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THE NATIONAL INTEREST WAIVER: UNDERSTANDING ITS HISTORY AND NAVIGATING ITS TERRAIN

by Paul Herzog*

There is a bipartisan consensus that the U.S. should amend its immigration laws to retain highly skilled foreign nationals, especially those with advanced degrees in sciences and engineering.[1] And no wonder—the majority of advanced degrees in engineering (and a third of those in science and mathematics) are awarded to noncitizens,[2] and many of these are employed in critical positions in "sunrise" industries, such as nanotechnology, biotechnology, and development of alternative fuels. But congressional action is mired in political gridlock, and observers are only cautiously optimistic that reform will be enacted during the current session.[3]

In the meantime, there is one route for scientists and engineers to pursue a green card: the national interest waiver (NIW). First enacted by the U.S. Congress in 1990, the NIW allows aliens with advanced degrees or exceptional ability[4] to receive a waiver of the labor certification requirement if they can show that granting such a waiver would be "in the national interest." The particular appeal of the NIW stems from the fact that, in obtaining the waiver, aliens can "self-sponsor" themselves and don't have to rely on an employer to petition for them. But in implementing this provision, U.S. Citizenship and Immigration Services (USCIS) has taken foreign nationals and their lawyers on a roller coaster.

Congress gave scant guidance as to its intent when it enacted this provision, making no reference to it during the floor debate.[5] In the absence of such guidance, the Immigration and Naturalization Service (INS) initially enunciated broad principles to govern adjudications through its 1992 appellate decision *Matter of Mississippi Phosphate*.[6] The Administrative Appeals Unit (AAU) [now the Administrative Appeals Office (AAO)] listed seven factors that could be considered for determining how an

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alien could advance the national interest. These factors were (1) improving the U.S. economy, (2) improving wages and working conditions for U.S. workers, (3) improving education and programs for U.S. children and underqualified workers, (4) improving health care, (5) providing more affordable housing, (6) improving the U.S. environment and making more productive use of natural resources, and (7) interested government agency request.

The broadness of the guidelines encouraged INS adjudicators to approve a wide range of petitions. The liberality with which NIWs were granted was the subject of a notorious article in the Wall Street Journal. The article apprised the broader public of the NIW and how it was being granted to, among others, golf course designers and science fiction writers as well as nuclear physicists and AIDS researchers.[7]

But this liberality quickly came to an end. Possibly the gently mocking tone of the Journal article irritated officials within the INS. In any event, in August of 1998, through its decision in *Matter of New York State Department of Transportation (NYSDOT)*,[8] the INS promulgated much narrower guidelines for issuance of the national interest waiver and, for the first time, provided a detailed analysis for adjudicators to follow. This analysis required applicants to demonstrate that:

(1) the person is seeking employment in an area of substantial intrinsic merit;

(2) the benefit will be national in scope; and

(3) the national interest would be adversely affected if a labor certification were required.

The issuance of this decision and its implementation by adjudicators at the service centers was justifiably viewed by the immigration bar with great trepidation.[9] And indeed, the days of easy approvals were over. However, now that more than a decade has passed, we have significant caselaw from the AAO to offer guidance on what does or does not make a good NIW case.

"Employment in an area of substantial intrinsic merit"

This is probably the easiest criterion to establish. Every single AAO decision that we reviewed found that the petitioner satisfied this criterion.

"Benefits will be national in scope"

Historically, the AAO has permitted a broad definition of "national in scope." In *NYSDOT*, supra, the AAO found that a bridge engineer's work could be considered national in scope since that state's bridges and roads connected to the national transportation system. However, at the same time, it warned that there could be no national scope in cases where the alien's work is highly localized. In *NYSDOT*, the AAO stated:

> [P]ro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest .... As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.[10]

The AAO has reaffirmed this view in recent decisions. In April 2012, it ruled that the work of an acupuncturist could not be considered national in scope since "direct impact of patient treatment is limited to the patients themselves."[11] In May 2011, the AAO ruled that a speech language pathologist could not demonstrate national scope since the benefits of her work were so attenuated and there was no evidence that the beneficiary would be developing national standards or curricula.[12] Likewise in a February 2010 decision in which the petitioner was a special education teacher who claimed to be developing a website that would have a national impact, the AAO noted that no evidence had been submitted showing any national impact.[13] Through these decisions the AAO has established that important regional impact cannot stand in the place of national influence.

