

# National Interest Waiver (NIW) Guide



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## Overview

The National Interest Waiver (NIW) is an employment based green card category that permits self-petitioning. The waiver part of the name is based on the fact that this green card is granted based on a waiver of the job offer and the labor certification (PERM) process. The national interest part of the name is based on the requirement that the waiver can only be granted if it is in the national interest of the United States. The NIW falls under the EB-2 green card category, which means that any applicant must have an advanced degree or equivalent (a baccalaureate or foreign equivalent degree plus 5 years of post-baccalaureate, progressive work experience in the field) or be able to demonstrate exceptional ability in the sciences, arts or business. Changes in NIW law have made NIW petitions more available to entrepreneurs and other categories.

## What are the requirements to apply for a National Interest Waiver?

The NIW falls under the EB-2 category, so as a threshold requirement each applicant must have an advanced degree (Master's or higher) or its equivalent (a bachelor's degree plus 5 years of post-baccalaureate, progressive work experience in the profession) **or** demonstrate that they have exceptional ability in the sciences, arts or business. Applicants can demonstrate exceptional ability by showing that they meet at least three of the following seven criteria: (If exceptional ability is met, the applicant need not have an advanced degree)

- Official academic record showing that you have a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to your area of exceptional ability
- Letters documenting at least 10 years of full-time experience in your occupation
- A license to practice your profession or certification for your profession or occupation
- Evidence that you have commanded a salary or other remuneration for services that demonstrates your exceptional ability
- Membership in a professional association(s)
- Recognition for your achievements and significant contributions to your industry or field by your peers, government entities, professional or business organizations
- Other comparable evidence of eligibility is also acceptable.

Once these threshold requirements are met, there are three additional prongs that must be satisfied in order to demonstrate that you qualify for the National Interest Waiver:

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1. You must show that your proposed endeavor has both substantial merit and national importance;
2. You must show that you are well-positioned to advance the proposed endeavor; and
3. There must be a showing 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.

These prongs are all described in more detail below.

## **1. The proposed endeavor must have substantial merit and national importance.**

### **What does it mean that an endeavor must have substantial merit and national importance?**

This focus of this prong is on what specific endeavor the applicant plans to undertake in the U.S. The NIW is appropriate for a wide variety of areas, including business, culture, health, education, technology, science and entrepreneurialism among others. Endeavors that further human knowledge in key areas (e.g., medical advances or military technology) or produce a strong economic impact may have substantial merit. To determine whether the endeavor has national importance, the government will consider the potential future impact and its importance to the U.S. It is important to note that in *Matter of Dhanasar* the court made it clear that an endeavor can have national importance even if it focuses only on one geographic area. It is not a requirement that the endeavor cover a wide geographic area to prove national importance. For example, if an entrepreneur is starting a business in an economically depressed area and this business plans to employ several U.S. workers, this could be deemed of national importance.

### **How can you demonstrate that the endeavor has substantial merit and national importance?**

The evidence will change depending on your field of endeavor, but for any case it is a good idea to include letters from experts in industry positions (and possibly experts in government and academia), news & media articles from reputable publications and research & academic reports that explain the importance & value of the particular industry or field of endeavor and also why this field has national importance in the U.S.

Below are some examples of how to prove substantial merit and national importance:

- An applicant who was researching the design & development of propulsion systems that had potential to be used in military & civilian technologies successfully argued that this research could enhance U.S. national security & defense. Demonstrating that the research would help U.S. competitiveness in the civil space sector, assist national security and propel scientific knowledge forward proved that the endeavor had substantial merit. Additionally, expert letters from government, academic & industry professionals, media articles and proof of government interest in the applicant's research area demonstrated that the research was important for U.S. strategic interests.
- An entrepreneur who formed a small consulting firm to work on projects focused on improving services to U.S. veterans was able to show that this type of consulting work had substantial merit and national importance. Supporting evidence included letters from future clients, a comprehensive business plan, news & media articles and research reports. These

supporting documents outlined the difficulties faced by returning veterans from Iraq & Afghanistan and showed the value & importance of providing services to these veterans (substantial merit). Letters from experts & leaders in military, government, business & charitable institutions, news articles & evidence of the federal government's own initiatives demonstrated the national importance of the applicant's work in improving services and programs for U.S. veterans.

