RECENT TRENDS IN NATIONAL INTEREST WAIVER CASES

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Fifteen years after its publication, *Matter of New York State Department of Transportation (NYSDOT)*[1] remains the standard for eligibility in the elusive "National Interest Waiver" (NIW) immigrant visa category. Since 1998, the Immigration and Naturalization Service and now its successor, U.S. Citizenship and Immigration Services (USCIS), have applied the *NYSDOT* criteria to myriad scenarios and refined the interpretation of the criteria as they apply to a wide range of fields and petitioners. This article addresses USCIS's recent NIW adjudication trends at the Administrative Appeals Office (AAO) level to see where *NYSDOT* has taken us over the years and to establish some guidance for practitioners in 2013.

Background

The NIW is available to certain foreign nationals who can demonstrate that it is in the national interest to waive the usual requirements of a labor certification and an offer of permanent employment. Most employment-based immigration cases currently require the foreign national's prospective employer to conduct a test of the labor market and obtain certification from the Department of Labor that there are no U.S. workers who are willing, able, qualified, and available to perform the duties of the foreign national's position.[2]

Only foreign nationals in the employment-based second preference (EB-2) category are eligible to apply for NIWs. The EB-2 category encompasses: (1) foreign nationals who are members of the professions holding advanced degrees or the equivalent and (2) foreign nationals 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.[3] For a NIW, a foreign national must prove not only eligibility for the EB-2 category, but must additionally demonstrate that the requirement of a labor certification will adversely affect the national interest.

To apply for an NIW, an applicant must file an I-140 petition with the appropriate USCIS service center requesting EB-2 classification as well as a waiver of the requirements of a labor certification and a job offer. If the petition is approved, it can form the basis for adjustment of status to lawful permanent residence in the United States for the foreign national and any derivative family members. If the I-140 petition is denied, the decision may be appealed to the AAO, which posts some of its decisions on its website.[4]

NYSDOT has been the only case to offer any substantial guidance on what constitutes "national interest" for NIW purposes. *NYSDOT* noted that since "exceptional ability" is required for some foreign nationals to even qualify for EB-2, the additional benefit of an NIW must require something well beyond what would be needed to establish exceptional ability.[5] *NYSDOT* also established a three-pronged test for evaluating whether the waiver will be in the national interest:

> (1) The foreign nation seeks employment in an area of substantial intrinsic merit;
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> (2) The proposed benefit to the United States is national in scope; and
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> (3) The national interest would be adversely affected if a labor certification was required.[6]

To determine how the standard applies today, we reviewed sixty NIW decisions posted on the AAO's website since January 1, 2011.[7] In over 90% of these cases, the AAO upheld the USCIS service center's

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[1] 22 I. & N. Dec. 215 (INS Acting Assoc. Comm'r 1998).

[2] 20 C.F.R. pt. 656.

[3] INA § 203(b)(2), 8 U.S.C. §1153(b)(2).

[4] These are at www.uscis.gov > LAWS > Administrative Decisions > B5 ("Members of the Professions holding Advanced Degrees or Aliens of Exceptional Ability"). They are grouped by year and are listed by date within that year. Note that the decisions have no other identifying information by which they can be searched. The NIW decisions are grouped in with the general EB-2 decisions, and there is no way to tell whether a decision relates to an NIW without opening it online.

AAO decisions also are on lexis.com in the database called "Immigration Non-Precedent Decisions: BIA, AAO/AAU." They are searchable by the identifier used by the AAO or by citation to Immigr. Rptr. LEXIS (e.g., 2012 Immig. Rptr. LEXIS 3423). That is, on the USCIS site, a decision will be identified by something like "Feb212012_02B5203.pdf" (second case dated February 21, 2012, that is listed in the B5 category, applying INA §203). A lexis.com search can be done for that identifier or part of it. We provide these identifiers for the cases cited.

[5] *NYSDOT*, 22 I. & N. Dec. at 218.

[6] *Id.* at 217.

