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US eases tests for green cards

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US authorities have liberalised the tests used to grant a National Interest Waiver (NIW) to EB-2 category of green card applicants. Those having an advanced degree or exceptional ability fall in the EB-2 category. Indian entrepreneurs and qualified individuals will now have a fairer chance of obtaining an NIW, which in turn will speed up the process of obtaining a green card.

The liberalisation was part of a recent landmark decision by the Administrative Appeals Office of the US Citizenship and Immigration Services. Normally, a permanent job offer and an approved labour certificate are pre-requisites to file for a green card. An NIW allows individuals in the EB-2 category to skip the cumbersome 'labour certification' process. In general terms, this certification process, which is a protectionist measure, requires the employer to determine whether US workers are available for the job.

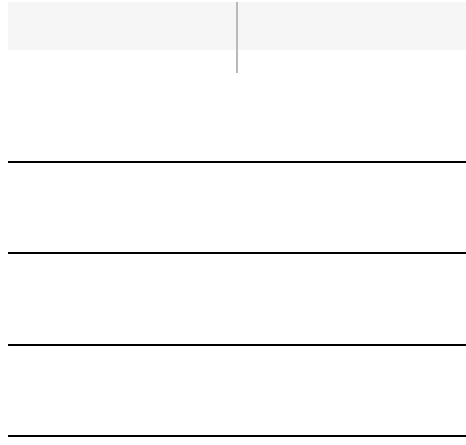
The AAO, in its decision dated December 27, has redefined the existing tests for obtaining a National Interest Waiver. These tests were perceived as subjective and often resulted in similar applicants being treated differently -with a denial of an NIW in one case and a grant in another.

In its order, the AAO states: USCIS may grant an NIW if the applicant demonstrates that his or her proposed endeavour (activity) in the US has both substantial merit and national importance. That he or she is well positioned to carry it forward and lastly that on balance it would be more beneficial for the US to waive the job offer and the labour certification requirements.

"The decision provides for a more flexible legal standard that can be applied for individuals who are entrepreneurs as well as those who are involved in occupations geared towards science, technology, engineering and mathematics (STEM)," says David H Nachman, managing attorney, at NPZ Law Group.

In this case, Dhanasar (name as appearing in the decision), a researcher and educator in aerospace engineering, sought an NIW. The petition was denied by the Director of the Texas Service Centre resulting in the matter coming up before the AAO. The appeals office had a relook at the existing framework, redefined the tests and granted the NIW. While it appears that the applicant is of Indian origin, the same could not be directly affirmed.

NIW was introduced by the Immigration Act, 1990, but conditions for obtaining the waiver were not explicitly set down in the law. "About a decade later, the New York State Department of Transportation (NYSDOT) case laid out a legal standard which required that the applicant seeking a NIW benefit the nation as a whole. This case made a subjective determination that the applicant needed to prove that the benefit of waiving



the labour certification outweighed the nation’s interest in the labour certification process. The new decision sets out a completely different analysis and it does not require the arbitrary subjectivity set forth in the NYSDOT case,” explains Nachman.

“A key point is that now USCIS will perform a balancing test on whether it would be more beneficial to the US to waive the requirement of a job offer and thus of a labour certification,” explains Rajiv S Khanna, US-based immigration attorney at Immigration.com.

“Apart from offering speedier process in the path towards a green card, NIW holders can also avail of an unlimited H-1B extension, and their spouses can apply for work authorization. Normally, the USCIS does not consider itself bound by a decision of the AAO. But this decision is binding. It has been so adopted by the USCIS,” adds Khanna.

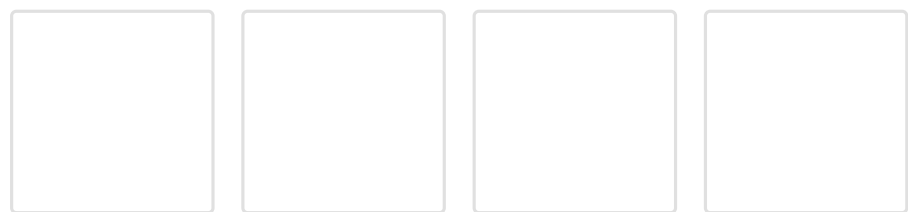
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