

Immigration Without Labor Certification: When and Why to File an EB-1 or NIW Petition

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INTRODUCTION

For employment-based immigration, the labor certification application is by far the most common path taken, as the outcome of the process is relatively predictable. Unfortunately, the labor certification process also has tremendous drawbacks. The most significant disadvantages are the permanent "job offer," prevailing wage, and recruitment requirements, as well as some unbearable processing times. The alternatives to labor certification are not panaceas, but in appropriate cases, they offer substantial advantages over the labor certification process.

This advanced-topic paper discusses four of the most common employment-based alternatives for obtaining permanent residency without going through the labor certification process.¹ Specifically, the paper:

- Introduces the basic legal requirements of the three employment-based, first-preference (EB-1) categories, including Aliens of Extraordinary Ability (EB-1A), Outstanding Professors or Researchers (EB-1B), and Multinational Executives and Managers (EB-1C). The requirements for the employment-based, second-preference (EB-2) category of National Interest Waivers (NIW) are also described.²

¹ There are many other alternatives, too, such as:

- Immigrant Investor Visas (EB-5). INA §203(b)(5); 8 CFR §204.6.
- Schedule A, Group II for aliens of exceptional ability. *See* 20 CFR §656.10.
- National Interest Waivers for physicians working in medically underserved areas. INA §203(b)(2)(B)(ii)(I); 8 CFR §§204.12 and 245.18.
- "Special Handling" for college and university teachers. 20 CFR §656.21a. Although "special handling" is technically still a "labor certification," it is also an alternative to the "normal" labor certification process.

In appropriate circumstances, all of these should be considered as well.

² Technically, there are two separate National Interest Waiver provisions: a general one, which is available to all fields, INA § 203(b)(2)(B)(i); 8 CFR § 204.5(k)(4)(ii), and another one that is

- Identifies the primary factors that distinguish these alternatives from each other and from the labor certification process.
- Provides general guidance on deciding which alternative(s) to use if trying to bypass the labor certification process is deemed to be in the client's best interests.
- Assesses options for re-filing or appealing if the Service denies your client's alternative-based I-140 petition.

WHAT ARE THE BASIC REQUIREMENTS OF THE COMMON ALTERNATIVES TO LABOR CERTIFICATION?

Because this is a practice-focused, advanced-topic paper, it focuses on how to use the alternatives to labor certification in practice instead of merely explaining what they are. Practitioners already familiar with these basic requirements can safely bypass this preliminary discussion and go directly to the next major heading. For those less familiar with these alternatives, this preliminary section provides a brief introduction to the basic legal requirements for each of the alternatives discussed in this paper.

Filing procedures

Procedurally, all four of the alternatives to labor certification mentioned in this paper are filed on Form I-140 at the CIS Service Center having jurisdiction over the proposed place of employment. For National Interest Waiver petitions, the petitioner must also include two signed originals of Form ETA-750 Part B describing the beneficiary's educational and employment background.

available only to physicians working in medically underserved areas, INA § 203(b)(2)(B)(ii); 8 CFR §§ 204.12 and 245.18. This article discusses only the general provision.

Aliens of Extraordinary Ability (EB-1A)

The EB-1A category is available for aliens of "extraordinary ability." The category is limited to "one of that small percentage who have risen to the very top of the field of endeavor." For most (but not all) cases, the applicable criteria for the EB-1A category are generally similar to the requirements for the O-1 nonimmigrant visa.³

EB-1A cases require evidence that the alien has achieved "sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." This evidence may include a significant internationally recognized award (such as the Nobel Prize or an Oscar). Otherwise, the individual must meet at least three of the following ten alternative criteria, shown here in abbreviated form:

- Lesser nationally or internationally recognized prizes or awards;
- Membership in associations that require outstanding achievement (as judged by recognized experts);
- Significant published material (written by others) about the beneficiary and his or her work;
- Service as a judge of the work of others in the beneficiary's field;
- Major contributions to the field;
- Scholarly articles or publications;
- Artistic exhibitions or showcases;
- Leading or critical role for distinguished organizations;
- High salary or remuneration (compared with others in the field); or
- Commercial success in performing arts.

The regulations also allow for the use of "comparable evidence" to establish the beneficiary's eligibility if the

³ Compare 8 CFR § 204.5(h) with 8 C.F.R. § 214.2(o). Whereas there is only one version of the EB-1A category, there are several different versions of the O-1 category, depending on the field of extraordinary ability.

above standards do not readily apply to the beneficiary's occupation.⁴

EB-1A cases do not require a permanent job offer, so beneficiaries may self-petition. If self-petitioning, the beneficiary must provide clear evidence that he or she is coming to the United States to continue to work in the area of expertise. This evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans to continue his or her work in the United States.

Although the regulations state that the alien's entry into the United States must "substantially benefit prospectively the United States," this seems to have become a dead issue in practice since the publication of the Service's response to an attorney inquiry.⁵

Outstanding Professors or Researchers (EB-1B)

The "outstanding professors or researchers" (EB-1B) category is limited to professors or researchers who are recognized internationally as outstanding in their academic field.⁶ The threshold requirements for beneficiaries in the EB-1B category are twofold:

- The beneficiary must hold a tenure-track faculty position or have a permanent job offer; and
- The beneficiary must have at least three years of prior teaching or research experience.⁷

⁴ 8 CFR § 204.5(h)(4).

⁵ Essentially, the Service's letter stated that although it might be conceivable that someone might otherwise qualify as an alien of extraordinary ability but not "substantially benefit prospectively the United States," the "benefit prospectively" test will almost automatically have been met simply by a showing that the beneficiary meets the other requirements. See Letter, Skerrett, Chief, Immig. Branch, Adjudications, HQ 204.24-C (Aug. 10, 1995), reprinted in 72 Interpreter Releases 1,281-82 (Sep. 18, 1995).

⁶ 8 CFR § 204.5(i).

