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Step One to the J-1 Waiver: Finding a Job

One of the most common questions asked by International Medical School Graduates is, "how do I find a job after I finish my post graduate training?" The job search is the first and most integral step towards processing the J-1 waiver or a petition for permanent resident status for other visa holders.

As a physician in J-1 status, you know that you must find a position where you will be providing services as a physician in an area designated by the Department of Health and Human Services as a Health Professional Shortage Area, Medically Underserved Area, or a position within the jurisdiction of the Appalachian Regional Commission, Delta Regional Commission a Federal Qualified Community Health Center which comes under the jurisdiction of the United States Department of Health and Human Servs. or a position with a VA facility. These areas are located throughout the United States, are listed in the Federal Register dated September 15, 2000 and updated periodically on the Internet. It is best to start your job search just before completing your next to last year of post graduate training. The following link can be used to determine whether a specific address is in a shortage area:

http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx

The truly eager IMGs who have a lot of time on their hands can do a lot of research and send resumes to every possible hospital, physician and clinic in Health Professional Shortage Areas or Medically Underserved Areas throughout the United States and VA facilities. However, time is not a luxury available to most IMGs.

If you are presently employed at a hospital located in a shortage area, you can try to pursue an attending position and J1 waiver opportunity there.

Another way to find a position is through networking. Speak to your friends who were in your position during the last few years. Renew old friendships and acquaintances and see if perhaps there is an opening coming up in the hospital, clinic or practice where they were able to obtain a position. If they are unable to direct you to a position, ask them if they can recommend a reputable recruiter who could assist you in finding a position.

If utilizing a recruiter, be sure to interview the recruiter. Find out from the recruiter what kind of opportunities may be available to you, where these opportunities are, the chances of being successfully placed, the salary range for the positions offered, as these points may be factors in obtaining a successful completion to the J-1 process. You should also find out if there are other J-1 physicians who have been granted waivers, presently employed at these locations, so you can speak to them and get their opinion on these locations or positions.

Once you have selected a recruiter to act on your behalf, always try to verify that the positions for which you are interviewing will qualify for a J-1 waiver.

Very often, prospective employers in shortage areas place advertisements in various publications and post positions at teaching hospitals.

When you go on the interview, make sure that the job opportunity fits both your professional and personal needs. Speak to other physicians employed by the sponsoring entity. Speak to other IMGs that may have preceded you in the town. Be sure that the choice you make will meet your family's needs. You may find that you are not in the position to pick and choose your positions. But making the wrong choice for the wrong reasons can be detrimental to you and your family.

The J-1 waiver process is long, difficult, and arduous. Dealing with trustworthy people throughout your journey will certainly make the process less burdensome.

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J-1 Waiver Memorandum

Procedure for Obtaining a Waiver of the Two Year Foreign Residency Based on an Offer of Employment at a Facility in a Health Professional Shortage Area

Physicians entering the United States with a J-1 (Exchange Visitor) visa must return to their home country for two years after the completion of training, unless the physician has obtained a waiver of the two-year foreign residency requirement, which encumbers the J-1 status. A waiver can be requested if the physician is able to obtain employment at a facility or practice located in an area designated by the United States Department of Health and Human Services (hereinafter referred to as "HHS") as a Health Professional Shortage Area (hereinafter referred to as "HPSA") or Medically Underserved Area (MUA). A waiver may also be processed if the place of employment is not in a HPSA or MUA, but treats a substantial number of patients from those locations. Waivers are also available for specialties, but it varies from State to State.

The Department of Veteran Affairs will process waivers for positions at its facilities and the Appalachian Regional Commission will process waivers for positions located in territories under its jurisdiction. All waivers require that the physician serve at the location for a minimum duration of three years.

Under the "Conrad 30" program, each state can process 30 waivers per year. Most states are participating. A few states require a four-year commitment.

Under the HHS J-1 Waiver program, the HPSA/MUA area must have a score of 14 or above and the sponsoring facility must be a Federally Designated Health Center, a Rural Health Clinic, or a Native American/Alaskan native medical facility. HHS can also process waivers for research positions.

