

USCIS Opens Door to Residence Status for Foreign Entrepreneurs

August 2, Washington - In a reversal of policy, USCIS has reinterpreted its regulations to allow foreign entrepreneurs access to the National Interest Waiver of the Labor Certification requirement. In effect, this should allow a much faster, more secure route to U.S. residence status for some employment-based immigrants with exceptional ability in business and other fields.

Owners of businesses who have advanced degrees or who can otherwise establish outstanding ability in business, the arts, or sciences will now be eligible for a fast-track to LPR status if they demonstrate that the national interest would be served by their proven ability to create jobs and other benefits to the U.S.

USCIS Director Alejandro Mayorkas announced the measure to ease restrictions on jobs-creating immigrants. This comes as [President's Council on Jobs and Competitiveness](#) and [Startup America](#) reach out to foreign entrepreneurs in an effort to attract and retain Foreign Direct Investment (FDI) in the United States.

The White House is coordinating efforts by the public and private sectors to foster opportunity and promote job creation for startups and high growth businesses. Part of this is a push to reevaluate regulations that are found to impede jobs creation and start-up businesses in the U.S.

In recent days, the [Startup America Partnership](#) has announced the first Impact Investment Partner, a Small Business Administration commitment to invest up to \$1 billion in underserved communities and emerging sectors over the next 5 years. This first effort will focus on growing businesses in Michigan, with up to \$130 million, with up to \$80 million coming from SBA. Startup America has launched the Impact Investment Fund “to accelerate entrepreneurship and turn innovation into jobs.”

USCIS Releases Immigrant Entrepreneur FAQ

As part of its new policy, USCIS released a [Questions and Answers](#) FAQ¹ Tuesday that lays out the Service's revised position regarding eligibility for the Employment-Based Second Preference visa category and the National Interest Waiver (NIW). Among the highlights:

Q4. Can an entrepreneur qualify as a member of a profession holding an advanced degree?

A4. Yes. An entrepreneur can qualify if the:

- Entrepreneur will be working for a U.S. employer who files a petition on the entrepreneur's behalf
- Entrepreneur is a member of the profession holding an advanced degree or foreign equivalent degree
- Underlying position requires, at a minimum, a professional holding an advanced degree or the equivalent
- Petitioning employer has received an individual labor certification from the Department of Labor; and
- Entrepreneur meets all the specific job requirements listed on the individual labor certification

Q5. Can an entrepreneur qualify as an individual of exceptional ability in the sciences, arts, or business?

A5. Yes. An entrepreneur can qualify if the:

- Entrepreneur will be working for a U.S. employer who files a petition on the entrepreneur's behalf
- Entrepreneur will be working in the sciences, arts, or business
- Entrepreneur has exceptional ability in the sciences, arts, or business
- Entrepreneur will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States

The most significant change in the new policy is that a self-employed person is now eligible for a NIW waiver of the labor certification requirement. Previous interpretation made it virtually impossible for most self-employed aliens, such as those who start-up and operated as the sole heads of their own businesses, to qualify for a waiver. That was a serious problem for entrepreneurs, particularly as the US Department of Labor bars by regulation the self-filing of alien labor certifications. The new USCIS policy now

¹ See, Employment-Based Second Preference Immigrant Visa Category Frequently Asked Questions Regarding Entrepreneurs and the Employment-Based Second Preference Immigrant Visa Category, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=93da6b814ba81310VgnVCM100000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD>

states that EB-2 waiver may now be granted provided that certain requirements are met:

Q12. If an entrepreneur wants to file for a NIW, does he or she still have to be a member of the profession holding an advanced degree or an individual of exceptional ability?

A12. Yes. The entrepreneur must first demonstrate that he or she is either a member of the profession holding an advanced degree or an individual of exceptional ability.

Q13. If an entrepreneur wants to file for a NIW must he or she have an actual employer in the United States?

A13. No. Pursuant to INA 203(b)(2)(B), an entrepreneur does not need to have an actual job offer from a U.S. employer if he or she qualifies for a NIW. In other words, an entrepreneur may be able to petition for him or herself and fill the role of both the petitioner and beneficiary. The law provides that the Secretary of the Department of Homeland Security may, if he or she deems it to be in the national interest, waive the requirements that an individual's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Q14. Is there a definition of "national interest"?

A14. The term "national interest" is not defined in the statute or the regulations, and Congress did not specifically define the phrase in the relevant legislative history. However, USCIS issued a precedent decision concerning NIWs, Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998) (NYS DOT).

While *NYS DOT* does not involve an entrepreneur, the decision contemplates that entrepreneurial or self-employed beneficiaries may qualify for the NIW under limited circumstances. Footnote 5 in the decision states:

The Service acknowledges that there are certain occupations wherein individuals are essentially self-employed, and thus would have no U.S. employer to apply for a labor certification...[T]he petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field.

NYS DOT lays out a three pronged test for NIW applicants to qualify for a waiver of the job offer requirement.

This is indeed welcome news for many non-immigrants with start-ups who would otherwise have run out of time. The current U.S. immigration regime lacks a specific provision for granting permanent status to entrepreneurs.

This has become a problem because in recent years USCIS has denied many L-1 applications and renewals, particularly for executives and managers in the IT outsourcing industry, forcing multinational companies to seek alternatives to the once reliable progression of L-1A nonimmigrants to First Preference immigrant visas.

If an EB-1 petition is ruled-out because of loss of L-1A status, the alternatives to immigration for multinational company executives and managers is PERM labor certification or an I-140 petition for EB-2 Exceptional Ability in Business with an application for a National Interest Waiver (NIW) of the labor certification.

This process can be particularly complicated for entrepreneurs who have an ownership stake in the companies they help establish.

The previous interpretation taken in 1998 by the then INS Commissioner was that the *NYSDOT* decision all but eliminated the self-employed from eligibility for a NIW. *NYSDOT* requires the petitioner to demonstrate persuasively that the national interest would be adversely affected if a labor certification were required for the beneficiary, i.e., that the national benefit offered outweighs the inherent national interest in the labor certification process.²

The August 2 Q&A concludes on a far more encouraging note for those who may have been otherwise considering exit plans from the U.S. startups they founded:

The entrepreneur who demonstrates that his or her business enterprise will create jobs for U.S. workers or otherwise enhance the welfare of the United States may qualify for an NIW. For example, the entrepreneur may not be taking a job opportunity from a U.S. worker but instead may be creating new job opportunities for U.S. workers. The creation of jobs domestically for U.S. workers may serve the national interest to a substantially greater degree than the work of others in the same field.

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² The third prong of *NYSDOT* requires a showing “that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the alien by making the position sought available to U.S. workers.” Elsewhere in *NYSDOT* the INS seems to erect an even higher barrier by requiring the petitioner to 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.”

In addition, that decision in effect required a demonstration that the beneficiary is virtually unique, which only the DOL may conclusively determine through a finding that similarly qualified workers are not available in the U.S.