⁷ Evidence of teaching and/or research experience must be in the form of letter(s) from current or former employer(s). These letters must include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

Teaching or research experience gained while working on an

The core requirements for an EB-1B petition are that the beneficiary must meet at least two of the following six alternative criteria (shown here in abbreviated form):

- Receipt of major prizes or awards for outstanding achievement;
- Membership in associations that require outstanding achievement;
- Published material (written by others) about the beneficiary's research;
- Service as the judge (either independently or as a part of a group of reviewers) of the work of others in the field;
- Original contributions to the field; and
- Authorship of scholarly articles or publications in internationally distributed journals.

The offer of employment need not be with a U.S. university or academic institution. The employer may also be a private company. Private companies, however, must show that the company or the applicable subdivision employs at least three full-time researchers. The company must also show that it has achieved "documented accomplishments" in the academic field.

In the past, the Service rarely disputed the "at least three researchers" or the "documented accomplishments" issues, but in recent years has begun to request evidence on them. Suggestions for how to meet the "documented accomplishments" issue include such things as patents (approved, pending, or prepared) or significant breakthroughs in technologies or processes. In applicable cases, such as start-up companies, one might also point to the prominent reputation and major awards of other

advanced degree will be acceptable only if the alien has acquired the degree. The teaching duties must have given full responsibility to the beneficiary for the class taught, or the research conducted toward the degree must have been recognized within the academic field as "outstanding." In practice, the issue of whether the Ph.D. research itself qualifies as "outstanding" has been subsumed in the question of whether the researcher's overall record is considered "outstanding." Given recent Service trends, however, one might expect to see this issue come up in future adjudications.

researchers in the company as proof that the group, as a whole, has achieved "documented accomplishments," even though the company itself may not have.

National Interest Waivers (NIW)

The legal requirements for National Interest Waivers are the most cryptic of the four alternatives to labor certification. Because National Interest Waivers fall within the EB-2 category, the threshold requirement is either an advanced degree or "exceptional ability" in one's field.⁸ Beyond that, the statute states only that the Attorney General (i.e., the Service) may approve an EB-2 petition without an approved labor certification when the Attorney General deems it to be in the "national interest" to do so.⁹ The Service regulations provide little additional guidance on determining whether approval would be in the national interest in a given petition. The preamble to the regulations merely state that the test for National Interest Waivers should remain "flexible" with decisions made on a "case by case" basis.¹⁰

In 1998, after nearly eight years of wandering adjudications at the Service Centers, the Service's Acting Commissioner for Programs formally designated as a "precedent" decision the opinion of the Administrative Appeals Office ("AAO") in *New York State Department of Transportation ("NYSDOT")*, 22 I&N Dec. 215 (Comm. 1998).

The *NYSDOT* opinion remains the only precedent decision related to National Interest Waiver petitions.

It sets forth a three-prong test, all of which must be met:

- The beneficiary's work must be of "substantial intrinsic merit;"

⁸ INA § 203(b)(2)(A).

⁹ INA § 203(b)(2)(B)(i).

¹⁰ Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

- The proposed benefits of the beneficiary's work must be "national in scope" (as opposed to being purely "local"); and
- The beneficiary's past record of achievement must demonstrate that he or she will prospectively benefit the national interest to a "substantially greater degree than would an available U.S. worker having the same minimum qualifications."¹¹

Although post-*NYSDOT* AAO opinions very consistently state the third prong as shown above, CIS Service Centers regularly rewrite the third prong to require proof that the denial of the National Interest Waiver petition would "adversely affect" the national interest.¹² An in-depth analysis of this distinction (and its adverse affect on NIW petitioners) is beyond the scope of this paper. It is, however, safe to say that the Service Centers' inability or unwillingness to follow the AAO on *NYSDOT*'s third prong causes tremendous confusion for Service adjudicators and private practitioners alike and ultimately

makes the adjudication of NIW petitions much more unpredictable than necessary.¹³

Multinational Executives & Managers (EB-1C)

Certain multinational executives or managers with permanent job offers can obtain permanent residency without labor certification. To qualify, the petitioning company in the United States must meet these general requirements (shown in abbreviated form):

- The U.S. petitioner is a parent, subsidiary, or affiliate of a company in another country;
- During the three-year period immediately preceding the beneficiary's entry to the United States, the beneficiary must have worked at least one year overseas with the parent, subsidiary, or affiliated company of the U.S. petitioner;

¹¹ *NYSDOT*, 22 I&N Dec. 215 (Comm. 1998).

¹² Specifically, virtually all post-*NYSDOT* AAO opinions state the *NYSDOT* three-prong test as follows (emphasis added):

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. *Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.*

Despite the AAO's consistent statement of the law as shown above, Service Centers typically remake the test, as exemplified by this quotation from a recent RFE from the California Service Center (emphasis added):

In Matter of New York State Dept. of Transportation, Interim Decision 3363 (Acting Assoc. Comm'r, Programs, August 7, 1998), three specific factors were presented for consideration in determining eligibility for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Second, it must be shown that the proposed benefit will be national in scope. *AND, thirdly, the petitioner seeking the waiver must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required.*

¹³ This issue is discussed briefly in C. Weber & R. Wada, "National Interest Waivers - a Practice Update," Homeland Security, Business Immigration: The Challenges of Practicing in Today's Recessionary Environment (AILA 2003); C. Weber & R. Wada, "National Interest Waivers - a 2002 Practice Update," 7 Bender's Immigr. Bull., 391 (2002). A more detailed analysis will be set forth in C. Weber & E. Peng, "AAO to CIS Service Centers: National Interest Waiver Beneficiaries Should Never Be 'Adversely Affected' by New York State Department of Transportation," (forthcoming).

- The position at the parent, subsidiary, or affiliate company was as an "executive"¹⁴ or "manager,"¹⁵ and not as a "first-line supervisor;"¹⁶ and
- The alien has a *permanent* job offer from the U.S. company to work in an executive or a managerial position.

