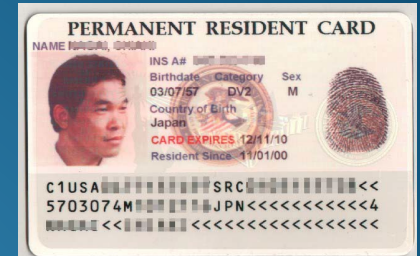


Self-Petitioned Pathways to Permanent Residency

Reviewing EB-1A, and National Interest
Waiver options for Foreign Nationals

Cline Williams Wright Johnson & Oldfather
Daniel W. Oldenburg, Esq.

While there are many ways to obtain Permanent Residency, today's focus will be on the "Self-Sponsored" options.



1. Employment Based (EB) Immigrant Petition for Alien Worker filed on FORM I-140.
 - (I.) Alien of Extraordinary Ability
 - (II.) National Interest Waiver
2. Filed on FORM I-140 Immigrant Petition for Alien Worker.

A Word About Priority Dates

- U.S. Department of State Monthly Visa Bulletin.
- EB-1 is current world-wide.
- We expect to see additional EB-1 retrogression.
- EB-2 is retrogressed for India and China (See next Slide).
- EB-2 is current for all other nations besides India and China.
- Alien of Extraordinary Ability are EB-1 Preference.
- National Interest Waiver is an EB-2 Preference.
- Must Always keep Priority dates in mind when deciding which preference category to file in.

Priority Dates for October 2022

| Employment-based | All Chargeability Areas Except Those Listed | CHINA-mainland born | EL SALVADOR GUATEMALA HONDURAS | INDIA | MEXICO | PHILIPPINES |
|--|---|---------------------|--------------------------------------|---------|---------|-------------|
| 1st EB-1A Extraordinary Ability | C | C | C | C | C | C |
| 2nd NIW | C | 08JUL19 | C | 01MAY12 | C | C |
| 3rd | C | 15JUL18 | C | 01JUL12 | C | C |
| Other Workers | 08SEP22 | 01NOV15 | 08SEP22 | 01JUL12 | 08SEP22 | 08SEP22 |
| 4th | C | C | 15APR18 | C | 15OCT20 | C |
| Certain Religious Workers | C | C | 15APR18 | C | 15OCT20 | C |
| 5th Unreserved (including C5, T5, I5, R5) | C | 01JAN16 | C | 08DEC19 | C | C |
| 5th Set Aside: (Rural - 20%) | C | C | C | C | C | C |
| 5th Set Aside: (High Unemployment - 10%) | C | C | C | C | C | C |
| 5th Set Aside: (Infrastructure - 2%) | C | C | C | C | C | C |

Explanation of Visa Retrogression

- The U.S. government makes only a certain number of immigrant visas (green cards) available each year and these are allocated among the various immigrant visa categories and countries from which applicants seek to immigrate. For the past few years, the number of immigrants approved for employment-based immigrant visas has been lower than the number of visas available, resulting in no backlog in visa numbers. Recently, the DOS has seen far more immigrants approved for employment-based immigrant visas and has run out of visa numbers in certain categories, causing a temporary backlog or "retrogression" of visa numbers.
- When worldwide demand for employment based visas exceeds worldwide availability, immigrant visa numbers are further apportioned among the various countries from which applicants seek to emigrate. Each country has a limit and each approved applicant is "charged" against his or her country's limit. Most countries have fewer applicants than available visa numbers. However, certain high-immigration countries often meet or exceed their chargeability limit. These countries include China, India, Mexico, and the Philippines.



http://www.travel.state.gov/visa/bulletin/bulletin_5113.html

- Immigrant visa numbers are given out according to a "first come, first serve" policy. The date an applicant first begins the green card process (often a Labor Certification Application filed with the U.S. Department of Labor or an I-140 or I-130 Petition filed with the U.S. Citizenship and Immigration Services) becomes that person's priority date, which will determine the order in which that person will receive a visa number and thus be further processed for an immigrant visa or adjusted to immigrant status. When a retrogression occurs in visa numbers, applicants will have to "wait in line" until their priority date becomes current before they can be adjusted or receive an immigrant visa.
- A visa number retrogression means that EB2 or EB3 applicants from certain high-immigration countries will not be able to apply for an immigrant visa (by filing an I-485 or through Consular processing) until a visa number becomes available for their priority date.

