

NAFSA Special Session
A Discussion of Biden Administration Actions to Attract and Retain Global STEM Talent
Tuesday, July 19, 2022, 3 – 4 p.m. Eastern
Pre-submitted Questions

NAFSA PRELIMINARY NOTE

We appreciate USCIS', DHS's, and the administration's efforts to help the U.S. better attract and retain talented and highly educated STEM professionals, efforts that are sure to benefit the nation and the international education community.

We are aware of a Jan. 21, 2022 [White House Fact Sheet](#) , [DHS press release](#) , [USCIS news alert on O-1 petitions](#) and a [USCIS news alert on national interest waivers](#). These describe a modest expansion of CIP codes that provide STEM OPT eligibility and the following improvements:

LPR. Jan. 21, 2022, initiative on national interest waiver standards for advanced degree and exceptional ability I-140 petitions. USCIS summarized the policy highlights of the [USCIS Policy Manual revision](#) in the [Jan. 21, 2022 Policy Alert](#):

- Explains adjudicatory framework for national interest waiver requests under *Matter of Dhanasar*, including special considerations for endeavors in STEM fields, as well as the significance of letters from governmental and quasi-governmental entities.
- Expands on the discussion in *Matter of Dhanasar*, to explain how the framework can apply to entrepreneurs.
- Incorporates *Matter of O-A, Inc.*, explaining that USCIS considers the date of a provisional degree certificate for purposes of calculating post-baccalaureate experience.

O-1. Jan. 21, 2022, initiative on O-1 evidence standards. USCIS summarized the policy highlights of the [USCIS Policy Manual revision](#) in the [Jan. 21, 2022 Policy Alert](#):

- Adds a chart in an appendix describing examples of evidence that may satisfy the O-1A evidentiary criteria, as well as considerations that are relevant to evaluating such evidence (with a focus on evidence and considerations that are relevant to STEM fields).
- Provides examples of qualifying comparable evidence that petitioners could provide in support of a petition for a beneficiary in a STEM field.
- Clarifies how officers evaluate the totality of the evidence to determine O-1A eligibility and provides examples of positive factors that officers may consider.
- Explains that when evaluating whether a beneficiary of extraordinary ability is coming to work in the beneficiary's "area of extraordinary ability," officers focus on whether the prospective work involves skillsets, knowledge, or expertise shared with the occupation(s) in which the beneficiary garnered acclaim.
- Clarifies that for a beneficiary with a record of extraordinary achievement in MPTV productions, USCIS interprets the beneficiary's "area of extraordinary achievement" to include any proposed work within the MPTV industry.

Please bear in mind that the NAFSA community includes many advisors who handle nonimmigrant and immigrant petitions on behalf of universities. They may on occasion file O-1 petitions and file many immigrant petitions but would rarely benefit from the LPR provisions mentioned above. Student advisors will welcome the opportunity to alert graduating and graduated students to both the O-1 and LPR provisions so that they may pursue these with their employers or with legal counsel.

NAFSA QUESTIONS

The Jan. 21, 2022 revisions to [USCIS Policy Manual - 6 USCIS-PM F.5.D.1-4 - National Interest Waiver](#) greatly expand the discussion of the three-prong analysis articulated in [Matter of Dhanasar, 26 I&N Dec. 884 \(AAO 2016\), Int. Dec. 3882 \(December 27, 2016\)](#). Although USCIS has been applying the Dhanasar analysis in its adjudications of national interest waiver (NIW) requests (requests for waiver of the labor certification and job offer requirements for employment-based second preference petitions) for a long time now, NAFSA appreciates the details and examples now included in the USCIS Policy Manual.

Under the first prong of Dhanasar, a petitioner must show, by a preponderance of the evidence, that the proposed endeavor has both substantial merit and national importance. Both the statute at [INA 203\(b\)\(2\)\(B\)\(i\); 8 USC 1153\(b\)\(2\)\(B\)\(i\)](#) and DHS regulations at [8 CFR 204.5\(k\)\(4\)\(ii\)](#) refer only to “national interest” as the criterion for determining eligibility for a national interest waiver, and do not further define that term.