The Multinational Executives or Managers category for employment-based immigration closely resembles the L-1A visa category. Therefore, many people who qualify for an L-1A visa as an Executive or a Manager would also qualify for permanent residency in the United States, without a labor certification application. It is important to

¹⁴ Under 8 CFR § 204.5(j)(2), an "executive" is defined as someone who:

- 1) directs the management of the organization or a major component or function of the organization;
- 2) establishes the goals and policies of the organization, component, or function;
- 3) exercises wide latitude in discretionary decision-making; and
- 4) receives only general supervision or direction from higher level executives, the board of directors, or stockholders.

¹⁵ Under 8 CFR § 204.5(j)(2), a "manager" is defined as someone who:

- 1) manages an organization, department, subdivision, function, or component of the organization;
- 2) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function;
- 3) for supervisors of others, has the authority to hire and fire or recommend such actions (non-supervising "functional managers," must be employed at a senior level within the organizational hierarchy or with respect to the function managed); and
- 4) exercises direction over the day-to-day operations of the activity or function.

¹⁶ Under 8 CFR § 204.5(j)(4)(i), "first-line supervisors" generally are not considered managers or executives, unless those being supervised are professionals. An individual is not considered to be acting as a manager or executive merely on the basis of the number of employees that he or she supervises, directly or indirectly. The Service is supposed to consider the reasonable needs of the organization, the overall purpose of the company and function, and the company's stage of development in determining whether a position qualifies for this category.

keep in mind, however, that prior L-1A status is not a requirement for eligibility for EB-1C. A beneficiary might adjust status from some other nonimmigrant status (*e.g.*, H-1B or J-1), or might even directly immigrate to the United States under an approved I-140 with consular processing, without having ever been in L-1A status. Also, even though the L-1A and EB-1C regulations are similar, current L-1A status does not, in practice, guarantee the approval of an EB-1C for the same beneficiary.

L-1B employees with "specialized knowledge" are not eligible for bypassing labor certification, unless the petitioner can show that the beneficiary served as an executive or a manager for the company abroad and that the position offered in the United States is "executive" or "managerial." In other words, an L-1B beneficiary qualifies for EB-1C only if it can be shown that in addition to meeting the "specialized knowledge" criteria, the beneficiary also meets the EB-1C requirements.

IN WHAT CIRCUMSTANCES SHOULD ALTERNATIVES TO LABOR CERTIFICATION BE PURSUED?

There are several major factors - and myriad minor ones - to consider in choosing between a labor certification application and an alternative. In some cases, your client may want you to pursue multiple paths at the same time.

Some of the major factors to consider in determining which route to take include:

- Is a *permanent* "job offer" available?
- How long does it take the government to make a decision?
- How strong a case could be made under labor certification (if applicable) or under one or more of the alternatives?
- How predictable is the outcome (even if the case is "strong")?
- How long does it take to prepare the case?
- Does the beneficiary need protection from the six-year limit on H and L visas?

- Does the beneficiary need protection from potential layoffs, or plan to change jobs in the foreseeable future?
- Is it particularly important for the beneficiary's spouse or other family members to obtain advance parole or work authorization?
- In which jurisdiction will the beneficiary be working?
- What is most important to the client(s)?

Is a permanent "job offer" available?

Labor certification is not the only category that requires a *permanent* offer of employment in the United States. The categories of Outstanding Professors or Researchers (EB-1B) and Multinational Executives and Managers (EB-1C) also require a permanent job. If the beneficiary has no permanent job offer, then the only available alternatives are the Aliens of Extraordinary Ability (EB-1A) or National Interest Waivers (NIW) categories.

How long does it take the government to make a decision?

Speed of adjudication is a major advantage of alternatives to labor certification, although this may change if the PERM regulation is finally implemented and works as planned.¹⁷ According to the most recent government processing times, all four of the alternatives to labor certification are decided in less than two years, with some petitions approved in as little as two months. By comparison, the time it takes for a labor certification application to be certified ranges from 3 months (for RIR LCs filed in Montana and Wyoming) to almost 7 years (for "regular" LCs filed in the Dallas DOL region). In the Dallas DOL region, all of the State Workforce Agencies (SWAs) are still processing applications filed in April of 2001, and the Dallas DOL regional office is processing cases received at that DOL office in March of 2000.

¹⁷ According to AILA, the Department of Labor's final PERM regulation was sent to OMB on February 23, 2004. OMB has up to 90 days to review the regulation and either return it for further work or send it on to the Federal Register for publication. DOL has indicated that the regulation would take effect 120 days after publication. Posted on AILA InfoNet at Doc. No. 04022469 (Feb. 24, 2004).

The following tables show the most recently available processing time estimates for the applicable SWA, Department of Labor (DOL) Regional Office, and CIS Service Center.

Alternatives take roughly 2 to 20 months.

As of February 20, 2004, processing times for relevant I-140 petitions at the applicable CIS Service Centers were as follows:

*California Service Center I-140 Petitions
As of 02/20/2004*

Category	Processing Date	Total Days
EB-1A	Jan. 09, 2003	401
EB-1B	Feb. 19, 2003	361
EB-1C	Feb. 11, 2003	369
NIW	Jul. 15, 2003	215

*Nebraska Service Center I-140 Petitions
As of 02/20/2004*

Category	Processing Date	Total Days
EB-1A	May 14, 2003	276
EB-1B	Mar. 11, 2003	339
EB-1C	Apr. 21, 2003	299
NIW	Dec. 13, 2002	427

*Texas Service Center I-140 Petitions
As of 02/20/2004*

Category	Processing Date	Total Days
EB-1A	Jan. 15, 2003	395
EB-1B	Jan. 15, 2003	395
EB-1C	Jan. 15, 2003	395
NIW	Jan. 17, 2003	393

*Vermont Service Center I-140 Petitions
As of 02/20/2004*

Category	Processing Date	Total Days
EB-1A	Jun. 07, 2002	613
EB-1B	Jun. 25, 2002	595
EB-1C	Dec. 24, 2003	56
NIW	Jun. 26, 2002	594

Although these figures represent the "official" processing times, actual processing times can vary dramatically in either direction.