In a January 2010 decision for a cardiologist, the AAO reviewed the matter of "national scope" and distinguished between national impact and purely local effect. The cardiologist not only worked as a physician but also performed clinical research. In its decision, the AAO noted, "While cardiac treatment as a whole serves the national interest, the impact of a single cardiologist at the national level is negligible ... Nevertheless, the petitioner is involved in ongoing clinical research that he publishes and presents at conferences. There is no evidence that he seeks to abandon his clinical research to work solely as a physician. Thus, we are satisfied that the proposed benefits of his research would be national in scope."[14] Here, the AAO validates scientific research as a means for fulfilling the "national scope" requirement.

"Alien will serve the national interest to a greater extent than an available U.S. worker with the same minimum qualifications"

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This criterion has proven to be the most difficult for petitioners to satisfy, undoubtedly because it is also the most difficult to understand. However, the AAO's numerous decisions have clarified the meaning of this standard and demonstrated what evidence is acceptable as proof. The AAO has repeatedly made the point that the petitioner satisfies this criterion when he or she can "demonstrate a past history of achievement with some degree of influence on the field as a whole." For researchers, an effective way of demonstrating this is through extensive citation of published work. For example, in an April 22, 2011, decision, the AAO reversed a denial by the service center in the case of a chemist, noting that her scholarly articles had been cited hundreds of times.[15] The AAO also quoted from the detailed reference letters, which explained how the petitioner's work had been the basis for further work by others and for funding from the National Institutes of Health. A strong citation record will even help overcome otherwise weak aspects of a petition. In a November 2011 decision, the AAO noted that, while the letters of reference seemed to have all been written by the same person and the petitioner had only four published articles, those four articles had been cited over 400 times.[16] That superlative record persuaded the AAO to overlook the weak aspects of the case and sustain the appeal.

By contrast, in two decisions issued on the same day, the AAO upheld denials. In one case involving an international relations scholar, the AAO noted that, while the petitioner had authored articles and presented his work, the case lacked evidence that these articles actually had influence on the field as a whole. The AAO specifically referred to the absence of citations.[17] Lack of citation was also a factor in the other case involving a materials engineer. In upholding the denial, the AAO noted the paucity of citations to the petitioner's published work and the absence of evidence demonstrating that the petitioner's work had influence upon the field as a whole.[18] In a decision issued in 2010, the AAO noted that the petitioner's work had been cited only a dozen times and described this as a "minimal number not sufficient to demonstrate that the petitioner's body of work had a significant degree of influence on her field."[19]

However, an absence of citations by itself is not fatal to an application where the petitioner can demonstrate through other objective evidence that his or her work has had an important impact. For example, in a March 2010 decision, the AAO reversed a denial by the service center in the case of a geodesist whose work had not been highly cited. The AAO decision stated:

> The director was correct in finding that citations are a strong gauge of the impact of an alien's published work. Citations are not, however, the only acceptable means of measuring that impact. Also, in this particular proceeding, the petitioner has demonstrated that much of his impact has come through means other than journal publications. Independent witnesses have provided credible, detailed and persuasive explanations of how the petitioner's work has influenced their own efforts, and NGS has consistently indicated that the petitioner is not only valued, but a vital participant in its ongoing efforts. We do not accept the assertion that a shortage is, itself, a strong factor in the petitioner's favor, but our rejection of this assertion does not undermine the other arguments made in this proceeding.[20]

Similarly, in a December 2011 decision, the AAO accepted that citations were not necessary. In that case, the petitioner was not a researcher but played a key role in supporting an important research project and in turn the work of several scientists. Detailed letters of recommendation stood as the main evidence in this case. The AAO gave this evidence considerable weight, noting:

> The petitioner is not, himself, primarily a researcher, and therefore one should not expect to see volumes of published materials in his name. At the same time, he is not merely a laboratory technician, following rote instructions to perform basic functions so that the researchers are free to perform higher level work. Credible witnesses have consistently indicated that the petitioner is largely responsible for creating the conditions necessary for IODP researchers... to achieve optimal results and the remainder of the record supports their assertions...Because the petitioner's primary role is not to produce published research, it is appropriate to look to other means to gauge the impact of his work. The individuals who perform research aboard the JR have made it clear that the petitioner is not simply a technician who maintains laboratory equipment...Rather, the witnesses have credibly, consistently, and in detail explained how the petitioner's work is an integral part of a major, international effort to collect and interpret data with important implications for climatology, disaster preparedness and other highly significant enterprises.[21]

