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US IMMIGRATION & NATIONALITY LAW

HOW TO WIN A NATIONAL INTEREST WAIVER

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by
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This article is not intended to be a comprehensive overview of the National Interest Waiver ("NIW") immigrant visa petition, and is instead a practical account of how our firm recently won a NIW.

The NIW is an immigrant petition for lawful permanent residence under the employment-based second preference ("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 are mandatory prerequisites to the filing of such an employment-based immigrant petition. However, the Immigration Act of 1990 (IMMACT90)[1] 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"[2] who will "substantially benefit prospectively the national economy, cultural or educational interest, or welfare" of the United States,[3] i.e. where the foreign national's employment is deemed to be in the "national interest." Yet, neither Congress nor the United States Citizenship and Immigration Services (USCIS) have defined the "national interest." Rather, it has been left intentionally undefined because, "the Service believes it appropriate to leave the application of this test as flexible as possible."[4]

In 1998, the threshold qualifications for a national interest waiver were articulated in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Acting Assoc. Comm. 1998) (NYSDOT). Prior to NYSDOT, NIWs were granted to

a much broader field of applicants including a lawyer who was committed to doing pro bono work and a trombonist. NYSDOT restricted the use of the NIW as a way to bypass the labor certification process for foreign nationals qualifying for placement in the EB-2 category. In NYSDOT, the Administrative Appeals Office ("AAO") defined a three-prong test as the legal standard for adjudicating NIW petitions. Under this test, the foreign national must demonstrate that:

- The area in which the foreign national seeks employment is of substantial intrinsic merit;
- The prospective benefit of the foreign national's services is national in scope; and
- The national interest would be adversely affected if a labor certification were required. That is, the foreign national will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

This firm filed a NIW petition, with the USCIS Texas Service Center, on behalf of a marine scientist who has developed certain pioneering technologies to map vital marine habitats and thus aid in preventing their further degradation, particularly coral reef habitats. We credit Stephen W. Yale-Loehr and Lindsay Schoonmaker for their article, "*National Interest Waivers After NYSDOT,*"[6] which proved to be an invaluable source and provided us with various ideas, now reiterated throughout this article, to aid our preparation of the NIW petition and our response to the USCIS' Request for Evidence ("RFE").

Generally, the first two prongs of the NYSDOT test are relatively easy to meet. For instance, post NYSDOT, the AAO has held that a managing director for a nonprofit organization that creates jobs in the inner cities,[6] a programmer/analyst who developed a software management system for government health care management systems,[7] and a Nigerian businessman who improved the US-Nigerian business relations in the oil business[8] all satisfied the first prong of the NYSDOT test.

To satisfy the second prong, the foreign national must demonstrate that his/her work will have a national impact. For example, in NYSDOT although the foreign national's employment, as a Bridge Engineer with NYSDOT, constructing and maintaining bridges was limited to the local area, New York's bridges and

roads connect the state to the national transport system. Because the proper maintenance and operations of bridges and roads served the interests of other regions as well, the benefit was held to be national in scope. Yet, not all applicants can meet the second prong even if their work is stellar. Thus, a social worker working to successfully rehabilitate drug addicts in one city may not be able to show that his or her work is national in scope. Of course, even in this situation, a social worker might be able to demonstrate that his or her work, though focused in one city or neighborhood, has been showcased throughout the country, and that his or her innovative techniques have influenced the field as a whole. Under these circumstances, a social worker may be able to meet the second prong of NYSDOT.

Still, it is the third prong which has proven to be the most difficult to establish and has been the sole subject of many RFEs. Under this prong, it should be noted that although a NIW is granted based on prospective national benefit, the foreign national's past record must justify projections of future benefit to the national interest. In other words, the prospective national interest must not be entirely speculative, but based on demonstrable prior achievements. The foreign national must have a provable strong track record in their field.

On behalf of our client, we filed an extensively detailed NIW petition clearly demonstrating each of the three prongs of the NYSDOT test. Besides the requisite copies of her advanced degrees, including a Ph.D, we submitted proof of her scholarly publications and presentations; copies of numerous published articles or book chapters by other researchers citing or otherwise recognizing her work; copies of newspaper articles describing her research; documentation of her receipt of grants and awards; letters requesting her participation in pioneering research expeditions; and seven letters of recommendation from experts in the field such as esteemed professors and research scientists. The NIW petition also included many articles on coral reefs and their importance, as well as their decline and endangerment. Nevertheless, the USCIS, as it does more often than not, issued an RFE. The RFE focused solely on further proving the third prong. The USCIS' RFE plainly acknowledged that our client had already submitted evidence meeting the first two prongs of NYSDOT, namely that she was working in an area of "substantial intrinsic merit," and which is "national in scope." The RFE clearly requested further evidence to demonstrate our client's ability to serve the national interest to a greater extent than other individuals with the same level of education, training, and/or experience.