Labor certifications take between 3 months and 7 years

As of February 12, 2004, processing times for labor certifications were significantly longer than for the alternative petitions. The following tables show the number of days needed to process both regular and RIR labor certification applications in nine selected cities.¹⁸ As these numbers show, the processing times vary widely by region and type of labor certification application filed. An RIR application takes only 10 months to process for a beneficiary in Chicago, but almost 3 years for a beneficiary in New York. Regular processing varies from a relatively "speedy" 9 months in Boston to almost 7 years in Dallas.

Labor Certification Processing Times for Selected Cities as of 2/12/2004

DOL Region	Days for Regular LCs	Days for RIR LCs
Atlanta	1,462	502
Boston	262	382
Chicago	1,582	292
Dallas	2,452	622

¹⁸ These calculations combine the SWA and DOL Regional processing times. Although SWA times vary from state to state within a given DOL Region, the dates shown are only for the state in which the applicable DOL Regional Office or Sub-Office is located.

Denver	N/A	592
New York	1,132	1,012
Philadelphia	712	292
San Francisco	1,492	802
Seattle	1,072	922

Total difference between "alternatives" path and labor certification path: 7 to 20 months versus 20 to 94 months

In analyzing the difference in processing times of labor certification applications as compared to those of the alternatives, one must also account for the fact that the DOL certification of the labor certification application puts the beneficiary only at the beginning of the CIS processing step. That is, after the labor certification application is certified by the DOL, the petitioner still must process the I-140 and the I-485 for the beneficiary.

To put the overall time comparison on equal footing, the following table shows the total processing time between the filing of the labor certification application and the date the person actually receives I-140 approval (i.e., SWA time + DOL time + I-140 time), as compared to filing the I-140 directly through one of the alternatives to labor certification.

To exemplify the difference in timing, the table seeks to answer the question, "What is the expected difference in overall waiting time to obtain an approved I-140 if a particular person was the named "alien" under a labor certification application filed with the applicable SWA today and was also the named "beneficiary" in a national interest waiver-based I-140 also filed today with the applicable CIS Service Center (assuming that the application and petitions will be approvable as initially filed)?"¹⁹ As a means of

¹⁹ The case of EB-2 is selected as the example because I-140 petitions under EB-2 can be filed based either on an approved labor certification application or on a request for a national interest waiver. If the beneficiary qualified under EB-1A or EB-1B, then the difference in processing times between a labor certification and an "alternative" may be relatively smaller or relatively larger than that for EB-2 petitions. Also, in comparing I-140 processing times for EB-2 petitions, one

providing sample answers from various cities nationwide, the tables provide data for each of the nine cities that happen to have DOL Regional Office or Sub-Office involved in labor certification processing.

(Continued on page 579).

needs to note that CIS processing times for EB-2 petitions based on an approved labor certification application are in some cases shorter than those for EB-2 petitions based on a successful request for a national interest waiver.

Comparing Processing Times for EB-2 I-140 Petition either via Approved Labor Certification or via a Request for a National Interest Waiver in Nine Sample U.S. Cities: DOL Data as of: 02/12/2004; CIS Data as of 02/20/2004

City	Reg. LC + EB-2 I-140	RIR LC + EB-2 I-140	NIW I-140	Difference: Reg. LC vs. NIW	Difference: RIR LC vs. NIW
Atl.	1,828	868	393	1,435	475
Bos.	666	748	594	72	192
Chi.	1,900	658	427	1,473	183
Dall.	2,818	988	393	2,425	595
Den.	N/A	958	427	N/A	483
NY	1,536	1,378	594	942	822
Phil.	1,116	658	594	522	102
San Fran.	1,766	1,168	215	1,551	861
Sea.	1,390	1,288	427	963	813

As this table demonstrates, the difference in processing times can be considerable. A foreign worker in Dallas, Texas, for example, can receive an I-140 approval over six years faster by filing an NIW case than by relying on his or her employer's filing of a regular labor certification application, and 20 months faster than with an RIR. Similarly, an individual in San Francisco, California could eliminate between two to four years of waiting for permanent resident status by filing a NIW petition rather than an RIR or regular labor certification application, respectively.

How strong a case could be made under labor certification (if applicable) or one or more of the alternatives?

Before getting too excited about the substantially better processing times, it is important to keep in mind that most of the benefits of alternatives to labor certification applications come into play only if the petition is actually approved. It is critical to examine carefully not only the benefits of pursuing an alternative, but also the strength of the case and the likelihood (or un-likelihood) of the petition being approved.

In terms of practice, the tremendous benefits of the alternatives cause many prospective beneficiaries - and

even some practitioners - to lose sight of the fundamental difficulty in getting the case approved in the first place. Although most reasonable Multinational Executives or Managers petitions and most strong Outstanding Professors or Researchers petitions can normally be expected to be approved, even these types of petitions are not guaranteed. Worse, Aliens of Extraordinary Ability and National Interest Waiver petitions - even if very strong and well documented - can be subjected to tremendous (often unwarranted) scrutiny.

In reviewing the beneficiary's credentials, it is important not to underestimate the difficulties in reaching the greener pastures of the alternatives. This is especially true nowadays, when the adjudication of seemingly clear winners can be unpredictable and the petitioner can run into Service resistance from nowhere. Careful evaluation of the benefits and costs of the alternatives to labor certification is critical to advising clients effectively in this area.

How predictable is the outcome (even if the case is "strong")?

These days, even "strong" cases can run into problems. This is true of any application, petition, or request for an immigration benefit from any of the state or federal gatekeepers. In general, though, there are significant differences in the predictability of outcomes for EB-1 and NIW cases. In practice, the outcome for "strong" labor certification applications and "strong" Multinational Executives or Managers (EB-1C) petitions are far more predictable than for petitions under the Aliens of Extraordinary Ability (EB-1A), Outstanding Professors or Researchers (EB-1B), or National Interest Waiver (NIW) categories.

How long does it take to prepare the case?

Even if government processing times were the same for the labor certification process and each of these alternative petitions, the time necessary to prepare and file the application or petition can vary significantly. The major factors affecting preparation time are what needs to be done, who needs to do it, and how much of it (if any) has already been done.