EB-1A Alien of Extraordinary Ability

- Is filed as a Self-Petition.
- Definition of “Extraordinary Ability”
Defined as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of their field of endeavor.”

Must show evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is a major, internationally recognized award).



EB-1A Alien of Extraordinary Ability

8 C.F.R. § 204.5(h)(3) Initial Evidence

- 1. Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.
- 2. Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members **as judged by recognized national or international experts in their fields.**
- 3. Published material in professional publications written by others about the alien's work in the academic field (Title, Date, Author, & Translation if applicable).
- 4. Evidence of the alien's participation either individually or on a panel, as the judge of the work of others in the same or allied academic field.
- 5. Evidence of the alien's original scientific or scholarly contributions **of major significance** to the field.
- 6. Evidence of the Alien's authorship of scholarly books or articles **in the field, in professional or major trade publications or other major media.**
- 7. **Evidence of the display of the alien's work in the field at artistic exhibition or showcase.**
- 8. **Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.**
- 9. **Evidence that the alien has commanded a high salary or other significantly high remuneration for services in relation to others in the field.**
- 10. **NO EMPLOYMENT OFFER is required.**

NEW DEVELOPMENTS IN THE EB-1A.

- Due to Retrogression– many more EB-1A Applicants.
- USCIS not clear their adjudication of these extraordinary applicants. Can USCIS make up their own standard for reviewing these petitions? Can they require additional evidence? Increase the burden on the Petitioner? Widen their scope of adjudicatory discretion?
- Kazarian v. USCIS 9th Circuit Court of Appeals
- How should USCIS adjudicate the EB-1 standard?
- Follow the law as it exists?
- New USCIS MEMO
- State of EB-1A Petitions

Kazarian V. USCIS

- The requirements for these types of I-140 petitions have not changed but this new method of evaluating the merits of cases may adversely impact those applying for immigration in these categories. There is an interim USCIS memo as response to the U.S. 9th Circuit Court of Appeals decision in Kazarian v. USCIS on March 4, 2010. In the Kazarian ruling, the court held that USCIS was being too strict in deciding EB1A petitions by requiring extensive citation evidence and specific types of peer review work in order to meet the EB1A criteria. However, the court did rule that USCIS could consider evidence such as extensive citations in making a final merits review of the case to determine whether an alien is at the very top of his or her field.

Kazarian V. USCIS March 4, 2010

- In essence, the new USCIS interim memo breaks the evaluation process up into two parts – 1) evaluating whether the applicant meets the baseline criteria for the immigration category and 2) determining whether the applicant's evidence demonstrates the required high level of expertise for the immigration category. In the second part of the review process the USCIS will evaluate the evidence to see if, as a whole, it proves by a preponderance of the evidence that the applicant is at the very top of his or her field of endeavor.

New Standard of Review

- After the officer has determined by a preponderance of the evidence that at least three of these criterion have been met, he or she moves into the second part of the review. For EB₁A cases, the second part of the review involves determining *whether the applicant has achieved a level of expertise indicating that he or she is one of a small percentage who has risen to the very top of the field of endeavor, he or she has shown sustained national or international acclaim, and his or her achievements have been recognized in the field of expertise*. This basically means that the officer will look at all the evidence as a whole and determine if the case is approvable. This new standard may decrease the number of approved cases since, by implementing this secondary review process, USCIS officers have the discretion to deny cases even if three EB₁A criteria have been technically met.

What to expect Post Kazarian and in light of the recent USCIS MEMO?

- Prior to this USCIS memo, the evidence was evaluated only in the context of meeting the necessary criteria for each type of case. Now by adding a second “**final determination on the merits**” phase of review, USCIS officers have more flexibility in denying cases or issuing Request For Evidence notices even if the baseline criteria has been met. This memo essentially gives the USCIS officer wider discretion in adjudicating EB1 cases since it has added a new level of review which follows a fairly subjective standard. As a result it is very possible that immigration through the EB1A, EB1B, and EB2 Exceptional Ability categories will become more difficult than it has been in the past.