## **2. The applicant must demonstrate that they are well positioned to advance the proposed endeavor**

### **What does it mean that you are well positioned to advance the proposed endeavor?**

This prong focuses attention on the applicant's background & accomplishments. In order to grant the green card, the government must feel comfortable that you will actually be able to accomplish the job that you propose. Educational background and having a track record of success in your field greatly strengthens this part of the application.

### **How can you demonstrate that you are well positioned to advance the proposed endeavor?**

The government generally wants to see evidence related to the applicant's education, experience, knowledge, skills and any evidence of past success in the relevant industry. Additionally, if the applicant can provide details on their future plans (such as a business plan) and can show that they have made progress on those plans, that can help to meet the NIW criteria. The government may also consider evidence such as contracts, MOUs, letters of intent or other expressions of interest in the project from prospective clients, investors, customers, business or philanthropic organizations or other relevant entities. Letters from experts in the field attesting to the importance of the endeavor and expressing their confidence in the NIW applicant are also helpful for the application.

Below are some examples of the types of proof applicants have submitted to meet the second NIW criteria:

- An engineer engaging in aerospace research that had applications for civilian and military technologies submitted proof of his educational credentials; publications he wrote, as well as proof that others had cited his work; proof that he was a member of prestigious professional associations; letters from experts attesting to his knowledge & skill; and documentation of his research and teaching activities.

- An entrepreneur who formed a small consulting firm to work on projects focused on improving services to U.S. veterans provided letters from government officials, business & philanthropic leaders and industry experts attesting to his prior success working on veterans' issues; a comprehensive business plan outlining his planned activities and including descriptions of services offered, detailed financial assumptions, prospective client targets & marketing strategy; emails & letters from prospective clients confirming an interest in working with the company; and financial statements demonstrating sufficient startup capital to fund the company and execute the business plan.

### **3. On balance, it is beneficial to waive the requirement of the job offer and the labor certification**

#### **What does it mean that on balance, it is beneficial to waive the requirement of the job offer and the labor certification?**

This prong is the one that allows the applicant to self-petition and removes the requirement of a job offer and labor certification. Prior to the adoption of the current NIW test described in the 2017 case, [\*Matter of Dhanasar\*](#), applicants had to prove that the national interest would be adversely affected by requiring a labor certification. This prong caused significant confusion and was one of the reasons the court changed the analytical framework in *Matter of Dhanasar*.

The new prong is meant to convey that while Congress intended to protect U.S. workers by requiring a job offer and requiring that U.S. employers test the labor market before hiring foreign workers, Congress also knew that there would be instances where the benefits from the labor certification's protection of U.S. workers would be outweighed by other U.S. national interests. A good example of this is the entrepreneur example. The labor certification system is not set up to allow entrepreneurs who are majority owners of companies to utilize the labor certification process, however the U.S. has significant national interests in encouraging entrepreneurial endeavors that will employ U.S. workers.

#### **How does an applicant show that on balance, it is beneficial to waive the requirement of the job offer and the labor certification?**

Under the court's new framework, NIW applicants may be successful in meeting this third requirement by submitting evidence of the following:

- Evidence that it would be impractical for the applicant to secure a job offer or for the petitioner to obtain a labor certification in light of the nature of the proposed endeavor or the applicant's qualifications;

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- Evidence that even if there were other qualified U.S. workers, the U.S. would still benefit from the applicant's contributions; and/or
- Evidence that the U.S. national interest(s) being served by the applicant's contributions are sufficiently urgent that to support waiving the labor certification process.

Under this approach, USCIS should evaluate one or more of the factors above to determine whether, on balance, it is beneficial to the U.S. to waive the requirements of the job offer and labor certification. The first factor listed above is particularly relevant to entrepreneurs, as the very nature of the entrepreneurial endeavor means that a labor certification is not usually possible for these types of applicants. Additionally, an applicant's past record of success in an endeavor may be used to demonstrate that the U.S. will benefit from the applicant's contributions even if other U.S. workers were able to work in the same area. NIW applicants who are working on important, time-sensitive research in areas of significant national interest, such as national security, may also be able to demonstrate that their work is so important and time sensitive, that on balance it makes sense to waive the requirement of the job offer and labor certification.