The Delta Regional Authority will process waivers for positions within their jurisdiction The program serves 240 counties in 8 states in the Mississippi Delta Region that have a demonstrated need for physicians. The following states are included in the program: Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri and Tennessee. However not every county in these states are included in the DRA's jurisdiction. Waivers are not limited to primary care.

The Appalachian Regional Commission will process J – 1 waivers for individuals with positions within their jurisdiction in one of the following specialties: family practice, general pediatrics, OB/GYN, Gen. internal medicine or psychiatry. They may consider specialty areas when an appropriate showing of need is demonstrated.

The waiver application takes several months to process. The preliminary step to filing the waiver application with an Interested Government Agency is to obtain a file number from the United States Department of State. After the number has been obtained, documentation establishing that the position is located in a HPSA or MUA, together with a detailed letter describing the need for a physician at the facility, the health conditions being treated at the facility, the efforts that the facility has made to recruit a US physician and the qualifications of the applicant are submitted to the agency, together with additional data and information, including an employment agreement. Each agency and each state has its own waiver policy, procedures and requirements. For example, some programs will require that the prospective employer establish that they had engaged in a recruitment effort for at least six months prior to filing the waiver application.

If the Agency supports the application, they will recommend to the United States Department of State that a Waiver be granted. The State Department will recommend to the USCIS that a waiver be granted. USCIS will then issue an approval notice confirming that the waiver has been approved. The approval of the waiver will specify that the physician must be employed by the employer specified in the waiver application for a period of three years, in H-1B status. The approval of the waiver does not confer Employment Authorization or Permanent Resident Status on the physician. An H-1B petition must be filed and approved prior to commencing employment.

There is no exact science as to when the H-1B process should be commenced. Many factors come into play. The USCIS will not grant a change of status to H-1B status by a J-1 waiver applicant, unless the waiver application has been approved. The H-1B petition cannot be filed more than 6 months before the commencement of employment. Generally, the date that office commences the H-1B processing will vary with each case. Ideally, if circumstances allow, we would file the H petition once the waiver has been approved by USCIS. Under certain circumstances, we may file the H once the United States Department of State has issued their recommendation to USCIS. Under other circumstances, we may wait until the waiver has been approved before starting the paperwork. The status of the license may impact on the time of filing.

USCIS has been inconsistent in their handling H-1B petitions filed without the USCIS waiver approval notice. The office handling the H – 1B petition sometimes contacts the USCIS office handling the waiver, obtains the approval of the waiver and approves the petition. However, this policy and procedure varies from time to time.

If the physician is legally in the United States, in a valid non-immigrant status, the H-1B petition should be approved with a change of status to H-1B. If the physician's J-1 status and 30 day grace period expired before the start date of the H petition or the IMG is outside the US, then the H should be approved without a change of status and employment authorization. The IMG will need to obtain an H-1B visa in their passport and be admitted to United States in H–1B status before commencing employment. Canadian citizens are exempt from obtaining the visa and may enter the United States in H – 1B status, by showing the H – 1B approval notice at the Port of Entry..

The physician must be employed by the sponsoring facility for three years in H-1B status before the physician can file an application to adjust status to Resident Alien Status, based upon an approved Labor Certification and accompanying petition, or an "Immediate Relative" petition, assuming retrogression is not an issue. The Application for Adjustment of Status may be filed sooner, if the physician has filed a "National Interest Waiver" based upon employment in an HPSA or MUA, assuming they are not from a country affected by retrogression. Please see the annexed memos regarding Labor Certification and National Interest Waivers.

I recommend that the physician not remain in the United States more than six months passed the thirty day grace period of the expired DS-2019, as to do so may bar return to the United States from three to ten years, even if the physician will be working in a HPSA. The present USCIS policy has been that if an individual has been given D/S, (Duration of Status) on their I-94, this provision may not apply. However, I prefer not

to rely on it, if possible.