[7] The latest published case was dated April 3, 2012, at the time this article was written.

denial of the NIW, implying that most NIW cases are won at the service center or not at all. The overwhelming reason for denial was a failure to meet the third prong of *NYSDOT*.[8] The AAO's decisions tend to focus on: (1) the petitioner's past achievements; (2) the quantifiable impact of these achievements on the field, and (3) direct comparison between the petitioner and peers in the field with a similar background. The AAO cites *NYSDOT* frequently to remind the petitioner that the Department of Labor, through the labor certification process, determines whether similarly trained U.S. workers are available to perform the job. The AAO maintains that *NYSDOT* makes the NIW benefit available only to a petitioner with an especially impressive record of accomplishments that have had an influence in the field.

Below we discuss issues that have arisen with the first two *NYSDOT* prongs, the AAO's recent approach to the third prong, and the AAO's discussion of different forms of evidence. We conclude by providing some tips for practitioners based on our research.

I. The First Two Prongs of *NYSDOT*

The AAO generally applies a lenient standard with respect to the first two prongs of the *NYSDOT* test. In the vast majority of the cases we reviewed, the AAO accepted that the petitioner's work was in an area of intrinsic merit in satisfaction of the first prong, and that the work was national in scope, thus meeting the second prong of *NYSDOT*.

A. Intrinsic merit

With respect to "intrinsic merit," a wide variety of fields appears to qualify, including consumer electronics sales, graphic design, Swahili education, business management, international broadcasting, and Taiwanese folk music. The AAO rarely engages in analysis of the merit of the field. Recall that *NYSDOT*, which involved a bridge engineer, stated "it is indisputably true that the nation's bridges play a fundamental role in the transportation system, and, by extension, in the economy itself which depends on the transportation of goods and mobility of commuters and tourists."[9] Similarly, the AAO, when it addresses this prong at all, does so by way of general statements about the obvious merit of the field. In some cases, the AAO skips this analysis altogether in its hurry to discuss the third prong, under which denials find firmer footing in *NYSDOT*.

B. National in scope

For the second prong, the AAO articulates the "proposed benefit" to the United States and determines whether the benefit, if realized, would be national in scope. For the second prong, the AAO is willing to engage in some speculation. Interestingly, the AAO has even reversed a service center's adverse findings concerning "national in scope" on several occasions. For example, the AAO reversed a service center's determination that Taiwanese folk music was not national in scope, recognizing that performances would take place around the country.[10] Similarly, the AAO reversed the service center and held that the proposed benefits of consulting, international relations, and electronics sales all could be national in scope.[11] The service center even reversed its own position after a petitioner's response to a Notice of Intent to Deny, holding that the work of a graphic designer was national in scope.[12]

We were surprised by the plethora of activities the AAO deems to have "national scope." This generous approach, however, is consistent with *NYSDOT*, in which the proposed benefit of proper maintenance and operation of New York City bridges was "national in scope" because the bridges connect New York to the rest of the United States.[13]

The AAO has taken a stricter view on certain occupations. For example, the work of local medical staff is *not* national in scope.[14] The AAO affirmed denials on this prong in the case of a nurse trainer, an oncologist, and a variety of physicians, reasoning that, for example, "the impact of a single nurse at one

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[8] This trend is consistent with the trend recognized in AAO decisions from 2003-2004. *See* Stephen Yale-Loehr & Sean Koehler, *National Interest Waiver Petitions for Researchers: Demonstrating a Measurable Impact on the Larger Field*, 9 Bender's Immigr. Bull. 1341 (Nov. 15, 2004) (stating that "the third prong of an NIW case is the most difficult to satisfy").

[9] 22 I. & N. Dec. at 220.

[10] Matter of X, 2012 Immig. Rptr. LEXIS 3423 (AAO Aug. 8, 2011) (Dec152011_01B5203.pdf).

[11] Matter of X, at 5 (AAO Feb. 21, 2012) (Feb212012_02B5203.pdf) (consultant where field was not inherently local); Matter of X, 2011 Immig. Rptr. LEXIS 8060 (AAO Apr. 11, 2011) (Apr212011_04B5203) (international relations); Matter of X (AAO Apr. 3, 2012) (Apr032012_01B5203.pdf) (consumer electronics).

[12] Matter of X (AAO Apr. 2, 2012) (Apr022012_02B5203.pdf).

[13] *NYSDOT*, 22 I. & N. Dec. at 217.

