



## U.S. Citizenship and Immigration Services

# Employment-Based Second Preference Immigrant Visa Category Frequently Asked Questions Regarding Entrepreneurs and the Employment- Based Second Preference Immigrant Visa Category

## Questions and Answers

### **Q1. Where can I find the laws governing the Employment Based Second Preference (EB-2) Immigrant Visa Category?**

A1. The statutory requirements may be found in the Immigration and Nationality Act (INA) at Section 203(b)(2). The regulatory requirements may be found in the Title 8 Code of Federal Regulations (8 CFR) at section 204.5(k).

### **Q2. What is the EB-2 Immigrant Visa Category?**

A2. Congress created the employment-based second preference visa category with the Immigration Act of 1990. This classification includes:

- Members of the professions holding advanced degrees or their equivalent, and
- Individuals who because of their exceptional ability in the sciences, arts, or business will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

### **Q3. Does anyone with an advanced degree qualify for an EB-2 Immigrant Visa?**

A3. No, not every individual with an advanced degree will qualify. It must be demonstrated that the occupation is a profession. The term "profession" is defined by 8 CFR 204.5(k)(2) as any occupation for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Occupations include but are not limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.

### **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
- 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.

**Q6. Why is a labor certification required to qualify for an EB-2 Immigrant Visa Category?**

A6. The labor certification process exists to protect U.S. workers and the U.S. labor market by ensuring that foreign workers seeking immigrant visa classifications are not displacing equally qualified U.S. workers.

**Q7. How is exceptional ability defined?**

A7. 8 CFR 204.5(k)(2) defines exceptional ability as degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

**Q8. How can an entrepreneur establish that he or she has exceptional ability in the sciences, arts, or business?**

A8. First, the entrepreneur would need to establish that they meet at least three of the criteria found at 8 CFR 204.5(k)(3)(ii). The criteria are:

- (A) An official academic record showing that the beneficiary has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
- (B) Evidence in the form of letter(s) from current or former employer(s) showing that the beneficiary has at least ten years of full-time experience in the occupation for which he or she is being sought
- (C) A license to practice the profession or certification for a particular profession or occupation
- (D) Evidence that the beneficiary has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

- (E) Evidence of membership in professional associations; or
- (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

It should be noted that, as set forth in subparagraph (A) above, the regulation requires that the alien (in this case, the entrepreneur) have a degree “relating to” the area of exceptional ability. This means that the entrepreneur’s degree need not be in the same field of claimed exceptional ability, but only that it be related to that field. For example, an entrepreneur seeking to start an internet-related business and who claims exceptional ability in that field might qualify with a degree in computer science, network technology, or certain areas of business.

Second, the entrepreneur must demonstrate that he or she has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

**Q9.** If an entrepreneur is unable to provide documentary evidence that he or she meets at least three of the six regulatory criteria for exceptional ability, can he or she submit other evidence to demonstrate exceptional ability in the sciences, arts or business?

**A9.** Yes. 8 CFR 204.5(k)(3)(iii), states:

*If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.*

Comparable evidence is to be accorded the same weight as evidence submitted in support of the criteria listed above. Irrespective of the type of evidence presented, the entrepreneur has the burden of proving, by a preponderance of the evidence (i.e. more likely than not), his or her eligibility for the EB-2 visa classification. USCIS will take into account the totality of the circumstances when reviewing the evidence provided.

When comparable evidence is presented, the entrepreneur must explain how and why the regulatory criterion for which comparable evidence is being submitted does not readily apply to his or her occupation.

There is no limitation on the type of comparable evidence the entrepreneur may present; instead, the focus is on the quality of the evidence presented and how it compares to the regulatory criterion for which it is being substituted. For example, the entrepreneur might demonstrate such past achievements as his or her successful history in obtaining venture capital funding from reputable sources, or his or her past participation in incubators (entities that provide resources, support, and assistance to entrepreneurs to foster the development and growth of an idea or enterprise) that have high evaluative standards for participation.

**Q10. How does an entrepreneur show that he or she will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States?**

**A10.** Entrepreneurs should discuss which element(s) (national economy, cultural or educational interest, or welfare of the United States) the entrepreneurial enterprise is claimed to benefit. For example, the educational interests of the United States may be met by an entrepreneurial enterprise that establishes tutoring instruction learning

centers throughout the United States.

As another example, the entrepreneur could demonstrate that at least one aspect of the welfare of the United States will be “substantially” better off were the entrepreneurial enterprise to be located in the United States. It should be noted that the term “welfare” as used by the statute is a broad concept and could refer to any number of areas.

## NATIONAL INTEREST WAIVER

### **Q11. Is there a “national interest waiver” (NIW)? And if so, what is it? Can an entrepreneur qualify for a NIW?**

*A11.* Yes. A NIW exempts the petitioner from the normal requirement of a job offer, and thus from obtaining a labor certification from the U.S. Department of Labor. Entrepreneurs, if they qualify, can obtain a waiver of the job offer requirement if it is in the national interest.

### **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) (*NYSDOT*).

While *NYSDOT* 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.*

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

**Q15. What are the three prongs laid out in the NYSDOT decision?***A15.*

1. The waiver applicant must seek employment in an area that has substantial intrinsic merit.
2. The waiver applicant must demonstrate that the proposed benefit to be provided will be national in scope.
3. The waiver applicant must demonstrate that it would be contrary to the national interest to potentially deprive the prospective employer of the services of the waiver applicant by making available to U.S. workers the position sought by the waiver applicant.

Stated another way, the petitioner, whether the U.S. employer or the NIW applicant, must establish that the entrepreneur will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

**Q16. How does the first prong of NYSDOT relate to entrepreneurs?**

*A16.* Under the first prong of the *NYSDOT* test, the entrepreneur must seek employment in an area that has substantial intrinsic merit. It is important for the entrepreneur to focus on the proposed employment rather than the entrepreneur's qualifications. In *NYSDOT*, the beneficiary was a structural engineer working on highway bridges. This activity was found to have substantial intrinsic merit.

**Q17. How does the second prong of NYSDOT relate to entrepreneurs?**

*A17.* The second prong of the *NYSDOT* test requires that the entrepreneur demonstrate that the proposed benefit to be provided will be national in scope. For example, the entrepreneur might be able to demonstrate that the jobs his or her business enterprise will create in a discrete locality will also create (or "spin off") related jobs in other parts of the nation. Or, as another example, the entrepreneur might be able to establish that the jobs created locally will have a positive national impact. As described below, and as the law contemplates, USCIS will give due consideration to entrepreneurs who establish that their entrepreneurial enterprise will serve the national interest to a substantially greater degree than the work of others in the same field.

**Q18. How does the third prong of NYSDOT relate to entrepreneurs?**

*A18.* NYSDOT's third prong is best understood in light of the labor certification process and the assumed benefit that it provides to the United States. An individual seeking an exemption from this process must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. NYSDOT's third prong requires that the entrepreneur "present a significant benefit to the field of endeavor." The field should be the same as that identified in prong one of the analysis and the entrepreneur must document how the entrepreneurial enterprise will benefit that field.

*NYSDOT* states:

*"In all cases, while the national interest waiver hinges on prospective national*

*benefit, it clearly must be established that the beneficiary's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the beneficiary will, in the future, serve the national interest cannot suffice to establish prospective national benefit if the beneficiary has few or no demonstrable achievements."*

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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