National Interest Waivers

In most of the employment-based immigration visa categories, the applicant must go through the labor certification process. However within the EB-2 category, there is a way that an applicant, who would normally have to have his or her employer file a labor certification request can have the labor certification requirement waived if it can be proven that the employee's work is in the national interest of the United States. This is known as a National Interest Waiver (NIW). There are two types of NIW cases: the physician NIW and the standard NIW.

**Standard NIW Cases**

For the NIW applicant who is not a physician, there are two major criteria that have to be met. First, the position of employment must be one that requires an advanced degree, that is, one that is beyond a baccalaureate degree such as a Master's degree or PhD. An applicant who has a baccalaureate degree plus five years of experienced can also be considered to have an advanced degree. The second criterion is that the employment must be in the national interest.

There is no formal rule defining 'national interest'. However, there is a list of factors that show whether the applicant's work constitutes being in the national interest:

- The applicant's work will improve the US economy;
- The applicant's work will improve wages and working conditions for US workers;
- The applicant's work will improve educational and training programs for US children and under-qualified workers;
- The applicant's work will provide more affordable housing for young, aged, or poor US residents;
- The applicant's work will improve the US environment and lead to more productive use of the national resources; or
- The applicant's work is requested by an interested US government agency.

Demonstrating that an area of employment is in the national interest is further divided into three requirements. These three elements are listed in the case In re New York State Department of Transportation, 22 I. & N. Dec. 215, Interim Decision (BIA) 3363 (1998). First, the employer, or petitioner, must show that the applicant seeks employment in an area of intrinsic merit. Second, the petitioner must show that the proposed benefit provided through the applicant's work would be national in scope. Finally, the petitioner must demonstrate that the national interest would be adversely affected if a labor certification is required for the foreign applicant. All three of these elements must be proven in detail, as well as the advanced degree requirement.

To adequately address these requirements, it is helpful to provide letters from the applicant's direct supervisor and co-workers explaining the work in layman's terms and why this work is beneficial to the entire United States. Letters from the employing organization should also explain why this specific individual must be retained by the organization and why a search for a US citizen or legal permanent resident employee would not measure up to the foreign applicant's qualifications. If the applicant is receiving funding or grants from US government agencies, they

should also provide letters explaining the work and why their agency funds it. The applicant should also submit any requests for patents or grants that are pending or were already approved.

To meet the degree requirement, copies of the applicant's degrees and curriculum vitae should be submitted. Also helpful in establishing that the applicant is qualified for the position and should be retained are copies of the applicant's most recent publications and a list of citations of his or her work, which should include the number of times each of the applicant's publications was cited in another's work.

Establishing that an applicant qualifies for a National Interest Waiver requires a well-crafted argument outlining how each specific NIW requirement has been met by the applicant. Many times, USCIS will agree that an applicant does possess the requisite degree, is working in a field of intrinsic merit and that the work will be national in scope. It is addressing the final NIW requirement that results in Request for Evidence (RFE's) and denials from USCIS. Because of this, it is extremely important to have an attorney familiar with the NIW process to assist in drafting a petition for this type of case.

**Physician NIW Cases**

In 1999, the US government enacted the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95, also known as the Nursing Relief Act. Section 5 of this act amended the Immigration and Nationality Act by adding the rules for national interest waivers that are filed by or on behalf of physicians.

To qualify for a physician NIW, the foreign physician must:

1. Agree to work full-time in a clinical practice. For most physician NIW cases, the required period of service is 5 years. However, those who filed an immigrant visa petition before November 1, 1998 are required to perform only 3 years of service. The beginning of the required service period varies depending on whether the applicant previously secured a J waiver based on service in an underserved area or not.

2. Work in a primary care specialty, which includes family or general medicine, pediatrics, internal medicine, obstetrics/gynecology, and psychiatry.

3. Serve either in a Health Professional Shortage Area (HPSA), Mental Health Professional Area (MHPSA – for psychiatrists only), a Medically Underserved Area (MUA), or a Veterans Affairs facility.

4. Obtain a statement from a federal agency or a state department of health that has knowledge of the physician's qualifications that states that the physician's work is in the public interest.

To begin the NIW process, the physician should first try to obtain the statement from the federal agency or state department of health. Each agency and department of health has its own

procedures for obtaining this statement. The physician should contact the appropriate agency to obtain this information.

Next, the physician must apply for the NIW on From I-140 with USCIS. The following evidence must also be submitted (for those who will serve at more than one practice site, the following must be submitted for *each* site):

- A full-time employment contract, issued and dated within 6 months prior to the date the petition is filed, for the required period of clinical medical practice (5 or 3 years), or an employment commitment letter from a Veterans Affairs facility.

- If the physician will establish his or her own practice, the physician must submit a sworn statement committing to the full-time practice of clinical medicine for the required 3 or 5 year period, and describe how the physician has or intends to establish the practice.

- Evidence that the physician will provide full-time clinical medical service, either:

    - In a geographical area (or areas) designated by the Secretary of Health and Human Services as having a shortage of health care professionals and in a medical specialty that is within the scope of the Secretary's designation for the geographical area or areas; or

    - In a facility under the jurisdiction of the Secretary of VA.

- A statement, issued and dated within 6 months prior to the date the petition is filed, from the Department of Veterans Affairs or a state department of health attesting that the physician's work is or will be in the public interest.

- Evidence that the physician has passed a US medical licensing examination and is competent in oral and written English.

- If the physician was a J-1 nonimmigrant who received medical training in the United States , he or she must also provide a copy of the USCIS approval notice of the J-1 visa waiver.

If a physician chooses to relocate to a different underserved area, he or she must submit a new I-140 petition that documents the reasons for the proposed relocation. In this case, USCIS will count the total amount of time the physician is engaged in full-time practices in calculating the amount of service in the underserved areas.

If the underserved area where the physician works loses its underserved designation, the physician is not required to relocate to another underserved area.

When the I-140 application is filed, the physician may also concurrently file his or her I-485 adjustment of status application. However, this option is not available to those whose country is backlogged in the EB-2 green card category.

When the physician can file the I-485 petition, he or she can also apply for an Employment Authorization Document (EAD). This will relieve the physician of having to maintain his or her nonimmigrant visa status prior to the adjudication of the adjustment of status application. The physician may also apply for advance parole, so he or she can travel outside the US while the adjustment application is pending.

USCIS will not make a final decision on any adjustment of status application based on a physician NIW application until the physician has shown that he or she has worked full-time as a physician for the required 3 or 5 year period. Upon receipt of the I-485 application, USCIS will note the date the physician began medical service and will provide the physician with a list of evidence that must be submitted showing compliance with the required service period and a timeline of when this evidence must be submitted.

This evidence includes the physician's individual tax return documents and documentation from the employer attesting that the physician has in fact performed the required full-time clinical medical service. This employer attestation must specify the date that the physician began medical service in the practice area or facility and state that full-time medical service has been provided. If a physician is self-employed, he or she must submit documentation proving that the medical practice has been established, including proof of incorporation if the practice is incorporated, business licenses, and business tax returns.

If a physician fails to file proof of his or her completion of the service requirement in a timely fashion, the agency will deny the application for adjustment of status and revoke approval of the Form I-140.

Like the standard NIW case, the physician NIW case can be a complicated matter. Margaret W. Wong and Associates suggests that interested applicants call to make an appointment to discuss their case.