[14] Matter of X (AAO Mar. 12, 2012) (Mar122012_01B5203.pdf); Matter of X (AAO Dec. 15, 2011) (Dec152011_01B5203.pdf).

hospital or other health care facility would be so attenuated at the national level as to be negligible."[15]

If a physician's techniques have been disseminated and adopted by other physicians, the petitioner stands a greater chance of success with the AAO. In the case of a nursing educator, the AAO held that the distribution of a small number of students around the country after their training diffuses the direct effect of his work rather than increases it.[16] If the petitioner could demonstrate that his duties go beyond the single nursing school, such as development of materials and curriculum adopted by other schools, the AAO would find the occupation national in scope. This same logic has been generally applied to educators in any field.[17]

Another exception was an urban forester. As with the medical staff, the AAO agreed with the service center that the effect of one forester is felt only locally. The AAO stated that although a forester's work could potentially be national in scope if his advanced forestry techniques were disseminated nationally, the impact on one forest alone was generally insufficient.[18] A Grid programmer, specializing in Grid computing, which is used to combine computers from multiple administrative domains to reach a common goal, was unable to persuade the AAO that his work would be national in scope where he planned to start his Grid program locally and later expand it nationally. The AAO acknowledged the standard in *NYSDOT* and the fact that the analysis involves the *proposed* benefit, but said that the petitioner's plan to expand an inherently local program to the entire nation was simply too speculative.[19] The AAO has also suggested that, despite the intrinsic value of nutrition, a cook would not be able to show national scope.[20] Nor would a pro bono attorney establish national scope, despite the value of low-cost legal services.[21]

In summary, with a few clear exceptions, the AAO predictably follows *NYSDOT*'s broad interpretation of the term "national in scope," accepting most reasonably well constructed arguments about the value of the benefit to the United States. Practitioners can be optimistic that their creative interpretation of "national in scope" will be heard sympathetically by the AAO, if not by the service center.

II. The Third Prong: NIW Versus Labor Certification

A. Prior achievements with an impact on the field as a whole

Most NIW cases reviewed by the AAO fail *NYSDOT*'s third prong, which requires the petitioner to show that she will serve the national interest to a substantially greater degree than a similarly qualified U.S. worker, thus meriting a waiver of the normal labor-certification requirement.[22] The AAO vigorously applies *NYSDOT*'s requirement of "a past history of demonstrable achievement with some degree of influence on the field as a whole."[23] Generally, the AAO requires petitioners to demonstrate both (1) prior achievements and (2) some measurable effect on the field as a result of those achievements.

To the AAO, the word "some" in *NYSDOT*'s "*some* degree of influence on the field" does not equate to "more than none at all." The AAO appears to require a *substantial* amount of influence. For example, the AAO affirmed a service center denial that held that twenty-two citations of the petitioner's published work were insufficient to show "some" degree of influence in the field.[24] The AAO stressed the need for *specific examples* of the quantifiable effects of the petitioner's work on the field, taking into consideration the nexus between the field of endeavor and the benefit to the United States. This creates a unique challenge for petitioners in theoretical fields such as mathematics, where citations are infrequent and practical application cannot easily be demonstrated.

A frequent pitfall was petitioners' emphasis on the originality of their contributions. According to the AAO, the novelty of an invention does not necessarily equal "impact."[25] Likewise, discoveries that are likely

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[15] Matter of X, at 9 (AAO Feb. 21, 2012) (Feb212013_01B5203.pdf) (RN).

[16] Matter of X (AAO Mar. 12, 2012) (Mar122012_01B5203.pdf).

[17] Matter of X, 2012 Immig. Rptr. LEXIS 3179 (AAO May 9, 2011) (May092011_02B5203.pdf) (teacher of Swahili).

[18] Matter of X (AAO Jan. 19, 2012) (Jan192012_02B5203.pdf).

[19] Matter of X (AAO Apr. 18, 2011) (Apr182011_01B5203.pdf).

[20] Matter of X (AAO Jul. 5, 2011) (Jul052011_02B5203.pdf) (citing *NYSDOT*, 22 I. & N. Dec. at 217 n.3).