In the labor certification context, for example, a "regular" labor certification application may be prepared and submitted relatively quickly, because the recruitment can be done later. Likewise, "reduction in recruitment" ("RIR") labor certifications might also be prepared without significant delay if the company has already completed the necessary recruitment without having found a qualified U.S. worker. Petitions for Multinational Executives or Managers might also be submitted relatively quickly if all of the materials needed are easily obtained from the petitioner and beneficiary.

Other options may take longer to assemble the necessary documents in comparison. For example, RIR labor certification applications in which no recent recruitment has been done ahead of time may require several months to complete an appropriate recruitment campaign. Likewise, in the EB-1A, EB-1B, and NIW context, it may take the beneficiary a significant amount of time to gather the appropriate materials, find appropriate experts, and so on. Often, this process may be further delayed if the beneficiary is swamped with his or her research work.

Does the beneficiary need protection from the six-year limit on H-1B visas?

With the passage of the American Competitiveness in the Twenty-First Century Act ("AC21")²⁰ on October 21, 2000, beneficiaries may now extend their H-1B status beyond the six-year limit.²¹ To obtain a seventh (or more) year in H-1B status, AC21 requires the beneficiary to have filed either a labor certification application or an I-140 immigrant petition at least one year before the six-year deadline.²²

If the beneficiary is too close to the six-year limit, there may be insufficient time to prepare an RIR labor certification application from scratch. In such cases, the beneficiary can take advantage of AC21's seventh-year extension mechanism by filing a "standard" labor certification application or one of the alternatives before the fifth-year anniversary in H-1B status.

Even if a labor certification application cannot be filed in time to meet the fifth-year anniversary deadline, it may still be possible to keep the beneficiary (and his or her family members) work- and travel-eligible through concurrently filing an "alternative"-based I-140 petition and an I-485 permanent residence application, along with the I-765 and I-131 applications.

Does the beneficiary need protection from potential layoffs, or plan to change jobs in the foreseeable future?

The labor certification process requires a beneficiary to maintain employment for a long period with the same employer. If job security with the alien's present employer is uncertain, an alternative to labor certification may be a better option.

²⁰ American Competitiveness in the Twenty-First Century Act of 2000 ("AC21"), Pub. L. No. 106-313, 114 Stat. 1251.

²¹ AC21, § 106(a); see also Memo, Cronin, Acting Ex. Assoc. Comm. Program, HQPGM 70/6.2.8 (June 19, 2001) at ¶ IIE, reprinted in 78 Interpreter Releases 1108-17 (July 2, 2001).

²² *Id.*

All four of the primary alternatives to labor certification allow the beneficiary the ability to change employers 180 days after filing the I-485, so long as the position is in the same or similar job classification.²³ This can be a significant benefit to beneficiaries at unstable companies.

Moreover, for many years informal Service guidance has allowed beneficiaries of approved I-140 petitions under the Aliens of Extraordinary Ability or National Interest Waiver categories to change jobs as long as he or she intended to continue to work in the same "field."²⁴ This Service guidance allows EB-1A and NIW beneficiaries even more job flexibility than other permanent residency applicants have under AC21, both in terms of time (because they need not wait 180 days) and in scope (because their work need not be in the "same or similar job classification," but only be in the same "field.")

Please note that in the EB-1B category, the beneficiary's petition is tied to the employer. Beneficiaries of approved Outstanding Professors or Researchers petitions may leave for other employers only after their I-485 application has been pending at the Service for over 180 days. These beneficiaries are not eligible to change employers before that time (even within the same field) without jeopardizing their permanent residency application.

Is it particularly important for the beneficiary's spouse or other family members to obtain advance parole or work authorization?

The EB-1 categories and the NIW category can provide access to work and travel authorization for dependent family members much quicker than can be achieved through the labor certification process. The ability to concurrently file the I-140 and I-485 (along with the I-131 and I-765 applications) highlights the tremendous advantage in speed. For some families, this is critical to their determination of how to proceed.

If it is important to the beneficiary's spouse or other family members to obtain authorization to work in the

²³ AC21 § 106(c).

²⁴ *E.g.*, Letter, Skerrett, Chief, Immig. Branch, Adjudications, HQ 204.24-C (Aug. 10, 1995), reprinted in 72 Interpreter Releases 1,281-82 (Sep. 18, 1995).

United States or to travel in and out of the United States without obtaining a visa abroad, then the value of filing an alternative to the labor certification process goes up relative to taking the more conservative but time-consuming labor certification path.

In which jurisdiction will the beneficiary be working?

The location of the beneficiary's employment may also impact the choice between a labor certification application and one of the alternatives. There can be substantial differences between the various jurisdictions in processing times and reliability of adjudications.

In states with long labor certification backlogs at the state workforce agency (SWA) and Department of Labor (DOL) regional office, the option of filing one of the alternatives becomes more attractive. For example, the New Jersey SWA is currently processing RIR labor certifications filed over 2.5 years ago.²⁵ If an alternative is ultimately approved, the filing of an EB-1 or NIW petition can avoid this lengthy processing delay.

Conversely, where a CIS Service Center is particularly slow or hostile in adjudicating alternatives to labor certification, the advantage of filing an alternative becomes somewhat less meaningful. For example, the Vermont Service Center (VSC) currently takes an inordinate amount of time to adjudicate I-140 petitions (other than EB-1C).²⁶ For individuals filing within the VSC jurisdiction, the difference in timing between a labor certification application and an

²⁵ As of February 12, 2004, the New Jersey SWA was processing applications filed in April of 2001.

²⁶ As of February 20, 2004, the current processing times for the Vermont Service Center for Aliens of Extraordinary Ability (EB-1A), Outstanding Professors or Researchers (EB-1B), and employment-based, second-preference (EB-2) petitions, which include National Interest Waivers (NIW), are 585, 582, and 566 days, respectively. The only shining light in VSC processing times for employment-based cases is the Multinational Executives or Managers (EB-1C), with processing reportedly being completed within 28 days.

alternative almost becomes the difference between infinity and infinity.²⁷

Likewise, with respect to unpredictability and hostility, the California Service Center has over the last several years taken an unduly harsh approach to adjudicating alternatives to labor certifications, especially with respect to National Interest Waiver petitions. Such hostility adds another layer uncertainty to the effort to obtain approval of even clearly approvable petitions.