In fact, the AAO has shown itself open to approving petitions largely supported by letters of recommendation provided that these letters are sufficiently credible. Usually this means letters from experts affiliated with the U.S. government. This is evident in a January 2010 decision when the AAO sustained an appeal from a petitioner who had submitted letters of recommendation from experts, including an engineer with the U.S. Department of Agriculture. The AAO noted approvingly that these letters gave specific examples of how the writers were using the petitioner's model in their own work and in the courses that they were teaching.[22]

In January 2010, the AAO also sustained an appeal in the case of an expert in Korean international relations. In an unusual move, the AAO actually had on motion reversed its earlier dismissal and sustained

the appeal after the petitioner was able to show that his opinions were sought after by major news outlets and also submitted letters from officials who had served in sensitive government positions and who attested that the petitioner had a unique and important influence on U.S. government policy.[23]

SUGGESTIONS

The attorney must begin by interviewing the prospective client thoroughly and understanding the importance of the client's work. This can be a challenge—many prospective NIW applicants work in advanced scientific research, and few lawyers have training in those fields. But this is where a good lawyer distinguishes him or herself. The attorney must educate himself or herself about the work that the potential client does and determine if that client's work is indeed in the national interest. If the lawyer does not understand what the client does, neither will the immigration officer.

The key questions to review with a client are:

• How is the client's work important? Who cares about it?

Remember, the crucial element here is not simply that the work (AIDS research, nanotechnology, nuclear safety, etc.) is important but that the client's role in that work is influential. In other words, what has your client personally done that is so valuable to others in that field?

• How can we show through objective evidence that the client's work is important?

Citations are obviously important. But if citations are not available or appropriate, what other objective means can demonstrate the influence of the client's work? Has the client's employer secured contracts or funding based on that work? Have others written to the client requesting information? Has the client's work been featured in trade magazines?

• If letters of recommendation are being submitted, are those letters informative and persuasive?

Are the writers independent experts in the field? Are they affiliated with U.S. government agencies? Do these letters actually explain in detail why the alien's work is important and how it has influenced others working in the field?

In dismissing one appeal, the AAO complained in language repeated in many other dismissals that the letters submitted "primarily contain bare assertions of influence. While the letters discuss the petitioner's work in detail and affirm its importance, **they do not provide specific examples of how his work had influenced the field as of the date of filing.** The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters."[24] (Emphasis added.) The AAO has stated that, to be considered authoritative, letters of recommendation must "provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive."[25]

SUMMARY

National interest waivers are not being approved as easily as in the 1990s. However, good cases, when properly presented, are being approved. The NIW therefore remains a useful option for immigrants performing important work in the United States.

Notes

1 See, e.g., "Streamlining Legal Immigration," http://www.whitehouse.gov/issues/immigration/streamlining-immigration and "Immigration Reform," http://goodlatte.house.gov/pages/immigration.

2 Congressional Research Service, "Science, Technology, Engineering, and Mathematics Education: Background, Federal Policy, and Legislative Action" (Mar. 21, 2008), http://www.fas.org/sgp/crs/misc/RL33434.pdf.

3 Llorente, "Already Facing Uphill Battle, Immigration Reform Doomed by Syrian Conflict" (Sept. 6, 2013), http://latino.foxnews.com/latino/politics/2013/09/06/already-facing-uphill-battle-immigration-reform-could-be-doomed-by-syrian/.

4 A discussion of the 2nd preference exceptional ability requirements is beyond the scope of this article. For an insightful discussion see Alber, "Employment-Based Immigration: The First Three Preferences" in Immigration & Nationality Law Handbook (2003-2004 edition) at 194-196 (AILA).

5 S. Rep. No. 55, 101st Cong., 1st Sess., at 11 (1989).

6 *Matter of Mississippi Phosphate*, EAC 92 091 50126 (AAU July 21, 1992).

7 Newman, "Alien Notions: The 'National Interest' Causes INS to Wander Down Peculiar Paths—Or How a Roving Acrobat Got a Visa While Doctor Probing Cancer Didn't—Is the Curio Cabinet Closed?" (Aug. 20, 1998), The Wall Street Journal, page A1.

8 *Matter of New York State Dept. of Transportation*, 22 I. & N. Dec. 215 (Comm'r 1998).