If possible, it is strongly recommended that the DS-2019 be extended for as long as possible. The ECFMG will extend the DS-2019 for Board Examinations. Once the Waiver Application is received by the U.S. Department of State, the DS-2019 may not be extended. This extension is not supposed to subject the physician to the two year foreign residency requirement again, even if it is issued subsequent to approval of the waiver. However, I strongly recommended that the physician, if possible, avoid that situation and file for the extension for the Board examinations in advance of the waiver being approved.

There is only a 30 day grace period to remain in the United States after your DS-2019 expires. Once your waiver has been forwarded to the Department of State, I do not recommend extending the DS2019, as it may make you subject to the two year foreign residency requirement again, thereby canceling the waiver. It should certainly be avoided for all points thereafter. Additionally, entering the United States in J -1 status after the approval of the waiver may subject you to the two-year foreign residency requirement and cancel the waiver approval. This however might not be an issue if you are returning to complete your PGY program. Please discuss this with an attorney prior to your departure as policies at USCIS as well as opinions of attorneys on this issue very from time to time as experiences have changed.

Options leading to Permanent Resident Status can be commenced while the waiver is in progress or at any time thereafter. Most parties will want to wait for the waiver to be approved and employment commenced in H-1B status before starting employment based cases. These options include, but are not limited to, Labor Certification, EB1/Alien of Extraordinary Ability, and Family based petitions, However, with these options, the final step leading to Resident Alien Status, the filing of an Application for Adjustment of Status, or the interview at a U.S. Consulate, if consular processing is sought, cannot be done until after the physician has completed their obligation of being employed for three years in H-1b status at the waiver location. As mentioned in the attached memo pertaining to National Interest Petitions based upon an employment commitment for 5 years in a shortage area, if there is no retrogression, applications for adjustment of status and employment authorization can be submitted prior to completing 3 years employment in H – 1B status.

If the J-1 waiver beneficiary is married to a U.S. Citizen, or is the beneficiary of a family -based preference petition with a current priority date, the physician will have to remain employed with the J-1 sponsor for three years pursuant to H-1B status, before filing an Application for Permanent Resident Status. If consular processing is chosen as the option to complete the process, the interview should be timed to occur after the 3 year obligation has been met.

If you are planning to marry a non-U.S. Citizen or non-Permanent Resident of the United States, or come from a country where traditionally, marriages are arranged by your family, it is imperative that you marry prior to obtaining Permanent Resident status. Please discuss with your attorney if this applies to you.

The entire process, from Waiver through Permanent Resident Status, is long and involved. It should be commenced as early as possible.

Unfortunately, problems can develop between the J-1 waiver beneficiary and the employer. These problems include, but are not limited to, salary issues, medical ethics issues and requiring services to be rendered beyond the hours and locations listed on the contract, the J1 waiver application and H-1B petition. If this situation occurs, you should contact an attorney to discuss your rights and obligations.

If circumstances make employment with the J1 sponsor unbearable and you are able to find another position in a shortage area, a new H –1B petition must be filed. However, you must document that the reason that you are changing jobs is due to no fault of your own and due to circumstances beyond your control, caused by your J1 sponsor. This may become difficult to establish. However, if the circumstances are due to the failure of your sponsor to increase his practice sufficiently to provide you with patients, and your sponsor indicates that this is in fact the case or that he has had a financial reversal, the H-1B petition and hence the waiver transfers should be approved.

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National Interest Waivers for Physicians

Section 203(b)(2) of the Immigration and Nationality Act of 1990 permits the filing of an employment-based second-preference immigrant visa petition for an alien who is "either a member of the professions holding an advanced degree" or "of exceptional ability in the sciences, arts or business." The petition incorporates a request for a waiver of the requirement of a job offer (the labor certification requirement), on the grounds that the alien would benefit the national interest of the United States.

The National Interest Waiver, a procedure to obtain Permanent Resident Status, can also be filed by a physician who will be employed in a HPSA, or perhaps in a MUA, or at a VA facility. The Petition, which is submitted to USCIS, is often referred to as a "National Interest Waiver." (It is not to be confused with the J-1 waiver). This petition seeks a waiver of the Labor Certification process on the grounds that the services to be rendered by an individual will benefit the National Interest of the United States.