The third prong is so notoriously difficult to demonstrate because, as many RFEs indicate, the foreign national is required to show him or herself to be substantially better than others in the same field. For foreign nationals who may not be immediately recognizable as leaders in their fields, this may prove exceedingly difficult. In NYSDOT, despite qualifying under the first two prongs, the foreign national Bridge Engineer failed the third prong because he was not found to be sufficiently influential in his field such that he would benefit the national interest to a greater degree than qualified U.S. workers who could provide the same services. The AAO also emphasized that the shortage of qualified workers in a given field, regardless of the nature of the occupation, does not constitute grounds for a national interest waiver because this is exactly the sort of circumstance that a labor certification is supposed to address. Therefore, any attempt to satisfy prong three ought not to include an argument on the uniqueness of the foreign national's skill set. The labor certification requirement exists, according the NYSDOT, "because protecting the job opportunities of U.S. workers having the same objective qualifications as a foreign national seeking employment is in the national interest. A foreign national seeking an exemption from this process must present a national benefit so great as to outweigh the national interest in the labor certification process."[9]

In their article, Stephen W. Yale-Loehr and Lindsay Schoonmaker have observed that the third prong of the NYSDOT test is almost like the "extraordinary ability" standards under the Employment-based First Preference (EB-1-1) required for those establishing themselves as persons of extraordinary ability, which comprises ten regulatory criteria out of which the applicant must readily meet at least three.[10] This should not be the case for the NIW as there is nothing in the statute, INA §203(b)(2)(B), which requires the applicant to demonstrate extraordinary ability or something close to it. Indeed, a plain reading of the statue requires the applicant to demonstrate how he or she will advance the national interest; not what one has done for oneself! Yet, the USCIS wants applicants to demonstrate otherwise, that they are one of the few individuals who have risen to the very top of their fields through various criteria including receipt of awards, published material about them, citations of their work, etc. While the third prong of the NYSDOT test is not identical to the EB-1-1 requirements, a foreign national who can prove qualifications under the EB-1-1 criteria will be better able to demonstrate that he or she will serve the

national interest to a substantially greater degree than others. This is because he or she would have won awards, judged the work of others, etc. and it is easy for the USCIS to examine such tangible[11] evidence as a guide to the applicant's future contributions to the U.S. At the same time, if the applicant is unable to demonstrate some kind of "extraordinary flavor," he or she should still argue that there is sufficient evidence that has been submitted to demonstrate advancement of the national interest, which is what the statute requires and nothing more. Indeed, one deliberately makes a strategic choice to opt for the NIW rather than the EB-1-1, in certain cases, since the applicant may not be at the top of his or her field, but may still be advancing the national interests of the USA.[12]

Despite the fact that the USCIS specifically requested additional information under prong three of the NYSDOT test, our response to the RFE focused on all three prongs of the test. While the first two prongs of the NYSDOT test are usually easier to demonstrate, NYSDOT did not rank each prong on its importance. Accordingly, we thought it a good idea to reiterate our client's qualifications under each of the three prongs. Our RFE response highlighted previously submitted evidence and also provided the USCIS with additional documentation to further clarify that our client's work as a marine scientist to save and protect coral reefs had "substantial intrinsic merit" and was "national in scope" including the fact that since the filing of the petition, the new U.S. President, President Barack Obama, had committed in a June 12, 2009, proclamation, his support to protect the oceans, coasts, and Great Lakes of the United States.

The RFE also asked for additional citations of our client's work *after* the petition was filed, which we readily submitted. However, we also found it strange that the USCIS was requesting evidence that would be normal for a person who filed an EB-1-2 petition as an Outstanding Professor or Researcher under INA 203(b)(1)(B) and not under the National Interest Waiver. In addition, we also submitted two additional letters of reference, one from an expert in the field and one from the scientist's new employer.

In rebutting the RFE, it was most important to overcome the USCIS' partiality to the labor certification process. The Yale-Loehr/Schoonmaker article stressed the importance of narrowly defining the foreign national's field in the NIW petition. That way, it becomes easier to demonstrate the foreign national's

superiority to others in the same field. In our case, our marine scientist client was not a run of the mill researcher of coral reefs, even though such research is vital. Instead, we also demonstrated that she was a pioneer of certain technologies that were now in wide use and that her work not only focused on the environment but was also applied to certain military applications. Thus, filing a labor certification on her behalf would be futile.