9 See, e.g., Paparelli and Pigeaud, "Read My Lips: No New National Interest Waivers!" (1998), http://www.seyfarth.com/dir_docs/publications/AttorneyPubs/READ%20MY%20LIPS_No%20New%20National%20Interest%20Waivers.pdf,

and Waxman and Craig, "Seeking the Inscrutable National Interest Waiver: They've All Come to Look for America," 02-09 Immigration Briefings 1 (Sept. 2002).

[10] *NYSDOT,* 22 I. & N. Dec. at 217, n. 3.

[11] *Matter of [name not provided]*, File No. [not provided] (AAO Apr. 19, 2012).

[12] *Matter of [name not provided]*, File No. [not provided] (AAO May 20, 2011).

[13] *Matter of [name not provided]*, File No. [not provided] (AAO Feb. 1, 2010).

[14] *Matter of [name not provided]*, File No. [not provided] (AAO Jan. 8, 2010).

[15] *Matter of [name not provided]*, File No. [not provided] (AAO Apr. 22, 2011).

[16] *Matter of [name not provided]*, File No. [not provided] (AAO Nov. 21, 2011).

[17] *Matter of [name not provided]*, File No. [not provided] (AAO Apr. 21, 2011).

[18] *Matter of [name not provided]*, File No. [not provided] (AAO Apr. 21, 2011).

[19] *Matter of [name not provided]*, File No. [not provided] (AAO Jan. 26, 2010).

[20] *Matter of [name not provided]*, File No. [not provided] (AAO Mar. 11, 2010).

[21] *Matter of [Name not provided]*, File No. [not provided] (AAO Dec. 21, 2011).

[22] *Matter of [name not provided]*, File No. [not provided] (AAO Jan. 25, 2010).

[23] *Matter of [name not provided]*, File No. [not provided] (AAO Jan. 10, 2012).

[24] *Matter of [name not provided]*, File No. [not provided] (AAO Mar. 15, 2010).

[25] *Matter of [name not provided]*, File No. [not provided], (AAO Jan. 8, 2010). ■

1. USCIS Updates H-2B Cap Count for Second Half of FY 2013 and First Half of FY 2014

On September 23, 2013, U.S. Citizenship and Immigration Services (USCIS) updated its statistics on the current cap count for H-2B nonimmigrant workers[26] for the second half of Fiscal Year (FY) 2013. USCIS reports that, as of September 20, 2013, it had approved 28,173 new beneficiaries for the second half of FY 2013 with 749 pending, for a total of 28,922.

USCIS has also advised that, as of September 13, 2013, it has approved 4,657 new beneficiaries for the first half of FY 2014 with 1,892 pending, for a total of 6,549.

The cap for both the second half of FY 2013 and the first half of FY 2014 is 33,000.

Notes

[26] The H-2B classification may be used for nonskilled temporary services and labor. ■

2. DOL Posts Two Notices Regarding OFLC Records Retention

The Department of Labor's (DOL's) Office of Foreign Labor Certification (OFLC) has issued two notices updating its records retention schedule to include case management systems and electronic records.

OFLC's notices explain that, on July 8, 2013, the National Archives and Records Administration (NARA) approved OFLC's revised record retention schedule following a 30-day period of public notice and review. As part of its review and approval process, NARA determined employer applications for labor certification and supporting documentation, whether retained in paper or electronic form, are temporary records and subject to destruction in accordance with an approved disposition schedule. The OFLC-approved disposition schedule authorizes the retention of records for a period of five years following the date a final determination letter is issued, subject to an active investigation or litigation hold. Records retained by the OFLC beyond the five-year period will be destroyed on at least an annual schedule or as determined by the OFLC. Employer applications that are part of an active investigation or pending litigation are exempted from the approved disposition schedule and will be retained until the investigation and/or litigation matters are closed.

OFLC states that as it implements its approved disposition schedule, it will provide notice to the public identifying the records and, where applicable, the associating case management systems and software being destroyed

In addition, the disposition schedule approved on July 8, 2013, authorizes the destruction of case management systems and software as they become obsolete and are no longer needed to administer the program(s). For example, in accordance with OFLC Records Schedule Number DAA-0369-2013-0002, the Paradox database, formerly used by the Employment and Training Administration (ETA) Regional Offices, and which is no longer needed in the administration of the permanent labor certification program was destroyed on September 26, 2013. This database contained information related to employer applications (screenshots of text) filed in 2002 or earlier where the records have been destroyed.