Occasionally, USCIS has requested a State License to practice medicine, before approving the Petition. This is probably not required. In most states, the license will not be issued prior to the completion of Residency and the verification of credentials.

The following are required for the NIW:

a. Five year contract for full time employment in a HPSA (MUA in some states) or a health care facility operated by the Department of Veteran's Affairs. The contract cannot be more than six months old.

b. A letter from a federal agency reflecting the agency's knowledge of the alien's qualifications and the agency's background in making determinations in matters involving medical affairs, so as to substantiate the findings that the alien's work is or will be in the public interest, dated and issued within six months of filing the petition.

Or

c. Letter from the State Department of Health attesting that the physician's work is in the public interest and reflecting that they have jurisdiction over the place where the individual intends to be employed, dated and issued within six months of filing the petition.

An Application for Adjustment of Status, Employment Authorization and Advance Parole (permission to travel) can be filed simultaneously with the Petition, as long as the Priority Date on the case is current. The Applications for Employment Authorization and Advance Parole are usually processed within 3-4 months of filing. Adjustment to Permanent Resident Status will not be granted to the physician until the physician has completed a total of five years (not including time spent as a J-1 physician holder) as a physician employed in the designated area. Most states will not allow you to count time spent in H – 1B status as a resident at a hospital in a shortage area towards the 5 years.

If the employee leaves the place of employment listed on the NIW, the individual can still benefit from the approved petition, if the new position is also in a HPSA, MUA or other facility qualifying for an NIW. The five years start accruing on your first day of employment in H-1B status regardless of when the National Interest Petition was approved. A new petition may be required.

A question which is being raised constantly is whether an individual should file an application for Alien Employment Certification (Labor Certification) or proceed with the National Interest Waiver. Physicians who have been granted waivers of the J-1 two-year foreign residency requirement, and are presently employed in H-1B status, if they are not affected by retrogression, may obtain permanent resident status faster through the labor certification process. However, if retrogression is a factor, unless there is a substantial change in the law or usage of the immigrant visas, the National Interest Waiver may result in adjustment of status being granted several months earlier than the labor certification process, since the Priority Date on a National Interest waiver is usually established earlier than would be the case with the Labor Certification case.

Please note that The Labor Certification process requires the physician to remain employed with the petitioning entity after being granted Permanent Resident Status, unless the Application for Adjustment of Status is pending more than 180 days. See the memo regarding Labor Certification. We recommend that the employees remain with the sponsoring employer for at least 6 months after adjustment has been granted. However, that is not necessary with the national interest petition. The obligation for employment in a shortage area regardless of the employer ends after satisfying the five-year employment commitment.

Presently, processing an application for Labor Certification is approximately 15 – 20 months, from the time the attorney starts working on the case until a decision is rendered by the Department of Labor. It will take about 6 to 10 months to process the I-140 petition, 15 days with premium processing. Adjustment of Status is approximately four months to one year, assuming there are no delays for security clearances or backlogs at immigration. Adding a reasonable period of six months of employment with the sponsoring employer after the Application for Adjustment of Status has been granted, will probably result in adjustment of status being granted at least several months faster than through the national interest petition. Please note however that processing times do change. Additionally, the above timetable will not apply if there is retrogression. If retrogression is a factor, you should consult with an attorney regarding these options.

Time can be saved by processing the last phase of the case at the U.S. Consulate in your home country. However, that is usually not recommended. Please consult with an attorney as to the benefits of doing one case or both.

Effective August 2017, USCIS is requiring interviews on employment-based cases. This could result in further delays.

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Employment First Preference

The first employment-based preference category is available to individuals of extraordinary ability in the sciences, arts, education, business, or athletics. This memo will address achievement in the sciences. Different, but sometimes overlapping rules,

apply to the other disciplines.