[21] *See, e.g.*, Matter of X, at 9 (AAO Feb. 21, 2012) (Feb212012_01B5203.pdf) (citing *NYSDOT*, 22 I. & N. Dec. at 217 n. 3).

[22] *See, e.g.*, Matter of X (AAO Dec. 14, 2011) (Dec142011_04B5203.pdf).

[23] *NYSDOT*, 22 I. & N. Dec. at 218.

[24] Matter of X (AAO Jan. 13, 2012) (Jan132012_01B5203.pdf).

[25] *See, e.g.*, Matter of X, 2011 Immig. Rptr. LEXIS 8061 (AAO Apr. 21, 2011) (Apr212011_02B5203.pdf).

to be the basis for future research are not sufficient.[26] Further, the AAO appears to interpret *NYSDOT* as requiring geographically broad influence on the field. In one case, the AAO conceded the probative value of a letter from an independent researcher relying on the petitioner's work in his own research, but denied the case because only one such letter was provided.[27] The AAO reasoned that the petitioner had shown impact, but not broad enough impact for NIW purposes. In a similar vein, the AAO stated more than once that an NIW is not warranted based on the importance of a specific project.[28]

The petitioner must have made an impact on the field in which she currently plans to work. The AAO upheld one denial because the petitioner had switched fields from stroke research to kidney research. While the petitioner boasted over 400 citations to original work in the field of stroke research, "It does not follow … that because the beneficiary used to be an influential stroke researcher, she will therefore be an influential kidney researcher."[29]

B. Comparison between the petitioner and peers in the field

According to the AAO, petitioners must demonstrate that their contributions to the field are "of such unusual significance" that they merit the "special" or "extra" benefit of waiver of the normal labor-certification requirement.[30] Accordingly, in many cases the AAO wanted petitioners to clearly demonstrate how their achievements compare to others in the same line of work with similar backgrounds. The AAO has rejected special or unusual knowledge or training as failing to meet the national interest standard. The AAO noted that a petitioner's job-related training in a new method, whatever its importance to the field, cannot be considered a contribution comparable to the *invention* of that new method.[31] It is not enough to be the only one in the United States capable of using a new technology. Even the invention of a new method can be insufficient if the petitioner works in a field in which innovation is common by all its members.[32]

The comparison approach presented a special challenge for management/business consultants, executives, and entrepreneurs who expressed their value in terms of job creation for U.S. workers. In these cases, the AAO reasoned that these types of professionals create jobs as a regular part of their work. If the petitioner has a greater potential for creating jobs than her peers, this comparison should be made with specificity and with examples of exceptionalism.[33] With respect to business consulting, the AAO has held, "it would appear that increasing efficiency and reducing waste are basic functions of a management consultant, rather than hallmarks of distinction."[34]

The AAO has repeatedly recognized job creation as a legitimate interest of the United States. In the cases we reviewed, the AAO always conceded the national scope of job creation, however local the proposed business. However, even where petitioners advanced the argument that labor certification was impractical or impossible (a factor touched on by *NYSDOT* as relevant to NIW analysis), the decisions we reviewed implicitly rejected the proposition that job creation alone could form the basis of NIW eligibility. The AAO denied cases on the third prong even where petitioners demonstrated that jobs would be created for U.S. workers. The AAO further noted that self-employment does not necessarily preclude harm to U.S. workers; it reasoned that foreign entrepreneurs compete with U.S. entrepreneurs for clientele.[35] The AAO employed the logic that Congress could have carved out a subcategory for entrepreneurial situations, but chose not to do so in the context of the NIW. Thus, per the AAO, it appears that entrepreneurs need to meet the NIW requirements independently of their

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[26] Matter of X, 2012 Immig. Rptr. LEXIS 3229 (AAO May 31, 2011) (May312011_02B5203.pdf).

[27] Matter of X, 2011 Immig. Rptr. LEXIS 8061, at 14 (AAO Apr. 21, 2011) (Apr212011_02B5203.pdf).

[28] Matter of X, 2011 Immig. Rptr. LEXIS 6039 (AAO Apr. 1, 2011) (Apr012011_01B5203.pdf). *But see Matter of X* (AAO Dec. 21, 2011) (Dec212011_01B5203.pdf), which departed from all other cases we reviewed by approving an NIW petition based on the petitioner's contributions to one oceanic expedition.

