of its bar either to reside in Louisiana or maintain an office in Louisiana. Id. at 643. The Court concluded that the residency requirement was unnecessary and irrational because there was no reason to believe that resident attorneys are any more competent than non-resident attorneys, or that non-resident attorneys are any less available to participate actively in a case than a resident attorney. Id. at 646-49. The Court also found the in-state office requirement unnecessary and irrational for the same reasons as well, with the additional reason that the requirement is not imposed on attorneys who reside in Louisiana and whose only office is out of state. Id. at 649-50.

The Frazier decision does not lend any support to Petitioner's case for two reasons. First, the Court's decision was based upon its inherent supervisory power of the lower courts, and not any Constitutional, statutory, or regulatory provision that would apply to the USPTO. Second, unlike in Frazier, there is a rational and necessary basis to distinguish between Petitioner and other attorneys. Petitioner's availability to perform legal work is strictly limited by the terms of her visa. Other attorneys who receive full recognition do not have such limitations. While in Frazier the Court found no reason to doubt the ability of Frazier vis-à-vis other attorneys who reside in Louisiana or have an office there, here there is an undisputed difference in the availability of Petitioner to perform legal services compared to other practitioners.

Finally, Petitioner claims that the OED Director's decision denies her equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner's arguments here are also unpersuasive. Petitioner's equal protection claim fails first because she has not shown that she is being treated differently than another to whom she is similarly situated. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)(explaining that the Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike.) Petitioner has not shown that the OED Director has granted full recognition under § 10.6(a) to individuals with similar restrictions on their ability to work as those placed on Petitioner. Because she is not being treated differently than others like her, Petitioner has not been denied equal protection. Furthermore, the Supreme Court has recognized that "a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded the other." Matthews v. Diaz, 426 U.S. 67, 78 (1976).

