

NATIONAL INTEREST WAIVERS-REVISITED

By Joseph Whalen (Sunday, October 2, 2016)

Although I have written on this topic previously, now seems to be an opportune time to do so again. On August 31, 2016, DHS-USCIS published its "International Entrepreneur Rule" which is a *Parole Program* based upon a directive of the Secretary in one of his November 20, 2014, Memos. The intended parole recipients are "*entrepreneurs of start-up enterprises*" and can include *inventors* and *researchers* among them. The Secretary indicated an intent to offer parole to those among the defined class who would not yet qualify for a National Interest Waiver (NIW). In conjunction with this effort, the Secretary also directed USCIS to revisit the NIW criteria in order to make NIWs more accessible to this group of individuals. I interpret this *Parole Program* as a prelude to an EB-2 visa with a NIW.

The Secretary directed USCIS to issue guidance or regulations clarifying the NIW criteria with the goal of making NIWs more attainable. It is this author's opinion that regulations would be the better approach to NIW criteria clarification. The current NIW "test" derived from the single precedent¹ is too esoteric to be of much use. Too much is left unsaid. AAO's standard explanation of the legal framework of the NIW includes the following verbiage:

"Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise" S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Matter of New York State Department of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. **First**, a petitioner must demonstrate that he or she seeks employment in an area of

¹ *Matter of New York State Department of Transportation*, 22 I&N Dec. [215](#) (AAO 1998) (*NYSDOT*).

substantial intrinsic merit. *Id.* at 217. **Next**, a petitioner must show that the proposed benefit will be national in scope. *Id.* **Finally**, the petitioner seeking the waiver must establish that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest **waiver hinges on prospective national benefit, a petitioner's assurance** that he or she will, in the future, serve the national interest **cannot suffice** to establish prospective national benefit. *Id.* at 219. Rather, a petitioner must justify projections of future benefit to the national interest by establishing a history of demonstrable achievement with some degree of influence on the field as a whole. *Id.* at 219, n.6.”

Matter of S-H-A-, 18325 (AAO Sept. 16, 2016), at p. 2 [A recently posted AAO *Sustained Appeal* decision on an EB-2 petition, with a NIW.]

I will dare to suggest that the *Parole Program*'s initial two-year period is designed to allow “superstars” to prove themselves and submit an I-140 as a quick next step. I will dare to further suggest that the single re-parole period of three-years, conditioned on “significant signs of growth” is a reasonable limitation. This additional time should allow those with a high probability of attaining the EB-2 with NIW, to strengthen their cases and then apply. The remainder, defined as: *those who realize that they cannot qualify for the three-years of re-parole, or realize during that period that they cannot qualify for the EB2 with NIW*; can:

1. Make arrangements for a graceful departure;
2. Make arrangements for departure while awaiting their I-941 denial; or
3. Seek some other status, if any exists for them.

Like a once-popular song said, sometimes *you have to be cruel to be kind*. It is in that vein that this article is written.

Having laid out the current interpretation above, it is now time to suggest changes to the NIW criteria if it is to be included in the regulatory framework. No such criteria yet exist so it is necessary to review the statute.

Section 203(b) of the Act [8 U.S.C. § 1153(B)] states, in pertinent part:

- (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. - Visas shall be made available ... to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer-

(i) National interest waiver. ... the ~~Attorney General~~ [Secretary of Homeland Security] may, when the ~~Attorney General~~ [Secretary of Homeland Security] deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

As is the case with a large proportion of 8 C.F.R., Chapter I, the regulations are in need of revision.

8 C.F.R. §204.5 Petitions for employment-based immigrants.

(a) *General.* A petition to classify an alien under section 203(b)(1), 203(b)(2), or 203(b)(3) of the Act must be filed on Form I-140, Petition for Immigrant Worker. A petition to classify an alien under section 203(b)(4) (as it relates to special immigrants under section 101(a)(27)(C)) must be filed on Form I-360, Petition for Amerasian, Widow, or Special Immigrant. A separate Form I-140 or I-360 must be filed for each beneficiary, accompanied by the applicable fee. A petition is considered properly filed if it is:

- (1) Accepted for processing under the provisions of part 103;
- (2) Accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program; and
- (3) Accompanied by any other required supporting documentation.