[29] *See, e.g.*, Matter of X (AAO July 12, 2011) (July122011_01B5203.pdf).

[30] Matter of X, 2011 Immig. Rptr. LEXIS 8061 (AAO Apr. 21, 2011) (Apr212011_02B5203.pdf).

[31] Matter of X (AAO Jan. 18, 2012) (Jan182012_01B5203.pdf).

[32] *See* Matter of X, 2012 Immig. Rptr. LEXIS 742 (AAO Feb. 2, 2011) (Feb022011_01B5203.pdf); Matter of X (AAO May 31, 2011) (May312011_02B5203.pdf); Matter of X, 2011 Immig. Rptr. LEXIS 8061 (AAO Apr. 21, 2011) (Apr212011_02B5203.pdf).

[33] Matter of X (AAO Apr. 3, 2012) (Apr032012_01B5203.pdf).

[34] Matter of X, at 11 (AAO Jan. 23, 2012) (Jan232012_02B5203.pdf).

[35] Matter of X (AAO Feb. 9, 2012) (Feb092012_02B5203.pdf).

company's job-creation prospects.[36] Entrepreneurs must show past achievements and a greater potential for job creation in the field than their peers.

III. The Evidence Required in NIW Cases

The AAO often devotes the greater part of its decisions to addressing the insufficiency of evidence submitted in support of the third prong. Practitioners should ensure that the evidence specifically demonstrates the above-mentioned standards, namely, the petitioner's distinction from her peers, the measurable effect of her work on the field, and the broad scope of her influence. We note below some specific evidentiary trends that stand out in recent AAO decisions.

A. Reference letters

The AAO dislikes too many expert witness letters, stressing *quality* of letters over quantity.[37] Further, the AAO typically does not lend any weight to letter-writers' pedigrees, numbers of awards, speeches, accolades, or reputations. The AAO notes that the most persuasive references are from witnesses who were previously unaware of the petitioner's work, but became aware of it through the petitioner's reputation and/or the letter-writer's own reliance on the petitioner's work.[38]

The AAO looks at the field as a whole. A petitioner is better served by less prestigious letter-writers from different corners of the field if they attest to the individual's influence on his or her own work.

Using the petitioner's personal connections to secure influential letter-writers will serve little purpose as "objective" references if they cannot show that they came to know the petitioner's work through her reputation. In one case, the AAO rejected the alleged objectivity of the petitioner's references because the petitioner did not demonstrate how the reference could have possibly come to know of the petitioner's work through her reputation alone.[39]

The AAO also focuses on whether the letters convincingly explained the petitioner's influence on the field. Letters with speculative assertions of future influence carry little weight. The AAO prefers *specific* examples of how the petitioner's contributions have influenced the field already.[40] Perversely, when letters overemphasized the petitioner's "prospective" benefit to the United States, the AAO has noted that this strongly suggested that the petitioner had not contributed anything yet. The AAO also criticizes letters that fail to compare the petitioner to others in the field. It is not enough to describe the petitioner's influence or enumerate the petitioner's achievements. The letters should distinguish the petitioner from peers, and then connect the dots among the petitioner's past achievements, their broad influence across the field currently, and the potential for future contributions.[41]

To illustrate these points, the AAO praised a reference letter that stated, "[I am] adapting [petitioner's] quantification method for the quality of nanocomposites ... and it helped my research with great impact." The AAO commented: "Her article, which cites two of the petitioner's articles more than once, is consistent with her claim to have applied the petitioner's method."[42]

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[36] USCIS has stated in an FAQ that entrepreneurs may qualify for an NIW in limited circumstances, per NYSDOT. USCIS, Employment-Based Second Preference Immigrant Visa Category Frequently Asked Questions Regarding Entrepreneurs and the Employment-Based Second Preference Immigrant Visa Category (last updated Aug. 2, 2011), questions11-18, *available at* 16 Bender's Immigr. Bull. 1438, 1445, 1460 (App. D) (Sept. 1, 2011), and http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=93da6b814ba81310VgnVCM100000082ca60aRCRD&vgnextchannel=44eec665e1681310VgnVCM100000082ca60aRCRD (www.uscis.gov > NEWS > Public Releases by Topic > Business Immigration). Some read the FAQ to imply that entrepreneurs can qualify for NIWs solely by virtue of their creation of jobs for U.S. workers. However, the AAO has been applying the usual standard of "past achievements" and "demonstrable influence" to entrepreneurs seeking NIWs. We have heard reports of successful entrepreneur cases based on job creation at the service center level, but we have found no AAO case that supports an NIW approval based on the prospect of job creation alone.

