

## Committee Newsletter | Spring 2017, Vol. 1, Issue 1

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## ARTICLES

### **Achievement-Based Immigrant Visas: Pathway to Permanent Residency**

By Erin L. Hogan

For many individuals seeking permanent residency, it may be appropriate to consider employment-based options outside of the more common Labor Certification process. Foreign nationals engaged in very high-level work and with a history of significant accomplishments and acclaim may be eligible for achievement-based options. These achievement-based options may present a faster alternative than the Labor Certification process, particularly for foreign nationals from countries with a significant visa backlog.

#### *EB-1A: Extraordinary Ability*

One Extraordinary Ability category, EB-1A, is available to individuals who can demonstrate that they are among the top few percent of experts in their fields. There is no limit to what type of field the individual must be in to qualify for this category. Rather, the individual must define the field and then show that she is at the top of it. This could include scientists, athletes, artists, business professionals, and many more.

To demonstrate that the individual is an alien of extraordinary ability, the individual must either show that she has a significant international award, such as a Nobel Prize, or, if the individual does not have a Nobel Prize or other similar high-level award, then she must identify and document that she has met at least three of the ten enumerated criteria. Specifically, at least three out of the following:

1. "Evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence;
2. Evidence of your membership in associations in the field which demand outstanding achievement of their members;
3. Evidence of published material about you in professional or major trade publications or other major media;
4. Evidence that you have been asked to judge the work of others, either individually or on a panel;
5. Evidence of your original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field;
6. Evidence of your authorship of scholarly articles in professional or major trade publications or other major media;
7. Evidence that your work has been displayed at artistic exhibitions or showcases;
8. Evidence of your performance of a leading or critical role in distinguished organizations;
9. Evidence that you command a high salary or other significantly high remuneration in relation to others in the field;
10. Evidence of your commercial successes in the performing arts."<sup>1</sup>

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<sup>1</sup> 8 C.F.R. § 204.5(h)(3)(i)-(x)

In addition to meeting at least three of the criteria listed above, the individual must also demonstrate that the totality of the evidence indicates that she is at the top of her field. In instances where the above-listed criteria do not readily apply to the individual's specific field, comparable evidence may be submitted.

The EB-1A category is appealing for a number of reasons. First, it is a first-preference visa category which generally does not have a backlog, even for those from countries traditionally subject to a long wait. Second, it does not require an employer petitioner. An individual may self-petition for an EB-1A. While no offer of employment is required, the individual must still show that she will be coming to the U.S. to work in her area of expertise.<sup>2</sup> Third, an individual can use premium processing for this category. For many with timing concerns, this may provide an advantage over other processes that would require a longer time. Though this category has many advantages, it should also be noted that this category is very highly scrutinized. It is meant for people with a long history of accomplishments and well-documented expertise. Those just starting out in their fields generally will not be eligible. Further, even with the option of comparable evidence, some fields may not lend themselves well to the rigid criteria or it may be hard to document in a way that can be reviewed by a USCIS Officer.

#### *EB-1B: Outstanding Researcher*

The EB-1B category allows outstanding professors and researchers (referred to collectively as "researcher") to seek permanent residency in the U.S. if they can meet certain criteria. The researcher must have at least three years of experience in teaching or research in the academic field of her expertise. The researcher must also be entering the U.S. to pursue tenure or tenure track teaching, or to pursue a comparable research position at a university or other institution of higher education. Private employers may also petition for their employees so long as there are at least three current researchers employed by the company and the company has achieved documented accomplishments in the beneficiary's academic field. Unlike the EB-1A category or the NIW category (listed below), the EB-1B category requires an offer of employment.

In addition to these criteria, the researcher must be able to demonstrate that she can meet at least two out of the following criteria:

1. "Evidence of receipt of major prizes or awards for outstanding achievement;
2. Evidence of membership in associations that require their members to demonstrate outstanding achievement;
3. Evidence of published material in professional publications written by others about the alien's work in the academic field;
4. Evidence of participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field;
5. Evidence of original scientific or scholarly research contributions in the field;
6. Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the field."<sup>3</sup>

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<sup>2</sup> 8 C.F.R. § 204.5(h)(5)

<sup>3</sup> 8 C.F.R. § 204.5(i)(3)(i)

Recently, revised regulations are now allowing for applicants to submit “comparable evidence” to the enumerated list, as is possible with the EB-1A category. This change allows for more flexibility and additional ways for researchers to demonstrate that they are outstanding researchers in their academic field.