Other Information

- File with the USCIS Nebraska Service Center
- 20 month processing time
- Can be premium processed (decision in 15 days or less)

Form *
I-140 | Immigrant Petition for Alien Workers

Form Category *
Extraordinary ability (E1)

Field Office or Service Center *
Nebraska Service Center

Get processing time

Processing time for Immigrant Petition for Alien Workers (I-140) at Nebraska Service Center

80% of cases are completed within

20
Months

National Interest Waiver (NIW)

- A waiver relieving the Petitioner from the labor certification process.
- A waiver relieving the Petitioner from the Job Offer requirement.
- Self- Petition (EB-2)
- Matter of Dhanasar
- 1. **“Substantial merit and national importance”**
- 2. **“Well positioned to advance the proposed endeavor.”**
- 3. **“On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.”**

National Interest Waiver

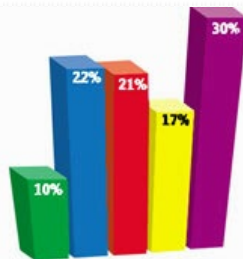
- **“Substantial merit and national importance”**
- What is substantial merit and national importance?
- Take your occupation and think about what makes it special, important, essential, or noteworthy.
- Why is it special, important, essential, or noteworthy?
- Most scientific research/clinical health care is substantial and of national importance.

Substantial merit and national importance

- Under the new NIW first prong, the AAO notes that merit may be demonstrated in a wide range of areas including “business, entrepreneurialism, science, technology, culture, health, or education.” The AAO indicates that showing merit by quantifying economic impact is one way to meet the test, but that it is not required if other evidence of national importance is provided (and providing the examples of research, pure science and the furtherance of human knowledge as potentially enough). Another example offered of merit is where there are national or even global implications in a particular field such as those resulting from improved manufacturing processes or medical advances.

Well positioned to advance the proposed endeavor

- Who benefits from the work, research or occupation?
- Are there long range or distant reaching consequences to one's research or work?
- Consumer or stream of commerce arguments.
- Statistical data as evidence of national issue, Applicant is well positioned to address.
- Publications, Articles, Citations, Letters Patents, etc.



“On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification”

PERM has replaced the Traditional Labor Certification process. There still remain the DOL regulations to comply with. Consider Employer’s Policy on PERM Sponsorship.

Can take several months.

Unique Skills not taken into consideration by PERM /DOL

Urgency / Importance of research or occupation.

Demonstrate that the Applicant provides a greater benefit to the national interest than a U.S. Citizen with similar skills and training etc.

“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 AAO is directing USCIS examiners to balance the interests of having a labor certification process to protect domestic workers against other factors deemed to be in the national interest. USCIS should consider factors such as *“whether, in light of the nature of the foreign national’s qualifications of proposed endeavor, it would be impractical either for the foreign national to secure a job offer of or from the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national’s contributions; and whether the national interest in the foreign national’s contributions is sufficiently urgent to warrant forgoing the labor certification process. We emphasize that, in each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.”*

Current Legal Standard

- 1. **“Substantial merit and national importance”**
- 2. **“Well positioned to advance the proposed endeavor.”**
- 3. **“On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.”**

I-140 Immigrant Petition for Alien Worker National Interest Waiver

(NIW)

- One of the most unique categories
- Not much guidance- in fact the term “national interest” is not defined anywhere in U.S. Immigration law. USCIS takes the position that Congress intentionally left the term ambiguous in order to permit a “flexible test” in which to evaluate an applicant’s contributions to the national interest.
- Purely Discretionary
- In depth review of the employment and the impact it will have on the national interest.
- Broad ranging standard yet seems to be narrowly defined.
- Prepare and present with the intention of educating the adjudicating officer.

Bio-Defense, Cancer Research, Public Health Issues, National Defense, Advances in Bio-medical technology/pharmacology etc.

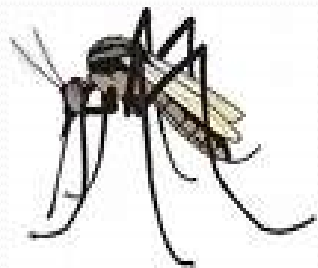
COVID-19



Scott Nelson / Getty Images



Spread the Word
Pledge your support to breast cancer research and outreach programs.
SEND A RIBBON TO A FRIEND!