[37] *See, e.g.*, Matter of X, 2011 Immig. Rptr. LEXIS 6039 (AAO Apr. 1, 2011) (Apr012011_01B5203.pdf at 15); Matter of X, 2012 Immig. Rptr. LEXIS 798 (AAO Feb. 24, 2011) (Feb242011_01B5203.pdf).

[38] Matter of X, at 6-7 (AAO Jan. 12, 2011) (Jan122011_01B5203.pdf).

[39] Matter of X, at 10 (AAO Apr. 2, 2012) (Apr022012_02B5203.pdf).

[40] Matter of X, at 7 (AAO May 31, 2011) (May312011_02B5203.pdf); Matter of X (AAO Feb. 3, 2011) (Feb032011_02B5203.pdf).

[41] *See* Matter of X (AAO Apr. 3, 2012) (Apr032012_01B5203.pdf); Matter of X (AAO Aug. 8, 2011) (Aug082011_02B5203.pdf).

[42] However, the AAO has also said: "The fact that *one* independent researcher has found the petitioner's work useful does not . . . demonstrate that the petitioner has already had some influence on the field as a whole." Matter of X, 2011 Immigr. Rptr. LEXIS 8061, at 7 (AAO Apr. 21, 2011) (Apr212011_02B5203.pdf) [emphasis added].

The AAO sustained the appeal of an expert in Korean international relations after the petitioner submitted a new set of letters more clearly elaborating the petitioner's unique impact on the field. The AAO quoted the following language from one letter as part of its basis for approving the NIW petition:

> No single individual is wholly responsible for policy planning on a target nation of such vital U.S. national interest like North Korea. At the same time, few academics, and no South Korean national working in the United States, have been as presciently and consistently making policy-relevant arguments on the issue as [the petitioner].
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> …
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> In my ten-plus years of studying North Korea, I have learned of just two people on this Earth who are capable of reading and understanding North Korea's threats, inducements, and propaganda in the original Korean, and of giving American audiences a coherent understanding of their complex, almost untranslatable nuances, and of their historical and cultural overtones. [The petitioner] is one of them....
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> I have also found great clarity in his analysis … No other observer has done more to inform my own understanding of the North Korean regime's lexicon and pathology than [the petitioner].[43]

B. Publications and articles

Researchers have an advantage over other applicants because they can show their published articles with citations by others in the field who rely on their work. Academic journals are ranked, and their readership can be easily identified. However, even where such evidence was submitted in the cases we reviewed, the AAO's standard was rigorous. The AAO required the evidence to go a step further: Why do these citations and published articles demonstrate an influence on the field? It was not always sufficient to show publications and citations, supplemented with letters from contemporary experts who attested to the importance of this research. The AAO wanted an explanation of how people have used the research in furtherance of the field and why the citation count indicated the petitioner's influence.

AAO decisions imply that citation number alone is not controlling. A petitioner needs to show *how* the citations demonstrate his impact and influence on the field as a whole. In practice, however, we saw very few cases reach the AAO with more than twenty independent citations.[44] In denying an NIW petition with seventeen citations, the AAO implied that a case could be approved with even fewer citations with the right set of facts.[45] Indeed, in 2002 the AAO approved a case for a researcher with sixteen independent citations.[46] Yet another AAO decision, from 2009, denied an applicant with twenty independent citations, noting that she had not yet realized her potential.[47] Be sure to exclude self-citations, as "self-citations cannot demonstrate the petitioner's wider influence in the field."[48]

Not all citations hold equal weight. Citations to a work on which the petitioner was first author imply a greater impact than if he was fifth or sixth author. If he was third author on a highly cited publication, be prepared to show that the petitioner's contributions were essential to the published research. A letter from the first author would help in this scenario.