(b) *Jurisdiction.* Form I-140 or I-360 must be filed in accordance with the instructions on the form.

(c) *Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

* * * * *

(k) *Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.*

(1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of the professions holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business. **If an alien is claiming exceptional ability in the sciences, arts, or business and is seeking an exemption from the requirement of a job offer in the United States pursuant to section 203(b)(2)(B) of the Act, then the alien, or anyone in the alien's behalf, may be the petitioner.**

(2) *Definitions.* As used in this section: *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

(3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

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(4) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program—*

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule-A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750² in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule-A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

² The form has changed. Currently, the ETA-9098 is used for this purpose.

(ii) *Exemption from job offer.* The director may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business if exemption would be in the national interest. To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.

At this point in the regulation it would be necessary to elaborate on the three basic criteria specified in *NYS DOT*. To do so, I would add additional levels to the regulation. As a refresher, the C.F.R. is organized in a specific order which is also codified.

1 C.F.R. §21.11 Standard organization of the Code of Federal Regulations.

The standard organization consists of the following structural units:

* * * * *

(h) Paragraphs, which are designated as follows:

level 1 (a), (b), (c), etc.

level 2 (1), (2), (3), etc.

level 3 (i), (ii), (iii), etc.

level 4 (A), (B), (C), etc.

level 5 (1), (2), (3), etc.

level 6 (i), (ii), (iii), etc.

With the above as our guide, the existing 8 C.F.R. § 204.5 (k)(4)(ii) would continue by adding new information from level 4 onward. Beginning with the often quoted words from *NYS DOT* as a starting point and improvising from there.

(A) While the national interest waiver hinges on prospective national benefit, a petitioner's assurance that he or she will, in the future, serve the national interest cannot suffice to establish prospective national benefit. Rather, a petitioner must justify projections of future benefit to the national interest by establishing a history of demonstrable achievement with some degree of influence on the field as a whole.

(1) In the case of a recipient of *International Entrepreneur Parole*:

- (i) Business records demonstrating rapid growth,
- (ii) Quarterly filing showing job creation; and
- (iii) ??????????????

(2) In the case of inventors or innovators:

- (i) Records showing patents attained and/or patents pending;
- (ii) Records showing copyrights for software/programs;
- (iii) Proof of grants, or other funding including stipends, scholarships, travel budgets;
- (iv) Contracts or letters of engagement; and/or
- (v) ??????????????

(3) In the case of researchers:

- (i) Proof of scholarly publications;
- (ii) Proof of presentations at professional events, meetings, conferences;
- (iii) Proof of grants, or other funding including stipends, scholarships, travel budgets;
- (iv) Proof of rapid progression within the profession;
- (v) Contracts or letters of engagement; and/or
- (vi) ??????????????

(4) In the case of a new entrepreneur petition (w/o parole):

- (i) Proof of prior entrepreneurial success, and
- (ii) A Business Plan demonstrating
- (iii) Credible market research supporting the BP;
- (iv) Proof of sufficient funding from a lawful sources or sources; and
- (v) ??????????????; and/or
- (vi) ??????????????

(B) The petitioner must also demonstrate that he or she seeks employment in an “area” of substantial intrinsic merit.

- (1) How is this “area” special, or of intrinsic merit?
- (2) Why does this endeavor substantial”
- (3) ??????????????

(C) The petitioner must also show that the proposed benefit will be national in scope.

- (1) How will it be national in scope?
 - (2) Explain the interrelationship of the alien's work product *and* the larger economy or business arena; scientific or academic arena; within their profession; or among *the arts*.
 - (3) ??????????????
- (D) The petitioner seeking the waiver must also establish that he or she will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.
- (1) How would the employer or the business be harmed if the labor certification process were pursued?
 - (2) What past successes has the alien attained that can be replicated in the U.S.?
 - (3) How is the alien more qualified than the most other available workers?
 - (4) ??????????????????

The above are merely something to consider as this dialogue gets started. Please join this conversation.