## **What role do expert letters play in a National Interest Waiver Application?**

Expert letters are an important part of a National Interest Waiver application, as they can be used to discuss the applicant's professional history and success, as well as explain the substantial merit and national importance of the proposed endeavor. It is especially helpful when you can provide letters from experts who first met you or contacted you through professional channels because they were favorably impressed after encountering your work in the relevant field (for example, if they heard you give a talk, saw you perform, read a publication by you, or used or purchased a product or service you developed).

### ***Who Should Write the Letters?***

Experts may include past employers or colleagues, professors, clients, editors of peer-reviewed journals or other prominent publications in which you have published your work, researchers who have cited your work or commercialized any aspect of your research, government officials, well recognized figures in the industry & political figures. This is not an exhaustive list and any industry expert may be a good choice. You should discuss any potential letter writers with your attorney. It is important that the letter writers can demonstrate that they are nationally or internationally recognized experts in the field, to help give weight to their opinions.

### ***What Should the Letters Say?***

Although the letter writers do not need to know you personally (and it can actually be stronger for the application if they are familiar with your work but not you, personally), the letters should speak to your contributions to the field and the importance of your proposed endeavor. In terms of the content, the letter should contain a description of the expert's relationship to you, a description of your professional history and impressive contributions to the field (for example, prizes or awards you have won, impressive or influential publications, business success, participation on prestigious panels, impressive exhibitions, ground-breaking research, etc.) and any background information they can provide on your field of endeavor and why it has substantial merit and national importance. Any technical jargon or industry-specific terminology should be explained clearly, as the USCIS officer reviewing the petition will likely not be familiar with your specific industry. The letters should generally be around 2-3 pages maximum and each letter should have its own style and voice. Templates or form letters that repeat the same information in the same language are more likely to be discounted by USCIS.

Let us examine one of the letters written for an accomplished engineer & successful NIW applicant who sought to start a technology, management & workforce development consulting firm addressing the challenges of how companies can stay competitive with the latest technologies while also avoiding job losses because of technological automation. One of this applicant's support letters was written by an established entrepreneur working in a similar field (management consulting, operational design & enhancement). The letter discussed the letter writer's impressive accomplishments (past & current entrepreneurial endeavors, prior success, educational background, advisory role on relevant professional, academic and philanthropic boards) and went on to discuss their knowledge of the applicant, who they became connected with based on a plan

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to create a strategic business alliance with the applicant's company. The letter clearly identified the applicant's field of expertise and explained the substantial merit and national importance of workforce development and entrepreneurship, particularly given concerns about how small and mid-size businesses can implement necessary automation technologies to compete with larger companies while also preserving U.S. jobs. The letter went on to describe the applicant's track record of success within the field and the expert's confidence in the future success of the proposed endeavor.

## **What is the process for applying for a National Interest Waiver? How long does it take to obtain a green card through the NIW category?**

The first step in the National Interest Waiver process involves filing an I-140 Petition with U.S. Citizenship & Immigration Services along with supporting documentation showing you qualify for the EB-2 category and the NIW. If the applicant is in the U.S. in valid status and an immigrant visa is available, an I-485 (Adjustment of Status) application can be filed concurrently with the I-140 Petition, along with applications for work (I-765) and travel (I-131) authorization.

As of the time of this writing (February 11, 2021), there is no option to request Premium Processing for I-140s in the NIW category, although this may become available in the future. As of now, the lack of the Premium Processing option means that it may take several months to receive a response from USCIS on the I-140 Petition. USCIS may approve, deny or issue a Request for Evidence or Notice of Intent to Deny on the I-140 Petition.

If the petition is approved and an I-485 was concurrently filed, then the next step is for the applicant to attend the I-485 green card interview with USCIS. The timing for getting this appointment will depend on the processing times at the local USCIS field office where the applicant resides. Most field offices have processing times of several months.