Example from California Service Center

In denying a National Interest Waiver petition (and certifying the denial sua sponte to the AAO) in 2002, the California Service Center opined that only experts working for the federal government, or affiliated with the government, could comment on the "national interest" of the United States. The CSC was unimpressed with the fact that of the dozens of AAO NIW opinions listed on the Service's own website, not one of them states that such association or government letters are required for approval.

What the Service had to say in its denial is this:

It is the Service's argument, therefore, that a "lay person" [i.e., professors and other experts] cannot write on behalf of the national interest simply because of the field he or she works in. A lay person can, however, write on a field that he or she is versed in. That is, if a person is in a field that requires an advanced degree or higher, and that person is in possession of an advanced degree or higher in the field, it is assumed that that person is in some way [sic] qualified to give an honest opinion of the merits of another person's work in that field. However, it cannot be assumed that that same lay person who is versed in his or her field of endeavor is therefore versed in the national interest of the United States simply because he or she has an advanced degree or higher in an area or field of expertise if that person does not work directly with an agency, institution or organization that is directly related to one of the agencies, institutions or organizations under the government of the United States or that may be directly or indirectly

in association with an agency, institution or organization within the government of the United States.

The CSC's requirement of association or government letters can be found nowhere in the statute, regulations, Operating Instructions, or formal or informal Service publications. In January 2004, the AAO reversed the CSC decision, stating that it would be "arbitrary" for the CSC to insist that petitioners submit letters from associations or government agencies.²⁸

A final note on deciding whether to pursue labor certification or the alternative(s)

By and large, the preceding factors focus on substantive and procedural legal issues. In analyzing potential cases, however, listen carefully to your clients to ensure that you have a good understanding of the relative value they place on these and other factors. Sometimes clients, for reasons beyond those discussed above, will ask you to pursue a strategy that is, in your opinion, only the second-best or third-best among the possibilities. As in other areas, the relative importance of the applicable factors can vary greatly from client to client.

HOW DO YOU DECIDE WHICH ALTERNATIVE(S) TO PURSUE?

The factors discussed above can help you decide whether to pursue one or more of the alternatives to labor certification. Once your client decides that he or she would like to pursue an alternative to labor certification, however, you must still select the best one (or two, or even three) to file. In the case of researchers, a prominent scientist may qualify under all four of the alternatives to labor certification. There is no universally applicable test, but examining answers to the following questions can clarify the pros and cons of each option and simplify the selection process for a particular beneficiary.

Does the beneficiary qualify as a Multinational Executive or Manager under EB-1C?

²⁷ Of course, these processing delays can be ameliorated if family members are able to obtain advanced parole and work authorization by concurrently filing the I-140 and I-485.

²⁸ An article on this AAO opinion is currently being written and will likely be published within the next few months.

If the beneficiary qualifies as a Multinational Executive or Manager under the EB-1C criteria, that option is generally preferred. The qualifications for the EB-1C category are relatively straightforward. The outcome in EB-1C petitions is more predictable (relatively speaking), and these petitions are usually adjudicated relatively quickly. As an example of differences in speed, the most recent processing time in the Vermont Service Center for EB-1C is 28 days compared to 585 days for EB-1A.

Does the beneficiary have a permanent "job offer"?

As mentioned above, a permanent job offer is required for the Outstanding Professors or Researchers (EB-1B) category, but not for the Aliens of Extraordinary Ability (EB-1A) or the National Interest Waiver (NIW) categories. In general, if the beneficiary has a permanent "job offer" and clearly meets the other criteria for the Outstanding Professors or Researchers category, it is best to file under the EB-1B category instead of under the EB-1A or NIW categories.

As a general rule, a highly qualified researcher is more likely to be approved under the Outstanding Professors or Researchers category than to be approved under the Aliens of Extraordinary Ability category. There are two primary reasons for this difference. First, the beneficiary needs to meet fewer criteria - two of six for EB-1B instead of three of ten for EB-1A. Second, as discussed below, one can see that many of the EB-1B criteria are "watered down" versions of the EB-1A criteria.

Although it would make sense that a second-preference (EB-2) petition for a National Interest Waiver would be more likely to be approved than would a first-preference (EB-1), practice shows that EB-1B petitions are generally more likely to be approved than NIW for the same beneficiary.

How accomplished is the beneficiary?

If the beneficiary does not have a permanent job offer, the only two alternatives potentially available are the Aliens of Extraordinary Ability or the National Interest Waiver categories. The analysis when the beneficiary does not have a permanent job offer becomes more complex and difficult. There are no "bright line" rules. Nonetheless, the following general guidance can be helpful in deciding whether to file an EB-1A or an NIW if the beneficiary has no permanent job offer.

What constitutes a "strong" case?

The strength of a particular petition in the Aliens of Extraordinary Ability, Outstanding Professors or Researchers, or National Interest Waiver categories is a complex, subjective determination in all but the very strongest and very weakest cases. There are, however, general guidelines that may prove helpful in making these determinations.

Carefully check the regulations for subtle, but important, distinctions between EB-1A and EB-1B criteria.

At first glance, the EB-1A and EB-1B criteria appear to be very similar, but upon careful review, they are in fact very different in many instances. For example, the criterion for "contributions" under EB-1A requires that the beneficiary's achievement be an original contribution "of major significance."²⁹ The corresponding criterion for EB-1B only requires that the achievement be an "original" contribution.³⁰ In law and in practice, these requirements are dramatically different despite their initial appearance of similarity.

Also, it is important to parse each criterion carefully. For example, the "membership" criterion has several subparts. Paying \$75 for a regular membership in the Institute of Electrical and Electronics Engineers (IEEE) or the American Association for the Advancement of Science (AAAS) will not be enough.

