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NATIONAL INTEREST WAIVER CHANGES FOR STEM GRADUATES AND ENTREPRENEURS, ALONG WITH PREMIUM PROCESSING, WILL BENEFIT H-4 SPOUSES SEEKING WORK AUTHORIZATION

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Earlier this year, U.S. Citizenship and Immigration Services (USCIS) announced that as of January 30, 2023, it would accept premium processing requests for all previously filed and newly filed petitions for National Interest Waivers (NIW) under the Employment-Based Second Preference (EB-2) category. For an additional filing fee of $2,500, USCIS will adjudicate these petitions within 45 days. This premium processing development coupled with last year's update to the USCIS Policy Manual, which clarified how the National Interest Waiver can be used by science, technology, engineering, and mathematics (STEM) graduates and entrepreneurs, makes the National Interest Waiver more appealing than ever. We last covered the National Interest Waiver five years ago after the Administrative Appeals Office of the USCIS issued its precedent decision, *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016) which articulated a new National Interest Waiver standard.

As background, the National Interest Waiver is an immigrant petition for lawful permanent residence under the EB-2 category. In the ordinary course, a valid, permanent offer of employment in the U.S. and a labor certification application certified by the Department of Labor (DOL) are mandatory prerequisites to the filing of such an employment-based immigrant petition. However, the Immigration Act of 1990 (IMMACT90) provided that the labor certification requirement in the employment-based second category may be waived and foreign nationals may qualify for the NIW in the sciences, arts, professions or

business if they are: (1) members of the professions holding advanced degrees; or (2) foreign nationals of "exceptional ability" who will "substantially benefit prospectively the national economy, cultural or educational interest, or welfare" of the United States, i.e. where the foreign national's employment is deemed to be in the "national interest."

In the updated Policy Manual, under the *Specific Evidentiary Considerations for Persons with Advanced Degrees in STEM Fields* heading, USCIS states, at the outset, that it was particularly interested in persons with advanced STEM degrees fostering progress in three areas, namely (1) "focused critical and emerging technologies", (2) "other STEM areas important to U.S. competitiveness", and (3) "national security."

Critical and emerging technologies "are those are critical to U.S. national security, including military defense and the economy". To identify a critical and emerging technology field, USCIS prompts officers to consider governmental, academic, and other authoritative and instructive sources, and all other evidence submitted by the petitioner. Officers may find that a STEM area is important to competitiveness or security in endeavors that will help the U.S. remain ahead of strategic competitors or adversaries or relates to a field that may contribute to the U.S. achieving or maintain technology leadership or peer statues among allies and partners. Moreover, the lists of critical and emerging technology subfields published by the Executive Office of the President, by either the National Science and Technology Council or the National Security Council, are listed as examples of authoritative lists which officers may consider. The Critical and Emerging Technologies List Update, issued in February 2022, defines critical and emerging technologies as "a subset of advanced technologies that are significant to U.S. national security." It then goes on to list the critical and emerging technology areas that "are of particular importance to the national security of the United States" as well as a set of key subfields for each identified critical and emerging technology. We encourage readers to view the full list, but note the following subfields: supercomputing, edge computing, cloud computing, data storage, computing architectures, data processing and analysis techniques, distributed ledger technologies, digital assets, digital payment technologies, and digital identity infrastructure.

An indicator of STEM areas important to U.S. competitiveness is inclusion as a priority in the annual research and development priorities memo about the President's budget issued jointly by the White House Director of the Office of

Science Technology Policy and the Director of the Office of Management and Budget. For example, the Memorandum on Research and Development Priorities (PDF) (August 2021) for President Biden's FY2022 budget, where reference is again made to "critical and emerging technologies" including artificial intelligence, quantum information science, advanced communications technologies, microelectronics, high-performance computing, biotechnology, robotics, and space technologies.

U.S. national security objectives, which includes "protect the security of the American people; expand economic prosperity and opportunity; and realize and defend democratic values", are outlined in the Interim National Security Strategic Guidance (PDF). The Policy Manual instructs that for purposes of National Interest Waiver policy and adjudications, "national security" refers to these three objectives.

Matter of Dhanasar provides that after eligibility for EB-2 classification has been established, USCIS may grant a NIW if the petitioner demonstrates, by a preponderance of the evidence, that:

- The foreign national's proposed endeavor has both substantial merit and national importance.
- The foreign national is well positioned to advance the proposed endeavor.
- On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The Policy Manual reiterates that with respect to the first prong as set forth in *Matter of Dhanasar*, *supra*, as in all cases, the evidence must demonstrate that a STEM endeavor has both substantial merit and national importance. It notes that many proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, but also have sufficiently broad potential implications to demonstrate national importance. At the same time though, the Policy Manual makes clear that "classroom teaching activities in STEM" are not, on their own, indicative of an impact in the field of STEM education more broadly, and therefore generally would not establish their national importance.