Further, it is not enough to show published articles, or even that the articles, book chapters and notes have been widely disseminated in the field. The AAO wants to know what happened to the work after it was released. Who is looking at it and why? According to the AAO, "mere publication is insufficient. It is the petitioner's burden to demonstrate the influence of the published articles."[49]

While the AAO frequently states that the petitioner must establish eligibility for the benefit sought as of the priority date or date of submission, some decisions have said that post-submission citations can be relevant to the outcome of the decision if they "can be noted as

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[43] Matter of X (AAO Jan. 10, 2012) (Jan10_2012_04B5203.pdf).

[44] Of the cases we reviewed, two had reached the AAO stage after denial with over twenty citations. Of these, one had twenty-two and the other well over 400. In the latter case, the appeal was easily sustained, so we attribute the service center's denial to lack of training, not a trend. Matter of X (AAO Jan. 5, 2012) (Jan052012_04B5203.pdf).

[45] *See* Matter of X (AAO Feb. 3, 2011); *see also* Matter of X (AAO Apr. 21, 2011) (Apr212011_01B5203.pdf) (seven).

[46] Matter of X, 26 Immig. Rptr. B2-7 (AAO June 13, 2002).

[47] Matter of X, 2009 Immig. Rptr. LEXIS 8689 (AAO Jan. 7, 2009) (Jan072009_01B5203.pdf) (but over thirty were shown on appeal to the AAO).

[48] Matter of X, at 5 (AAO Feb. 2, 2011) (Feb022011_01B5203.pdf).

[49] Matter of X, at 7 (AAO Jan. 7, 2011) (Jan072011_03B5203.pdf).

continuing a trend of significant citations that was already apparent as of the date of filing."[50]

C. Problems with other common evidence

With respect to patents, the AAO states that "original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest or not must be decided on a case-by-case basis."[51] In one interesting case, the petitioner claimed that his work as a material engineer demonstrated influence on the field because he invented a quantification method for the quality of nanocomposites. The AAO rejected this argument, relying on the Occupational Outlook Handbook's job description for "material engineers" and concluding that the petitioner's work did not inherently distinguish him from other material engineers in the field because one of the inherent duties of material engineers is to invent.[52]

Proof of memberships in organizations or awards may not help, as the AAO has explained that this is one of the criteria to establish "exceptional ability." The AAO noted that not every applicant with exceptional ability qualifies for the waiver, reasoning that "[q]ualifications that can be articulated on an application for an alien employment certification cannot serve as a basis to waive the requirement for an approved alien employment certification."[53]

Academic performance is generally not considered an appropriate indicator for an NIW. The AAO has stated that academic performance alone does not constitute "specific prior achievements" as defined in *NYSDOT*.[54] Similarly, the AAO disregards Ph.D. theses on the basis that every Ph.D. student must submit something original that adds to the pool of general knowledge.[55]

Peer review is addressed on a case-by-case basis. The AAO wants to see evidence that an invitation to review was an indicator of a petitioner's influence. In one case the AAO commented:

> Peer reviewed scientific journals rely on numerous volunteers to review the manuscripts submitted for publication. Journals seek reviewers with expertise in the relevant area of research such that the reviewers are knowledgeable in the area. None of the evidence suggests that the journals for which the petitioner has reviewed manuscripts rely on a small number of reviewers with demonstrated influence on the field.[56]

In another case, the AAO found peer reviewing insufficient when it was for a symposium that listed 138 reviewers.[57] In yet another, "requests to participate in the widespread peer review process, especially from the petitioner's own supervisor, are not evidence of the petitioner's influence on the field."[58]

Still, peer reviewing can be excellent evidence of NIW criteria. Like everything else, however, the practitioner must take the analysis to the next step and explain why this petitioner's invitation to review demonstrates eligibility.