In order to qualify for Employment First Preference, aliens of extraordinary ability in the sciences must establish that they are one of a small percentage of people who have risen to the top of their field. The alien must establish sustained national or international acclaim and recognition for achievements in their field of expertise and must be seeking to enter the United States to continue work in the area of extraordinary ability.

Establishment of sustained national or international acclaim and recognition for achievement in the field of expertise can be established by providing evidence of receipt of a major internationally recognized award such as the Nobel Prize or at least three of the following:

1. Documentation of receipt of lesser nationally or internationally recognized awards for excellence in the field of endeavor.

2. Documentation of membership in associations in the field of endeavor which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

3. Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation.

4. Evidence of participation on a panel or individually as a judge of the works of others in the same or an allied specialization.

5. Evidence of original scientific contributions of major significance in the field of endeavor.

6. Evidence of authorship of scholarly articles in the field in professional journals or other major media.

7. Evidence of having commanded a high salary or other significantly high remuneration for services in relation to others.

8. Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation.

9. Comparable evidence if the above criteria do not readily apply to the alien's case.

10. Evidence of the display of the alien's work in the field at showcases in more than one country.

USCIS carefully scrutinizes these petitions. They maintain a very high threshold, which must be met in order to obtain an approved petition.

1. Documentation of receipt of nationally or internationally recognized awards for excellence in the field. USCIS may accept documentation that works were selected for presentation at medical conferences and meetings as fulfilling this requirement. However, if these accomplishments are also being used to satisfy another standard for qualifying in this category, it may not be acceptable for this purpose.

2. Documentation of membership in associations in the field of endeavor. The mere membership in various medical associations is not sufficient to meet this requirement. The individual must be a member of a society or association that is extremely selective and would not accept members merely by their filing of an application and payment of dues. Documentation of their selectivity and the selection process should be given, as well as information about the society.

3. Published material and professional or trade publications. Documentation submitted to USCIS must discuss the merits of the alien's work, the alien's standing in the field, and any significant impact that work has had in the field. In addition to submitting published material about the alien and their work, USCIS requires evidence to establish the significance of the published materials submitted about the individual's work, and how it has set the individual apart from others in the field as one of the small percentage who have risen to the top of their field. The publication's name, its logo, national or international circulation, how often it is printed, and the number of copies printed should also be provided.

4. Judging the work of others. Numerous physicians and researchers are involved in reviewing articles by others which are submitted for publications in various trade journals. However, USCIS may not deem this to be sufficient. USCIS requires evidence to establish the criteria used to choose the alien as a judge. It must be demonstrated that the individual's sustained national or international acclaim resulted in their being selected to serve as a judge of the work of others in the field. The judging must be on a national or international level, and involve other accomplished professionals in the field. Evidence demonstrating the review of an unusually large number of articles, or the receipt of independent requests from a substantial number of journals, or serving in an editorial position for distinguished journals should be submitted. Additionally, note that requests to review articles are generally insufficient as evidence to establish this criterion. Rather, documentation must be submitted that the individual has submitted reviews in order for this

criterion to be met.

5. Original scientific contribution. USCIS requires proof establishing that the individual's work is considered original and how it has made a contribution of major significance in the field, compared to all others in the field. According to USCIS, research by itself cannot be considered major in the absence of proven major accomplishments resulting from the studies. USCIS requires other evidence to satisfactorily establish the impact in the field. If the individual has written scholarly articles, heavy independent citation of those articles would be acceptable evidence and objective evidence, according to USCIS, that other researchers have relied on the individual's work. A listing containing the name of each article and the author should be provided.

   If an individual holds one or more patents, evidence of the significant implementation of the patent(s) and innovation(s) should be provided.

   The mere fact that the individual has made presentations of their research or publication at a conference is not sufficient. USCIS requires evidence that sets these presentations apart from others in their field. Such evidence would include, but not be limited to, documentation that the individual was a keynote speaker, or that the presentation drew an unusually large audience. Accordingly, poster presentation should not satisfy this requirement.