For the second prong, the person's education and skillset are relevant to whether the person is well positioned to advance the endeavor. Here, the

USCIS officer's analysis involves assessing whether the person has an advanced degree, such as a Ph.D. which USCIS considers an especially positive factor. But the advanced degree must also be in a STEM field tied to the proposed endeavor and related to work furthering a critical and emerging technology or other STEM area important to U.S competitiveness or national security. Additionally, taking into account that doctoral dissertations and some master's theses concentrate on a particularized subject matter, the person's "scientific knowledge in a narrow STEM area" must also be considered in order to determine whether that specific STEM area relates to the proposed endeavor. Finally, the Policy Manual cautions that a degree in and of itself, is not a basis to determine that a person is well positioned to advance the proposed endeavor, and urges petitioners to submit supplemental evidence, including letters from interested government agencies. Evidence that may demonstrate that the person is well-positioned to advance a proposed endeavor includes, but is not limited to:

- Degrees, certificates, or licenses in the field;
- Patents, trademarks, or copyrights developed by the person;
- Letters from experts in the person's field, describing the person's past achievements and providing specific examples of how the person is well positioned to advance the person's endeavor;
- Published articles or media reports about the person's achievements or current work;
- Documentation demonstrating a strong citation history of the person's work or excerpts of published articles showing positive discourse around, or adoption of, the person's work;
- Evidence that the person's work has influenced the field of endeavor;
- A plan describing how the person intends to continue the proposed work in the United States;
- A detailed business plan or other description, along with any relevant supporting evidence, when appropriate;
- Correspondence from prospective or potential employers, clients, or customers;
- Documentation reflecting feasible plans for financial support (see below for a more detailed discussion of evidence related to financing for entrepreneurs);
- Evidence that the person has received investment from U.S. investors,

such as venture capital firms, angel investors, or start-up accelerators, and that the amounts are appropriate to the relevant endeavor;
- Copies of contracts, agreements, or licenses showing the potential impact of the proposed endeavor;
- Letters from government agencies or quasi-governmental entities in the United States demonstrating that the person is well positioned to advance the proposed endeavor (see below for a more detailed discussion of supporting evidence from interested government agencies and quasi-governmental entities);
- Evidence that the person has received awards or grants or other indications of relevant non-monetary support (for example, using facilities free of charge) from federal, state, or local government entities with expertise in economic development, research and development, or job creation; and
- Evidence demonstrating how the person's work is being used by others, such as, but not limited to:
    - Contracts with companies using products that the person developed or assisted in developing;
    - Documents showing technology that the person invented, or contributed to inventing, and how others use that technology; and
    - Patents or licenses for innovations the person developed with documentation showing why the patent or license is significant to the field.

Lastly, with respect to the third prong, the Policy Manual reminds us that it is the petitioner's burden to establish that factors in favor of granting the waiver outweigh those that support the requirement of a job offer and thus a labor certification. In its evaluation of the third prong and whether the U.S. may benefit from the person's entry, USCIS considers the following combinations of facts contained in the record to be a strong positive factor:

- The person possesses an advanced STEM degree, particularly a Ph.D.;
- The person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and
- The person is well positioned to advance the proposed STEM endeavor of national importance.

USCIS considers the benefit to be "especially weighty" where the endeavor has the potential to support U.S. national security or enhance U.S. economic competitiveness, or when the petition is supported by letters from interested U.S. government agencies.

The expanded guidance will also benefit noncitizen entrepreneurs under the *Matter of Dhanasar* standard. They may submit evidence of ownership and a role in the U.S. entity; degrees, certifications, licenses and letters of experience; investments from outside investors; participation in an incubator or accelerator; awards or grants; intellectual property such as patents; published material on the petitioner and U.S. based entity; prospects of revenue generation and job creation; and letters and statements from credible third parties.

In comparison, eligibility under the Employment-Based First-Preference category (EB-1A) can be established through evidence of a one-time, major international award or fulfillment of at least three out of ten criteria. But even after the applicant has demonstrated evidence of at least three criteria, USCIS conducts a final merits determination where it considers the submitted evidence holistically and determines whether the applicant has sustained national or international acclaim and is among the small percentage of individuals who have risen to the top of their field of endeavor. Clearly, to qualify for a National Interest Waiver, one need not satisfy any set regulatory criteria or rise to the EB-1A level of acclaim or level of expertise, which can be quite difficult to establish. Like the EB-1A, individuals may self-petition for the National Interest Waiver under EB-2 and need not be beholden to an employer.

The NIW on its face will have little utility for India or China born beneficiaries of I-140 petitions in the EB-2. The EB-2 for both these countries is retrogressed, and more so with India which according to the February 2023 State Department Visa Bulletin, the Final Action Date is October 8, 2011. Still, even if an Indian born EB-2 beneficiary obtains the NIW they will not be bound to any employer to file a new labor certification, and can remain in H-1B status from employer to employer until their Final Action Date becomes current. Another advantage of the NIW under EB-2 is that dependent spouses in H-4 status can receive work authorization once the I-140 on behalf of a principal beneficiary is approved and the dates for the country remain retrogressed. Currently the EB-2 is retrogressed worldwide at November 1, 2022. Therefore, in addition to H-4 spouses of India born beneficiaries of I-140 petitions, all H-4 spouses would

be entitled to work authorization once the I-140 under the NIW is approved. *See* 8 C.F.R. § 214.2(h)(9)(iv). Given that there is now premium processing, the speed with which an H-4 spouse can obtain an EAD through the NIW than through the traditional employer sponsored labor certification process is significant.

Although the USCIS has broadened the evidentiary criteria for NIW petitions, it is still important to demonstrate that the national interest of the US will be advanced under the standards set forth in *Matter of Dhanasar*. As the EB-1 has become muddied with the need to satisfy the final merits determination, the NIW may be easier to win under the expanded guidance for individuals in STEM and entrepreneurs and may be worth considering if one is born in a country other than India. However, even for those born in India, the NIW may have a significant benefit as it would allow the H-4 spouse to get employment authorization more rapidly.

(This blog is for informational purposes, and should not be relied up as a substitute for legal advice)

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