As with other petition types, the EB-1B category has its pros and cons. For those who are currently engaged in research and have an employer willing to petition for them, the EB-1B category may be a better path than the EB-1A category. The standard is slightly lower than the EB-1A category (“international recognition for outstanding achievements” versus “extraordinary ability . . . sustained through national or international acclaim”) and only two criteria are required as opposed to three for the EB-1A category. It is a first-preference category so again there will likely not be a visa backlog for any individuals. Premium processing is also available. However, in some situations the EB-1B category may not be possible. Usually the biggest hurdle to the EB-1B category is whether the individual has an employer willing to sponsor them. If she does not, then regardless of her credentials she will not be eligible for this category. Another potential pitfall for the EB-1B category is whether the individual will be engaged in active research. Many accomplished academics have moved away from active research to work in consulting or management. If the individual no longer has an offer of employment specifically for *active research* then she will likely not be eligible for this category.

#### *National Interest Waiver*

For many applicants working in areas of high innovation or of particular importance for the national landscape, the National Interest Waiver may be an appropriate option to consider. While many talented foreign nationals may be interested in the EB-1A or EB-1B categories, the strict eligibility criteria set forth in these categories may not work well for a particular applicant or a particular profession. The National Interest Waiver (“NIW”) second-preference category offers a flexibility that is not found in the first-preference categories, often opening the door to permanent residency to those in newer or less traditional fields. It is therefore important for any practitioner to explore the NIW option when a foreign national is working in a trendy or nationally important field.

The NIW category is available to foreign nationals who are “members of the professions holding advanced degrees or aliens of exceptional ability”<sup>4</sup> and who can meet a three-prong test demonstrating that it is in the national interest that the job offer and labor certification requirements are waived.

This three-prong test is laid out in *In re Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). Specifically,

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

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<sup>4</sup> 8 C.F.R. § 204.5(k)

3. that, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.”<sup>5</sup>

It should be noted that while the NIW may be an available option to the individual, it may not be the best option for practical reasons. First, the NIW category falls under the employment-based second preference category. The EB-2 category often has a visa backlog, particularly for those born in China or India. Second, the NIW petition does not allow for premium processing. For those who may need an approved I-140 quickly due to other timing concerns, this may not be the best option. For those reasons, it may be worth considering first whether the EB-1A or EB-1B options are available to the individual before pursuing an NIW petition.

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<sup>5</sup> Matter of Dhanasar, 26 I&N at 889.

## NEWS AND ANNOUNCEMENTS

### Webinar Announcement

*Own Your Practice: Ideas from a Successful Immigration Lawyer*  
July 20, 2017            1:00pm – 2:00pm ET

Young lawyer and successful immigration attorney Emily Amara Gordon of Amara Immigration Law, LLC, in Boston, MA, will share what it takes for early-career immigration attorneys to approach their practice as their own. Great information for those starting their own practice as well as immigration associates who want to take initiative and have a more meaningful impact in their respective firms. Learn smart ways to leverage technology to manage cases and your time; engage with professional groups for mentorship and professional growth; and, develop a professional reputation that can help with business development for you or your firm.

Register online:

<https://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=278553484>

### Call for Article Submissions

Those with a desire and experience in legal writing are encouraged to contribute through a law update, practice pointer, or brief article that would be helpful to immigration attorneys in the earlier years of their practice. The Committee accepts draft article submissions of at least 100 words. Authors should include a brief two to three sentence by-line that briefly mentions their practice area focus and any other relevant information regarding their background. Authors cannot advertise, promote, or include slogans or service marks in their by-line. If interested in writing a more lengthy and informative article on a matter of law, please email us with a proposed topic and scope of coverage.

Attribution. Authors may rely on primary and secondary sources. Primary sources must be references to appropriate laws, regulations, as well as official agency guidance (binding and non-binding). Secondary sources can include scholarly journal articles, treatises, and other reputable and reliable sources of legal analysis. Authors should provide brief references to the source of law as well as secondary sources. Authors are not required to follow a particular citation format, however we ask for consistency of formatting style. References should only appear in footnotes.

**Note:** The articles and content in this newsletter are intended to be informative and helpful to law practitioners. However, they are not intended to be a substitute for legal or other professional services. For legal advice, the services of a competent professional should be sought.