In National Interest Waiver cases, focus on the third prong.

As mentioned above, the precedent *NYS DOT* opinion sets forth a three-prong test for National Interest Waivers. A detailed analysis of the *NYS DOT* test is beyond the scope of this particular paper (and this topic has already been covered elsewhere).³¹ Still, it is

²⁹ 8 CFR 204.5(h)(3)(v).

³⁰ 8 CFR § 204.5(i)(3)(i)E

³¹ *E.g.*, C. Weber & R. Wada, "National Interest Waivers - a Practice Update," Homeland Security, Business Immigration: The Challenges of Practicing in Today's Recessionary Environment (AILA 2003); C. Weber & R. Wada, "National Interest Waivers - a

worth noting that the primary focus of the Service and the AAO is on the third prong. In other words, the critical issue in the vast majority of NIW cases is the track record of the beneficiary, rather than the "substantial intrinsic merit" or the "national scope" of the beneficiary's work.

In National Interest Waiver cases, look backward, not forward.

Every prospective beneficiary may do something great in the future. For the Service, the best predictor of future greatness is evidence that the beneficiary has already achieved greatness in the past. For success in NIW cases, be prepared to prove that the beneficiary has already made "at least some impact on the field as a whole."³²

If the case is extraordinarily "strong," pursue the Aliens of Extraordinary Ability category.

Once it has been determined that the petition for a self-petitioning beneficiary (who does not have a *permanent* job offer) is in fact very "strong," it is generally better to file the petition under the Aliens of Extraordinary Ability category than under the National Interest Waiver category.

The wording and context of the statute and regulations imply that the first-preference Aliens of Extraordinary Ability category should be far more difficult to qualify for than the second-preference National Interest Waiver category. Unfortunately, practice shows that there is much less difference than the statute and regulations suggest. In fact, National Interest Waiver beneficiaries are sometimes held to the same standard as (or even a higher standard than) that for Aliens of Extraordinary Ability beneficiaries. Furthermore, the adjudication patterns are far more erratic in NIW petitions than in EB-1A petitions.

Given the smaller than expected difference between these two categories in practice, it is generally easier to convince the Service that the beneficiary meets specific, defined criteria, such as "scholarly articles," in the Aliens of Extraordinary Ability context than it is to argue with

2002 Practice Update," 7 Bender's Immigr. Bull., 391 (2002).

³² NYS DOT, 22 I&N Dec. 215, n.6 (Comm. 1998).

the Service about whether it is in the "national interest" to approve a specific National Interest Waiver request, at least at the Service Center level. As discussed below, NIW appeals to the AAO generally receive fair consideration.

Generally, if the EB-A case is not extraordinarily "strong," pursue the Aliens of Extraordinary Ability petition, the National Interest Waiver, or both.

If the beneficiary is not an *obvious* winner under the Aliens of Extraordinary Ability category, you should determine whether the beneficiary is more likely to be approved under that category or under the National Interest Waiver category. If the beneficiary is a probable winner (but not an obvious winner) under EB-1A, it is probably better to file under that category to take advantage of the existence of the more clearly defined criteria and the less erratic adjudication patterns.

Likewise, if the beneficiary is a *probable* winner under the NIW category (but a less-than-probable winner under the EB-1A category), then it is generally better to file under the National Interest Waiver category.

Multiple Filings for the Same Beneficiary

The preceding discussion assumes that you will file only one I-140 petition. There is no prohibition against filing more than one petition simultaneously. In fact, doing so can be a good strategy for beneficiaries whose qualifications fall somewhere between EB-1A and NIW. Such double-filing is not standard practice for most firms, but there are some practitioners who recommend double-filing as a matter of course.³³ On rare occasions, a case may even be filed simultaneously in all three categories (EB-1A,

³³ For example, a panelist on a national teleconference on the Aliens of Extraordinary Ability category in 2003 stated that it was her standard practice to file simultaneously under both EB-1A and NIW. Pravinchandra J. Patel, Gary Endelman, Asher Frankel, Sheela Murthy, Suzanne Seltzer, Nathan Waxman and Cletus Weber, "Crème de la Crème: Extraordinary, Outstanding, Multinational and Exceptional," national teleconference sponsored by Immigration Lawyers on the Web, <<http://www.ilw.com/lawyers/seminars/june2003.shtm>> (comments of Suzanne Seltzer during August 28, 2003 session).

EB-1B, and NIW), but the need for such triple-filings is absent in most cases.

You can always argue, but can you win?

Once you decide to file in a particular category, there are many strategic decisions to be made about whether a particular piece of evidence should be included in the petition materials. Essentially, the question boils down to whether it is better to "have something" under as many criteria as possible or to present evidence only under those criteria the beneficiary meets most strongly.

At the initial case-*assessment* stage, be careful not to conclude that the beneficiary meets a particular criterion simply because he or she has some evidence of that type. For example, many beneficiaries have won various awards, but frequently these awards do not meet the regulatory criteria for "awards" under either EB-1A or EB-1B. Determine whether the beneficiary's award is considered a "nationally or internationally recognized award" (for EB-1A) or a "major prize or award for outstanding achievement" (for EB-1B).

At the case-*preparation* stage, it is safe to say that all experienced EB-1A/EB-1B practitioners agree that the petitioner should submit all *strong*, non-redundant evidence somewhere in the materials. Normally, one would submit the strong evidence under the most appropriate criterion. If the strong evidence does not fit under the available criteria under EB-1A, the petitioner should submit it under the "comparable evidence" section of the regulations.³⁴ Although there is no such "comparable evidence" section for EB-1B cases, one should try to shoehorn it into the most closely related criterion. If nothing else, simply include it and still call it "comparable evidence" or something to that effect.

There is no universal agreement on what to do with evidence that is not clearly strong or clearly weak but somewhere in between. Some practitioners include it in the hope that the adjudicator will see that the beneficiary has additional achievements, abilities, recognition, etc. Other practitioners believe that if a particular piece of evidence does not arguably meet the criteria as stated in the regulations (including the "comparable evidence" catch-all criterion), it should be left out altogether,

because including it may only "drag the case down" and provide additional fodder for the RFE cannon.