Can you briefly review the 3 Dhanasar prongs that are now discussed in detail in the USCIS Policy Manual, and how Dhanasar has stepped in to flesh out the details of how petitioners must establish “national interest?” We understand that the Dhanasar criteria have been applied since 2016, but a brief recap would be helpful.

Dhanasar Prong 1 requirement

Regarding the Dhanasar Prong 1 requirement to describe the “proposed endeavor” and to show that it has both substantial merit and national importance:

Q1: Can you go over the difference between an “occupation” and an “endeavor” for this purpose?

A1: While an occupation is broad and general, such as engineering, an endeavor should describe the specific project and goals. For example, in *Dhanasar*, the petitioner’s endeavor was research and development of air and space propulsion systems rather than engineering, which was his occupation.

Q2: Can you comment on how detailed the description of the “proposed endeavor” must be?

A2: The description should be sufficiently detailed to explain the project and goals. Consistent with the above answer, a petitioner should offer details not only as to what the occupation normally involves, but what types of work the person proposes to undertake specifically within that occupation, as well as the intended impact of the endeavor.

Q3. Can you talk about the nature of “substantial merit,” and give some examples of research and teaching that would be considered to have substantial merit?

A3: The endeavor’s merit may be demonstrated in areas including, but not limited to, business, entrepreneurship, science, technology, culture, health, or education. Merit may be established without immediate or quantifiable economic impact and endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in those fields are likely to translate into economic benefits for the United States. USCIS recognizes the importance of progress in STEM fields and the essential role of persons with advanced STEM degrees in

fostering this progress, especially in focused critical and emerging technologies or other STEM areas important to U.S. competitiveness or national security.

Many teaching and research activities will meet the “substantial merit” requirement, as teaching normally has merit in relation to educational interests, and research generally aims to further human knowledge.

Q4: Can you describe the factors you might consider when determining if the endeavor has national importance? For example, the USCIS policy manual states that, “Endeavors such as classroom teaching, for example, without broader implications for a field or region, generally do not rise to the level of having national importance for the purpose of establishing eligibility for a national interest waiver.”

A4: Many proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, but also have sufficiently broad potential implications to demonstrate national importance. As noted in the question, the USCIS Policy Manual, consistent with *Dhanasar*, explains that teaching generally does not rise to the level of having national importance absent evidence of a broader implication for a field or region. While national interest waivers are decided on a case-by-case basis, factors such as the number and geographic pool of students or impact on teaching strategies in the endeavor are relevant.

Dhanasar Prong 2 requirement

The USCIS Policy Manual describes the factors USCIS will consider and the types of evidence that a petitioner might submit to establish the Dhanasar Prong 2 requirement that the beneficiary is “well positioned to advance the proposed endeavor.”

Q1: Are the lists of factors and types of evidence exhaustive or non-exhaustive?

A1a: The list is non-exhaustive.

Q2: Can you speak to the use of letters from experts in the person’s field?

A2: USCIS reviews all evidence submitted, including letters from experts. Letters that describe the person’s past achievements and provide specific examples of how that person is well-positioned to advance the endeavor are particularly useful.

Q3: Can you speak to the use of a beneficiary’s list of publications and citation history?

A3: Citations are one type of evidence a researcher may submit. They are not required; rather, they are one form of evidence that can, on a case-by-case basis, support a determination that the person is well-positioned to advance the endeavor.

Q4: Must all requests include a detailed plan describing how the person intends to continue the proposed work in the United States?