6. Scholarly articles. USCIS requires evidence establishing the significance and importance of the alien's scholarly articles in the field. The evidence must indicate that the published articles have garnered national or international attention, for example, being widely cited by individual researchers.

   USCIS does not consider the mere publication of an article in a scientific publication, in and of itself, as meeting any of the criteria. USCIS has concluded that every scientist whose scholarly research is accepted for publication does not necessarily mean that they have made a major contribution in the field.

7. Documentation of receipt of lesser nationally and internationally recognized awards for excellence in the field. USCIS does not consider the selection of an individual's work by a medical conference or journals as being equivalent to an award of a prize.

8. Performance in a leading or critical role for organizations that are established as having a distinguished reputation. The fact that the individual has done research at a major research facility or major hospital could meet the standard. Very strong letters of recommendation establishing the contributions made, and the individual's extraordinary ability, as well as information about the facility should be made. Significant detail should be included in these letters.

On March 4, 2010, the Ninth Circuit of the United States Court of Appeals issued a decision on a case appealed to it regarding an alien of extraordinary ability whereby after establishing three of the criteria for Extraordinary Ability, the applicant must show in the final merits analysis that the requisite level of achievement has been attained. The following is a link to the decision.

http://www.ca9.uscourts.gov/datastore/opinions/2010/03/04/07-56774.pdf.

In the case, Poghos Kazarian, Plaintiff-Appellant, v US Citizenship and Immigration Services, a Bureau of the Department of Homeland Security; John Does, 1 through 10, Defendants-Appellees, the Court held the following:

1. The regulations do not require an individual to demonstrate the research community's reaction to their published articles before the articles can be considered as evidence.

2. Neither USCIS nor the Administrative Appeals Office (AAO) may unilaterally impose novel substantive or evidentiary requirements beyond those set forth in 8 C.F.R. §204.5.

3. While the authors' citations (or lack thereof) might be relevant to the final merits determination of whether a petitioner is at the very top of their field, they are not relevant to the antecedent procedural question of whether they have provided at least three types of evidence.

4. The criteria applied by the USCIS and AAO in determining whether the individual was judging the works of others by judging graduate level diploma works at a university, and the AAO's conclusion that this was not persuasive evidence of acclaim beyond that of the university, and the determination by USCIS and the AAO that absent 'evidence that the petitioner served as an external dissertation reviewer for a university…" was not correct. The Court determined that 8 C.F.R. §204.5(h)(3)(iv) does not allow USCIS to inquire as to whether judging university dissertations counts as evidence, depends on which university the judge is affiliated with. The Court felt that although this might be relevant to the final merits of the determination, the AAO and USCIS could not unilaterally impose this requirement, and felt that this was a "novel evidentiary requirement."

Although the decision by the Court did not reverse the decision of USCIS and the AAO, it did acknowledge that USCIS and the AAO erred by stating that none of the criteria were met. The Court determined that two of the ten criteria, of which three are required, were met.

Despite the Kazarian decision, USCIS is taking a very tough position on these cases. After filing the petitions, they are issuing letters requesting additional information,

claiming that the submission is deficient and stating and requesting the following:

"The criterion has not been met because the evidence submitted does not show that the beneficiary has made original scientific or scholarly research contributions to the Academic field. To assist in determining whether the beneficiary's contributions are original, you may submit:

- Objective documentary evidence of the beneficiary's contribution to their academic field.
- Documentary evidence that people throughout the field currently consider the beneficiary's work original.
- Testimony and/or support letters from experts which discuss the beneficiary's original scientific or scholarly research contributions to their academic field. (see note below).
- Evidence that the beneficiary's original contribution has provoked **widespread** public commentary in the field or has been widely cited.
- Evidence of the beneficiary's work being implemented by others. **Possible evidence may include but is not limited to:**

    - **Contracts with companies using the beneficiary's products;**
    - **Licensed technology being used by others;**
    - **Patents currently being utilized and shown to be significant to the field.**

- Any other relevant evidence

Note: Letters and testimonies, if submitted, must provide as much detail as possible about the beneficiary's contribution and must explain, in detail, how the contribution was "original" (not merely replicating the work of others). General statements regarding the importance of the endeavors are insufficient.