IF THE PETITION IS DENIED, SHOULD YOU REFILE, APPEAL, OR GIVE UP?

It is no secret that over the last decade, the adjudication of EB-1A, EB-1B, and NIW petitions has generally become slower, more difficult, and less predictable. In the current environment, we can expect to see a continuing erratic pattern of RFEs and denials of these petitions at the Service Center level.

Irrespective of the strength of the petition, you and your clients have to be prepared for the possibility of this undesirable outcome. The most common options for going forward if a petition is denied at the Service Center are:

- File another petition (in the same or a different category);
- Appeal to the AAO;
- File a labor certification application;
- Do one or more of the above options; or
- Give up altogether.

Filing another petition (in the same category or in a new category)

Under Service regulations, denials of I-140 petitions are without prejudice to any other petitions currently pending or filed in the future. Therefore, a beneficiary of a denied I-140 petition has the option of filing a new petition in the same category or in one or more other categories. Obviously, because the I-140 petition itself requires disclosure of prior adjudications, the Service adjudicator will have knowledge of any prior denials.

A previous denial of an I-140 could have some negative effect on subsequent petitions, but prior denials clearly are not fatal. In particular, cases for researchers often strengthen over time because their achievements accumulate over time.

In advising clients about filing a new petition, one should be aware that there have been unofficial

³⁴ 8 C.F.R. § 204.5(h)(4).

reports in the past that the Vermont Service Center (and possibly other service centers) would "kick back" subsequently filed petitions if a prior petition in the same category was still pending before the AAO.

Appealing to the AAO

If an I-140 petition is denied at the Service Center, the petitioner can appeal to the AAO by timely filing a Form I-290B with the appropriate filing fees at the Service Center. Although the Service Center receives the appeal and has the authority to reverse the decision on its own accord, practice over the last decade or so has shown that the Service Centers almost never reverse themselves on these denials.

Given this general unwillingness to reverse themselves on erroneous decisions, the best one can hope the Service Center to do is to forward the petition on to the AAO as quickly as possible. In the past, the Service Centers used to sit on appeals for months before forwarding them to the AAO for review. Service Centers may be picking up the pace on forwarding appeals to the AAO, however, as evidenced by an appeal filed recently with the California Service Center; it appears that the Service Center the appeal to the AAO on the same day the Service Center received it.

Practitioners debate the effectiveness of appealing to the AAO. Those who believe it is not effective point primarily to the high percentage of appeal dismissals by the AAO, as shown on the CIS website³⁵ or in other samplings of AAO opinions.³⁶ It does, in fact, appear from these online opinions and other samplings that

appeals of weak or poorly documented petitions are virtually always denied by the AAO.³⁷

Nonetheless, personal experience in the National Interest Waiver context has shown that Service Center denials of reasonably strong petitions are consistently overturned by the AAO. The AAO appears to give the petition a more careful - and arguably more knowledgeable - review. (In defense of Service Center adjudicators, one can surmise that AAO adjudicators are probably also allowed more time to spend on each case.)

What this more careful and exacting review means for practitioners and their clients is that the strengths and weaknesses of the case will be amplified at the AAO level. The result is that poorly prepared petitions have even less of a chance of approval at the AAO, but strong cases that are well prepared - and which should have been approved at the Service Center in the first place - will finally get the adjudication they deserve at the AAO.

Apparently *no* federal review of NIW denials

Unfortunately, the AAO may be the end of the road for NIW appeals. A recent decision of the U.S. District Court for the District of Columbia held that the National Interest Waiver provision - at least the general NIW provision - is a "discretionary" one and as such is beyond the reach of the courts.³⁸

Filing a labor certification application

There is no inherent conflict in simultaneously filing a labor certification application and one or more of the alternatives to the labor certification process. Likewise, there is no inherent conflict in subsequently

³⁵ The CIS provides online access to many AAO opinions at <<http://uscis.gov/graphics/lawsregs/admindec3/5/index.htm>>. Although the exact percentage has not been calculated, it is fair to say that "most" of the appeals of national interest waiver denials shown online have been dismissed by the AAO.

³⁶ For example, a sampling of 225 EB-1A, EB-1B, and NIW appeals to the AAO in 2003 showed that, on the merits, 85% of EB-1A, 100% of EB-1B, and 80% of the NIW appeals were dismissed. C. Recio, "Recent Adjudications of EB-1 and EB-2 cases," II IMMIGRATION AND NATIONALITY LAW HANDBOOK, 2003-2004, 214 (AILA).

³⁷ *Id.* Carlos Recio's article also suggests that weak underlying cases and poor documentation are the primary reasons for many AAO dismissals. With respect to EB-1B cases, for example, he writes, "A review of the (weak) cases where the AAO upheld denials on the merits again emphasizes the need for documentation." *Id.* at 220.

³⁸ *Zhu v. INS*, 2004 U.S. Dist. LEXIS 950 (D.D.C. 2004) (Civ. No. 02-00685, January 28). Because the NIW provision for physicians states that the Attorney General "shall" approve the petition if the conditions are met, AAO dismissals under that provision should still be reviewable.

filing a labor certification application any time during the pendency of an "alternative"-based I-140 petition or the pendency of an appeal of the denial of a petition based on one of the alternatives. Labor certification applications and the alternatives are based on completely different criteria.

Taking more than one action simultaneously

If cost were no factor, you could conceivably appeal to the AAO, file one or more new petitions in the same category or different categories, and prepare and file a labor certification application all at the same time.

CONCLUSION

There are several paths to obtaining employment-based immigrant status without having to file a labor certification application. Determining when and why to pursue one or more of these "alternative" paths can be confusing, particularly in borderline cases. Given the current weakness in the economy and the long delays in processing labor certification applications in most regions of the country, these alternatives become more appealing. Although clearly not perfect in all instances, if these "alternative" tools are used properly in the appropriate circumstances, they can be extraordinarily effective in achieving your clients' goals.

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