The applicant may also choose to file the green card application through Consular Processing, which means the I-140 approval would be sent to the National Visa Center (NVC). This process can take several weeks. Once NVC confirms receipt of the approval, the applicant would pay a visa fee, complete an online form DS260 and submit supporting documents to NVC. NVC reviews the documents and will then reach out to the applicant if anything further is needed. Once all documents are received, the case will be sent to a U.S. Consulate abroad and an interview will be scheduled. After the applicant attends the interview, they will be given an immigrant visa and must enter the U.S. within 6 months and their green card will be mailed to them at their new U.S. address.

## **Can a National Interest Waiver petition be used for an Entrepreneur?**

A wide range of fields may qualify for a National Interest Waiver (business, entrepreneurship, science, technology, culture, health, education). In addition, the waiver of the job offer and labor certification makes the NIW an attractive green card category for entrepreneurs. E-2 investors who have created U.S. jobs and can show a track record of strong economic impact in the U.S. and employment of U.S. workers could consider the NIW category if they are interested in pursuing a green card.

### **Can Hiring Employees in a Local Area Satisfy the “Substantial Merit and National Importance” Prong of *Dhanasar*?**

Under *NYSDOT*, the entrepreneur had to provide evidence that the proposed benefit of his endeavor would be national in scope. This requirement was difficult to meet, as an entrepreneur could not often show that localized employment through his enterprise would be national in scope. Under *Dhanasar*, however, the entrepreneur only needs to demonstrate that the proposed endeavor has significant potential to employ U.S. workers, even in their local region. This is a significant departure from the old law and provides opportunities for individuals who are starting businesses that may only impact one city or state.

### **If I Am an Entrepreneur and Thus Self-Employed, How Can I Address the Prong Concerning Labor Certification?**

Under *NYSDOT*, the entrepreneur had to compare himself to other qualified U.S. workers and establish that he would serve the national interest to a substantially greater degree than an available U.S. worker having the same minimum qualifications. The AAO in *Dhanasar* acknowledged that this requirement was especially problematic for entrepreneurs and other self-employed individuals. For example, a self-employed consultant would never be able to sponsor himself through a labor certification, as there would be no distinct employer. Under the more flexible *Dhanasar* standard, which disposes of the comparison requirement and focuses on the entrepreneur’s own background, the entrepreneur can demonstrate that even assuming that other qualified U.S. workers are available, the U.S. would still benefit from the entrepreneur’s unique and exceptional qualifications.

### **In What Other Ways Does *Dhanasar* Support Filings of Green Cards in the NIW Category By Entrepreneurs?**

The U.S. Alliance for International Entrepreneurs issued a press release outlining some of the ways *Dhanasar* supports entrepreneurs:

1. The case allows using the person’s degrees and experience, which benefits educated entrepreneurs with experience in the field.
2. The case allows teaching as evidence, which means that an entrepreneur who also teaches in his field will get a boost in the NIW category.

3. The benefit to the U.S. interest can be local, such as helping to create jobs in a depressed area or creating a specialized local product. Entrepreneurs can argue the impact of their work on the economy, starting regionally, then add national supply chain implications if applicable.
4. *Dhanasar* specifically notes that entrepreneurial work can lead to an NIW.
5. The decision also notes that the entrepreneurial venture does not need to succeed: “many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed.” The business just needs to be “well positioned to advance the proposed endeavor.” This stresses the importance of a high-quality business plan for entrepreneur NIW cases.

### **Can I Only Apply for the NIW with an Established Business or Can I Apply if I have an Idea for a Start up?**

If you have an established business that has created lots of jobs and had a strong economic impact (for example, if you are an E-2 investor who has been running your business for several years), this could be a good basis for a National Interest Waiver case as you could argue the substantial merit and national importance of job creation and economic impact from the business. Additionally, your track record of successfully running the business and hiring employees could help demonstrate that you meet the second prong and are well positioned to advance the endeavor. As a majority owner, the labor certification process would not be an option for you which speaks to the third prong, that it is beneficial to waive the labor certification requirement.

It is also possible to apply for an NIW if you have an idea for a startup and your business is not fully established yet. In an AAO case on NIW post-*Dhanasar*, a self-employed entrepreneur for veteran services submitted a business plan for his proposed company, including types of services, fee structures, marketing strategies, operating budget, financial statements, and a list of potential clients.