Letters of support alone are not sufficient to meet this criterion. Letters, though not without weight, cannot form the cornerstone of a successful outstanding ability claim. USCIS may, in its discretion use such letters as advisory opinions submitted by expert witnesses. However, USCIS is ultimately responsible for making the final determination of the alien's eligibility [*Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr.1988)]. The content of these letters, and how the letter writers became aware of the beneficiary's reputation, is important. **Letters solicited by him in support of an immigration petition are of less weight than the preexisting, independent evidence one would expect to find where an individual has made original contributions.** Without extensive documentation showing that the beneficiary's work has made original contributions to the field, we cannot conclude he meets this criterion."

The process established by the US government to bring the best and brightest to the United States, has been overly and subjectively complicated, making approvals of these cases for physicians extremely difficult.

Kazarian established a two step process to adjudicate first preference petitions. First, three of the criteria required for approval of an Immigrant Petition based upon Extraordinary Ability must be established. Second, in a final merits analysis, the totality of the evidence must show that the petitioner has risen to the top of the field, and has sustained national or international acclaim.

Further to the *Kazarian* 2 step analysis, USCIS has found in some cases that an applicant may meet three of the evidentiary criteria, but in the second step, an analysis of the totality of the evidence, USCIS may nevertheless conclude that the individual does not qualify for the First Preference category.

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National Interest Petition: Non Shortage Area Case: Matter of Dhanasar Precedent Decision

Section 203(b)(2) of the Immigration and Nationality Act of 1990 permits the filing of an employment-based second-preference immigrant visa petition for an alien who is "either a member of the professions holding an advanced degree" or "of exceptional ability in the sciences, arts or business". The petition incorporates a request for a waiver of the requirement of a job offer (the labor certification requirement), on the grounds that the candidate would benefit the national interest of the United States.

In 1998, after approving numerous National Interest Petitions for different professions, especially physicians who agreed to serve in Health Professional Shortage Areas, the Administrative Appeals Office of the Immigration and Naturalization Service issued a decision denying a National Interest Petition for an Engineer employed by the New York State Department of Transportation (hereinafter referred to as "NYSDOT"). The decision was accepted as precedent in the area of establishing what would truly be deemed as being in the "National Interest". This case had no impact on National Interest Petitions for physicians who would be employed for 5 years in a qualifying shortage or underserved area.

Until "NYSDOT", immigration adjudicated National Interest Petitions without a regulatory definition of what factors are to be considered in adjudicating a "national interest waiver." However, the decision established tough guidelines for determining whether an individual was truly going to be serving the "National Interest of the United

States".

In December 2016, the Secretary of the Department of Homeland Security designated as precedential the USCIS Administrative Appeals Office's decision in Matter of Dhanasar. This precedent decision vacates NYSDOT. The Dhanasar decision can be found at https://www.justice.gov/eoir/page/file/920996/download.

As a result of the Dhanasar decision, USCIS may grant a National Interest Waiver if the petitioner demonstrates the following:

1) that the foreign national's proposed endeavor has both substantial merit and national importance;

(2) that he or she is well positioned to advance the proposed endeavor; and

(3) that, on balance, it would be beneficial to the United States to waive the requirement of a job offer and thus of a labor certification.

In the decision, the AAO stated that the decision in NYSDOT was ripe for revision and adopted the Dhanasar framework for adjudicating national interest waiver petitions to provide greater clarity, to provide for flexibility to circumstances of both petitioning employers and self-petitioning individuals, and to better advance the purpose of the discretionary waiver provision to benefit the national interest of the United States.

The Schedule A, Group II blanket labor certification for "aliens of exceptional ability" may still be a viable option. Group II covers aliens with exceptional ability in the sciences and the arts.

Despite the development of the Dhanasar framework, USCIS preference is for the applicant to go through the labor certification process. However, there are numerous times where the labor certification process will not be a viable option and hence the National Interest Petition or other options must be considered and possibly pursued.

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