Instead of focusing strongly on the uniqueness of our client's work or that her employment was necessary to satisfy a labor shortage, we focused on the fact that she is widely recognized as playing a foundational, pioneering role in her endeavor, through the use of technology that is crucial to map environmental degradation in coral reefs, which in turn could forestall and even reverse the extensive damage they have already suffered. Accordingly, obtaining a labor certification on her behalf would be futile and would not serve the national interest because it would be senseless to require an employer to test the labor market for a U.S. worker who would qualify with minimal skills required in the job offered. On the other hand, in the instant case, the urgent need to reverse the adverse impacts on the environment, needed the abilities of someone like our client who was already well entrenched in her field through her pioneering work. In other words, the American people, and future generations, already impacted by an adverse environment, could ill afford to wait for the labor market to be tested when someone had already so readily proven her ability to protect the environment, especially the oceans, from further damage.

Further demonstrating the futility of a labor certification, we highlighted the fact that the types of employers who desired someone with our client's expertise, especially US government agencies, could not offer her a position because such high level employment requires access to various facilities for which lawful permanent residency or U.S. citizenship is required. This point made it clear, once again, that the lengthy labor certification process would not be in the national interest. Depending on the circumstances, it might also be worth demonstrating that a labor certification is impossible. For instance, a self-employed consultant would never be able to sponsor oneself through a labor certification as there is no distinct employer. In fact, the DOL regulations prohibit one who is the owner of the corporation from filing a labor certification on his or her own behalf as this person might negatively influence the good faith effort to recruit US workers. Also, one can show that certain governmental agencies do not have a policy of filing labor certifications on behalf of foreign

nationals even though they may be critically needed.

Letters from experts arguably constitute *the* most convincing evidence of the foreign national's qualifications and contributions to the national interest. These letters are therefore a crucial tool in providing the USCIS with a context for understanding the foreign national's work, its significance and impact on the field, and the recognition that both the work and the foreign national have received. They must be detailed and must also demonstrate the importance or worth of the letter writer in the field. In responding to the RFE, it was important to highlight the significance of the expert letters submitted with the initial NIW petition, going through each letter again to reiterate the important passages that justified our client's work in the national interest of the country. The additional letter, submitted at the time of the RFE demonstrated that our client's influence on her field of employment is such that there is no shortage of experts willing to comment on her impressive record of specific prior achievement justifying projections of future benefit to the national interest.

Finally, because our client had obtained prestigious new employment since the filing of the NIW petition, we provided a lengthy letter from the new employer highlighting the employer's need for our client, among many other candidates who had applied, and focusing on her job duties in the context of the organization's goals and the importance/urgency of her work, such that obtaining a labor certification would be a futile process that would undermine the national interest.

Due to the inconsistent adjudication of NIW petitions, there is no surefire plan of attack and it is difficult to solidly predict the success of these petitions. However, our recent success provides some hope that if in addition to proving the first two prongs of the NYSDOT test, counsel can also overcome the most difficult and amorphous third prong, which is that due to the importance of the foreign national's work in advancing the environment, it would NOT be in the national interest if a labor certification were required, success is achievable. We and our client were thrilled when we received the approval of the I-140 petition!

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[1] Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978.

[2] INA §203(b)(2)(B).

[3] INA §203(b)(2)(A).

[4] *See* Supplementary information to Service regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991).

[5] PLI Course Handbook, Basic Immigration Law 2008.

[6] *Matter of* ___, VSC, EAC 01-010-50438 (AAO Feb. 4, 2003).

[7] *Matter of* ___, VSC, EAC 98-130-54376 (AAO Jan. 1, 1999).

[8] *Matter of* ___, VSC, EAC 99-144-51371 (AA0 Aug. 22, 2002).

[9] *NYSDOT*, 22 I&N. Dec. at 218.

[10] In fact, the AAO has explicitly held that satisfaction of the extraordinary ability standards is not required for an NIW petition. *See Matter of* ___, VSC, EAC 98-120-50192 (AAO June 29, 1999) and *Matter of* ___, VSC, EAC 98-135-53585 (AAO July 14, 1999).

[11] INA §203(b)(1)(A); 8 C.F.R. §204.5(h)(3)

[12] Also, if one is born in India or China, it makes more sense to attempt an EB-1 as the dates are current for these two countries.