As described in the section above, the court in *Dhanasar* specifically contemplated that nascent entrepreneurial endeavors could qualify for the NIW, stating “many innovations and entrepreneurial endeavors may ultimately fail, in whole or in part, despite an intelligent plan and competent execution. We do not, therefore, require petitioners to demonstrate that their endeavors are more likely than not to ultimately succeed. But notwithstanding this inherent uncertainty, in order to merit a national interest waiver, petitioners must establish, by a preponderance of the evidence, that they are well positioned to advance the proposed endeavor.”

### **Have NIW Cases Filed by Entrepreneurs Been Approved?**

Yes. In an AAO case on NIW post-*Dhanasar*, a self-employed entrepreneur for veteran services submitted a business plan for his proposed company, including types of services, fee structures, marketing strategies, operating budget, financial statements, and a list of potential clients.

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The AAO approved the case, stating, “Based on his intention to start a consultancy firm through which he will be self-employed, it would be impractical for him to obtain a labor certification. The record demonstrates the immense value in improving programs and assisting organizations that provide support and advocacy for U.S. veterans and wounded warriors. Furthermore, the Petitioner has a past record of success . . . and he has shown that several organizations in the field are eager to make use of his services as a consultant.”

## **NIW Questions & Answers**

Below are some frequently asked questions about the NIW:

### **Does the NIW require an employer to sponsor the application?**

No. As described in this guide, the NIW allows applicants to self-petition. No sponsor is needed.

### **How long does it take to prepare an NIW application?**

The NIW requires preparation of a significant amount of supporting documents. We provide a detailed questionnaire at the start of the process that asks for all the documents we need. The timeline for how long it will take to gather the documents depends on the individual and how quickly they can pull together the evidence. It also usually takes at least a few weeks (or months) to obtain finalized expert letters, as the letters will usually go through at least one round of editing before they are finalized.

### **How is the EB-2 NIW different from the EB-1A extraordinary ability green card?**

The EB-2 NIW green card category is available for applicants with an advanced degree or equivalent (a baccalaureate or foreign equivalent degree plus 5 years of post-baccalaureate, progressive work experience in the field) or who can demonstrate exceptional ability in the sciences, arts or business. Applicants must also be able to show they qualify for the waiver of the job offer and labor certification requirement by meeting the three prongs listed below:

1. You must show that your proposed endeavor has both substantial merit and national importance;
2. You must show that you are well-positioned to advance the proposed endeavor; and
3. There must be a showing 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.

The EB-1A extraordinary ability green card is available for applicants who have achieved sustained national or international acclaim in the sciences, arts, education, business or athletics. These applicants must be able to show that they have risen to the very top of their field. They can demonstrate this extraordinary ability by either showing evidence of one large achievement, such as a Pulitzer prize or Olympic medal, or by showing they meet three out of the ten criteria listed below.

- Evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence;
- Evidence of membership in associations in the field which demand outstanding achievement of their members;

- Evidence of published material about the applicant in professional or major trade publications or other major media
- Evidence that the applicant has been asked to judge the work of others, either individually or on a panel;
- Evidence of the applicant's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field;
- Evidence of authorship of scholarly articles in professional or major trade publications or other major media;
- Evidence that the applicant's work has been displayed at artistic exhibitions or showcases;
- Evidence of performance of a leading or critical role in distinguished organizations;
- Evidence that the applicant commands a high salary or other significantly high remuneration in relation to others in the field;
- Evidence of commercial successes in the performing arts.

EB-1A applicants must also be planning to continue to work in their area of extraordinary ability.

**What are my options if the EB-2 category is backlogged? Can I remain in the U.S.?**

For foreign nationals born in India or China, there are currently backlogs in the EB-2 category and it is always possible that the category could become backlogged for all applicants. If a category is backlogged, it means that although applicants can file the I-140 Petition, they cannot concurrently file the I-485 adjustment of status until a green card becomes available. The availability changes each month based on the new visa bulletin from the Department of State. The filing of the I-140 Petition does not provide any status, so if an applicant wishes to remain in the U.S., they will need to have some other underlying status that allowed them to remain (H-1B, L-1, E-2, etc.) while they wait for a visa to become available.

**Can my spouse and children apply with me?**

Your spouse and children under 21 may apply for green cards as dependents on your green card application.

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