The overall point is that evidence of a petitioner's professional achievements is insufficient if it does not tend to prove that she stands out from other professionals. But some cases have been approved based on reference letters alone when they can clearly show eligibility. In one of the few NIW approvals we found, the AAO stated:

> The witnesses have credibly, consistently, and in detail explained how the petitioner's work is an integral part of a major, international effort to collect and interpret data with important implications for climatology, disaster preparedness, and other highly significant enterprises.[59]

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[50] Matter of X, at 5 (AAO Dec. 20, 2010) (Dec202010_01B5203.pdf).

[51] Matter of X, at 3 (AAO Jan. 7, 2011) (Jan072011_03B5203.pdf).

[52] Matter of X, 2011 Immig. Rptr. LEXIS 8061 (AAO Apr. 21, 2011) (Apr212011_02B5203.pdf at 7) (citing the Department of Labor's definition for "Materials Engineers," which states that the profession involves "development, processing, and testing of materials used to create a range of products … they work … to create new materials … selecting materials for new applications … create and then study materials.…"); *see also* Matter of X, at 10 (AAO Jan. 14, 2011) (Jan142011_01B5203.pdf) (mechanical engineers).

[53] Matter of X, at 12 (AAO Jan. 7, 2011) (Jan072011_05B5203.pdf).

[54] Matter of X, at 5 (AAO Jan. 7, 2011) (Jan072011_03B5203.pdf).

[55] *See* Matter of X, at 4 (AAO Jan. 12, 2011) (Jan122011_02B5203.pdf) .

[56] Matter of X, 2011 Immig. Rptr. LEXIS 8061 (AAO Apr. 21, 2011) (Apr. 212011_02B5203.pdf at 6).

[57] Matter of X (AAO Jan. 12, 2011) (Jan122011_01B5203.pdf).

[58] Matter of X, at 5 (AAO Apr. 21, 2011) (Apr212011_01B5203.pdf).

[59] Matter of X, at 10 (AAO Dec. 21, 2011) (Dec212011_01B5203.pdf).

The AAO also said, "because the petitioner's primary role is not to produce published research, it is appropriate to look at other means to gauge the impact of his work."[60]

Final Tips

Do

- Use your petitioner's references and your cover letter to connect the dots between the petitioner's past achievements and how they have influenced the field as a whole.
- Address the petitioner's accomplishments compared to others in the same field with the same experience, skills, and education.
- Focus on what the references have to say rather than their prestige.
- Be willing to make creative arguments about national scope and intrinsic merit.
- Focus on achievements that cannot be articulated on a labor certification application.
- Document everything. If you reference studies or statistics, submit them.
- Clearly articulate the boundaries of the field and the petitioner's impact on that field, relating the impact to how it benefits the United States.
- If the field does not lend itself to the usual indicators of influence, provide evidence of this aspect of the field.
- Be creative! Many cases have been approved at the service center that might not have passed scrutiny with the AAO, so it is worth trying a variety of arguments while keeping the AAO's approach in mind.

Don't

- Overwhelm USCIS with reference letters.
- Submit reference or cover letters with bare, unsupported assertions of the petitioner's influence.
- Focus on the position that the petitioner *will* work in. Instead, focus on the petitioner's own accomplishments.
- Argue that the petitioner should qualify for an NIW because of a labor shortage in the field.
- Focus on petitioner's accomplishments that are unrelated to the proposed field.
- Cite unreliable sources such as Wikipedia.
- Exaggerate or misrepresent the evidence presented.
- Be quick to reject an NIW case because the field does not appear to have merit. USCIS rarely, if ever, rejects a case based on the merit of the petitioner's field. The more critical inquiry is the petitioner's influence within the field.

Reviewing AAO decisions provides us with useful tools to understand USCIS's official position on the interpretation of *NYSDOT* in a wide range of cases. This is especially important when providing clients with a frank analysis of their chances of success. However, keep in mind that a great majority of NIW approvals are not in the form of written decisions. Although there is no shortage of information available on reasons for denial, we know very little about when and why individual service center adjudicators approve NIW cases. USCIS service centers approve many NIWs that would never have survived the AAO. The AAO overturns USCIS service center NIW denials only rarely. A little creativity can go a long way with a service center adjudicator, so we encourage practitioners to try different arguments and share their results.

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REMINDER:

The correct citation form for the BIB is Author, *Title*, 18 Bender's Immigr. Bull. 741 (June 15, 2013).

[60] *Id.*