The National Interest Waiver Path to a U.S. Green Card

By Elizabeth M. Klarin

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National Interest Waivers to obtain a green card (permanent residence) in the U.S. are getting a lot of attention these days. With large backlogs creating long waits for some people applying for green cards, applying with a request for a National Interest Waiver of the usual labour market testing requirement to complete the process can make green card processing much quicker — if you qualify.

However, just because they are getting a lot of buzz does not mean they are easy to get, or that application requirements or adjudication standards have softened.

To get a green card in the second- or third-preference employment-based immigrant categories (EB-2 or EB-3), one must normally go through a recruitment process (called PERM, which stands for “Program Electronic Review Management”) through the U.S. Department of Labor, to demonstrate there is no qualified and available U.S. worker for the job. This requires intending employers to go through certain defined steps, including putting out ads, collecting resumés, vetting applicants for eligibility, and genuinely interviewing U.S. workers (those who are citizens or have green cards already), and only offering the job to a non-U.S. worker if there really isn’t any U.S. worker who meets the minimum requirements.

For intending immigrants with an advanced degree from a U.S. university or exceptional ability in their field (EB-2), one of the ways to skip this recruitment step is to obtain a waiver of the requirement by demonstrating that their work serves a "national interest" of the U.S., which is to say:

1. That the worker and his or her endeavour have substantial merit and national importance;
2. That the applicant is well-positioned to advance the endeavour in the U.S.

The media has seemingly been pushing this as an option anyone can qualify for. With almost every call I have, whether about an immigrant process or a nonimmigrant visa, I am asked, "And what about a National Interest Waiver?"

It's important to recognize that this is an immigrant option only. Whether an activity, skill or job serves the national interest of the U.S. is irrelevant to qualifying for most nonimmigrant work authorizations and statuses. Rather, there are defined criteria for nonimmigrant statuses, and you either meet them or you don't. But if what you do truly serves an important interest of the U.S., and you would like to be a permanent resident, a National Interest Waiver of the usual labour certification requirement can be a godsend.

But meeting the two criteria noted above does not guarantee that you will be approved for a National Interest Waiver; there is, historically, a final adjudication analysis that can tank an application for a National Interest Waiver, even if you do meet the other two requirements noted earlier in this article. This is often called the "final merits" test or the "balancing test," where U.S. Citizenship and Immigration Services (USCIS) decides whether, taken as a whole, the record justifies permitting the applicant to bypass the normal labour market test. This final prong of the analysis gives the officer the greatest amount of discretionary power and can be difficult to overcome on appeal if imposed. However, this type of "final merits determination" framework — which is also used in certain other immigration benefit categories such as EB-1 — was recently questioned in a federal court case in Nebraska.

In *Mukherji v. Miller*, 2026 LX 151484, the court found that such an analysis was not properly vetted as an immigration adjudication standard and, therefore, lacks legal force. Essentially, the court in Nebraska said USCIS has imposed an unwritten eligibility hurdle that is extra-regulatory, and that this standard did not go through the proper channels and processes to be legally applied under clear, objective standards. Rather than going through the proper rulemaking steps, USCIS simply implemented the "final merits" test via a 2010 policy memo.

In Mukherji v. Miller, the court ordered the agency to approve the petition; however, there is so far no indication that this will necessarily eliminate a "final merits" analysis from the approval process for EB-2 National Interest Waiver cases. While it certainly opens the door to future challenges to cases that are denied merely on the basis of a final merits determination, it remains to be seen whether or how impactful this case will be on EB-2 National Interest Waiver cases moving forward.

EB-2 National Interest Waiver cases are under greater scrutiny than ever in 2026, as intending immigrants look for ways to expedite lengthy immigration benefits processing and eliminate steps that could derail their green card case. If you think that what you do serves the national interest of the U.S., you should reach out to Lippes Mathias immigration team members Elizabeth M. Klarin (eklarin@lippes.com) or Eileen M. Martin (emartin@lippes.com), or another qualified immigration professional to discuss the potential viability of your case before proceeding. They can assist with researching government priorities and initiatives that might help to bolster your case, strategize

about the most persuasive elements of your case, and help to gather and organize evidence to best position you for success.

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Related Team

Elizabeth M. Klarin
Partner

Eileen M. Martin
Partner | Team Co-Leader - Immigration | Team Leader - Canada-U.S. Cross Border