Matter of Dhanasar 26 I&N Dec. 884 (AAO 2016).

- 1. **“Substantial merit and national importance”**
- 2. **“Well positioned to advance the proposed endeavor.”**
- 3. **“On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.”**

Post *Dhanasar* Decisions

- Matter of S-S, AAO May 11, 2017 -Computational mathematics researcher. In sufficient citations, inability to demonstrate the “potential prospective impact” of his work.
- Matter of N-S-M-K, AAO May 30, 2017- Fluid mechanics and heat transfer researcher. In sufficient to establish Petitioner is well positioned to advance the endeavor based on her participation member of a research team and not as the sole or leading contributor of the cited project. Provided evidence of a recently published article, evidence seeking her review of a manuscript, and an invitation to lecture all provided in response to the RFE and all submitted after the I-140 had already been filed.
- Matter or M-R-W, AAO July 13, 2017, Forensic DNA analyst (Crime Lab). Petitioner did not illustrate evidence of future impact. Focused on current work and not on plan to conduct future research and impact the field.
- Matter of C-A-H, AAO January 2, 2018, Integrative Medicine, lacked evidence to demonstrate past work has been influential in the field of integrative medicine. Request for evidence of patents or pending patent applications.

Recent RFEs

- Look at some recent RFEs for a window into how USCIS is currently adjudicating NIWs.
- **National Importance**-“The Petitioner has not established that his employment activities in the United States will have a broader impact on the field of medicine, outside of his prospective pool of patients, colleagues, and workplace.”
- “In general, time spent on the provision of medical care and educational services area not considered to be of national importance.”

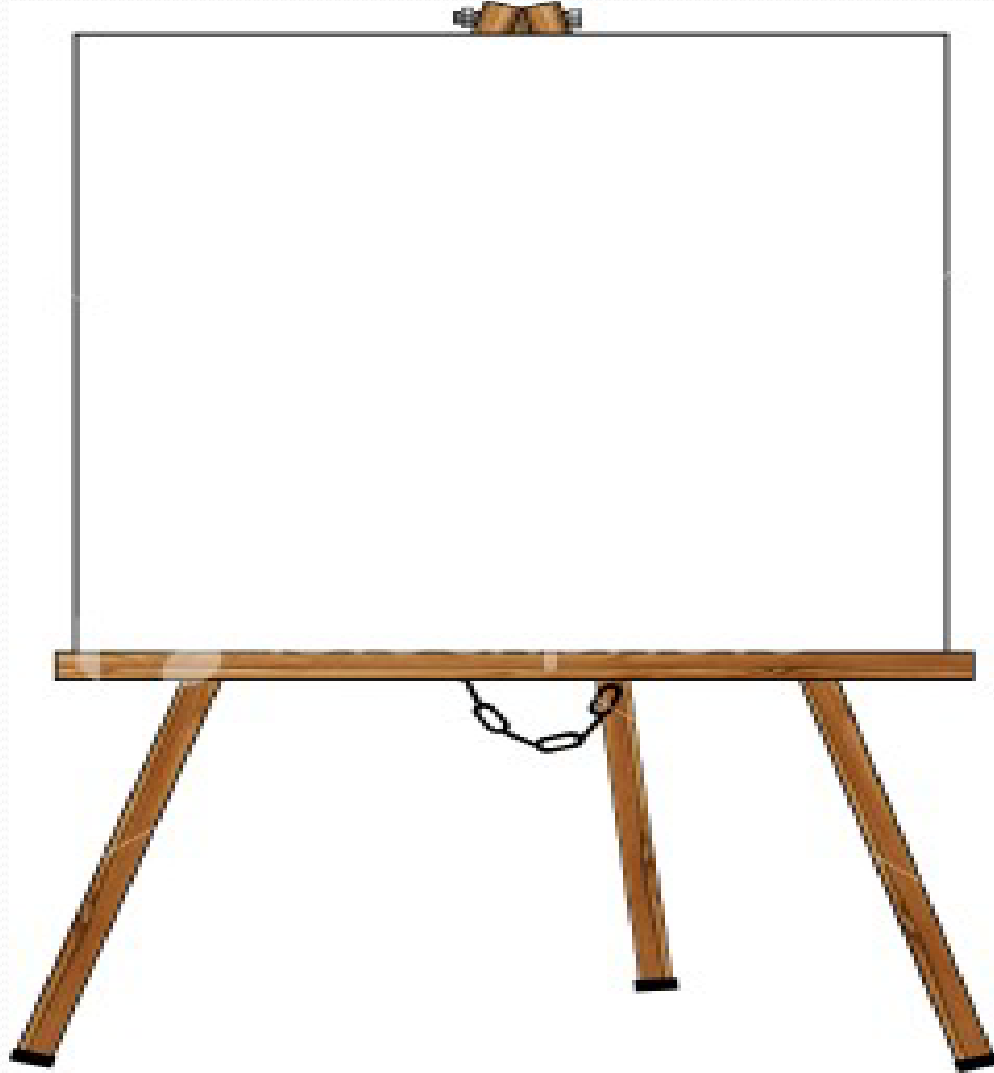
Recent RFEs

- **Well positioned to advance the proposed endeavor-** “Petitioner provide a statement signed by the Petitioner stating the approximate number of hours per week that will be spent on researching duties versus his clinical and teaching duties and any other professional activities.”
- “The Petitioner’s work has generated positive interest among relevant parties, has been implemented by others in the field, or otherwise reflects a record of success in petitioner’s area of research.”

Recent RFEs

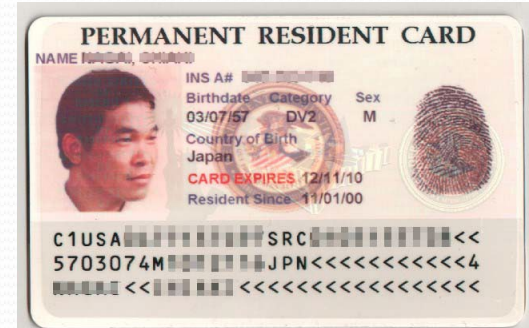
- **-Balancing Factors to Determine Waiver's Benefit to the United States:**
- “Petitioner has not demonstrated, as claimed, that he presents benefits to the-United States through his proposed endeavors that outweigh those inherent in the labor certification process.”
- “Petitioner has not shown that it would be impractical either for the petitioner to secure a job offer or for the petitioner to obtain a labor certification. Further, the petitioner has not demonstrated that his endeavors may lead to potential creation of jobs.”

NIW: Creation and Persuasion



Keep in Mind the Standard

- 1. “Substantial merit and national importance”
- 2. “Well positioned to advance the proposed endeavor.”
- 3. “On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.”



How Long Does it Take?

- Nebraska Service Center
- I-140 Immigrant Petition for Alien Worker (Advanced Degree or Extra-ordinary ability requesting an National Interest Waiver)
- Currently takes about 8-12 months. (Could not previously be Premium Processed, but now it can). Note expansion of PP to NIW.
- EB-2 Category Currently subject to Visa Retrogression. Concurrently file with I-485 Application for Adjustment of Status to Permanent Resident if and when priority date is current.

What happens after filing an NIW?

- 1. Approved----- Green light to apply for permanent residency or continue the process if concurrently filed.
- 2. Denied----- without prejudice (can file again) (must disclose on any future I-140s that you did previously file and your I-140 was denied.
- Request For Evidence (RFE)
- Can be appealed (AAO) Very lengthy and difficult. USCIS lists current processing times for Appeals at 12 months?

Other Information

- File with the USCIS Nebraska Service Center
- 15 month processing time
- Cannot be premium processed (decision in 15 days or less) unless received on or before June 1, 2021.

Form *

I-140 | Immigrant Petition for Alien Workers

Form Category *

Advanced degree or exceptional ability requesting a National Inter.

Field Office or Service Center *

Nebraska Service Center

Get processing time

Processing time for Immigrant Petition for Alien Workers (I-140) at Nebraska Service Center

80% of cases are completed within

15
Months



- Questions?



Daniel W. Oldenburg, Attorney

Cline Williams

233 South 13th Street Suite 1900

Lincoln, NE 68508

(402)479-7125

doldenburg@clinewilliams.com