A4: No, while all petitioners must provide a description of the proposed endeavor to satisfy the first prong, as discussed above, a “detailed plan” is only one type of evidence that a person may submit under the second prong; it is not required. A detailed plan is most useful where the person seeks to pursue self-employment individually or in partnership with others. In the case of a petitioner who does not intend to be self-employed, USCIS considers a job offer or communications with prospective employers, while similarly not required, relevant to demonstrate the circumstances or capacity in which the person intends to carry out the endeavor and the feasibility of that plan.

Dhanasar Prong 3 requirement

Dhanasar Prong 3 requires the petitioner to establish that “On balance, it would be beneficial to the United States to waive the job offer and thus the permanent labor certification requirements.”

Q1: Is this determination always made in reference to a balancing of the national interest represented by a standard labor certification versus other national interests that would outweigh that interest?

A1: USCIS assesses whether the person’s endeavor and the person being well-positioned to advance that endeavor, taken together, provide benefits to the nation such that a waiver of the labor certification requirement outweighs the benefits that ordinarily flow from that requirement, which primarily focuses on a geographically limited labor market.

Q2: We understand that they are two different standards used for different purposes, but are there any similarities in approach between the Dhanasar Prong 3 “on balance” analysis and the Kazarian “final merits determination” used in EB-1 extraordinary ability and EB-1 outstanding professor or researcher petitions?

A2: While both of the analyses look at the evidence in the totality, a final merits determination focuses on the statutory standard of sustained national or international acclaim. That is not the standard for a national interest waiver.

Specific Evidentiary Considerations

Thank you for the guidance added to the USCIS Policy Manual on “Specific Evidentiary Considerations for Persons with Advanced Degrees in Science, Technology, Engineering, or Mathematics (STEM) Fields.”

Q1: Can you confirm that USCIS will consider evidence that a field is in a STEM specialty from any authoritative STEM list? For example, the USCIS Policy Manual mentions the following sources:

- **The F-1 STEM OPT provision defining STEM as “science, technology, engineering, or mathematics”)**
- **Lists of critical and emerging technology subfields published by the Executive Office of the President, by either the National Science and Technology Council or the National Security Council**
- **Can petitioners identify other authoritative sources?**

A1: USCIS considers all evidence a petitioner may submit. We note, however, that the national interest waiver is not limited to those who propose to work in STEM fields.

Q2: How critical is it to establish that a STEM area is important to competitiveness or security?

A2: An endeavor’s importance to competitiveness or security is merely a factor that can be considered favorably in relevant cases. USCIS considers all evidence in the record and may grant national interest waivers for endeavors involving various fields, not just those in specific STEM areas.

Q3: Can you speak to how a USCIS adjudicator evaluates a beneficiary’s degree in a STEM field relates to the particular endeavor that serves as the basis for the national interest waiver request?

A3: Adjudicators evaluate every petition based on a totality of the evidence submitted. A beneficiary’s education and skillset are relevant to whether the beneficiary is well positioned to advance the endeavor. As noted in policy guidance, USCIS considers an advanced degree, particularly a Doctor of Philosophy (Ph.D.), in a STEM field tied to the proposed endeavor and related to work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness or national security, an especially positive factor to be considered along with other evidence for purposes of the assessment under the second prong.

Q4: The USCIS Policy Manual explains that persons with a Ph.D. in a STEM field, as well as certain other persons with advanced STEM degrees relating to the proposed endeavor, have scientific knowledge in a narrow STEM area since doctoral dissertations and some master's theses concentrate on a particularized subject matter. Officers will therefore consider whether that specific STEM area relates to the proposed endeavor.

How persuasive are letters from interested U.S. government agencies, and how might they be used to establish eligibility under all 3 *Dhanasar* prongs?

A4: While not required, letters from interested government agencies or quasi-governmental entities in the United States (for example federally-funded research and development centers) can be helpful evidence and, depending on the contents of the letters, can be relevant to all three prongs.

Specifically, letters from an interested government agency or quasi-governmental entity could prove favorable for purposes of the first prong if, for example, they establish that the agency or entity has expertise in the proposed endeavor and that the proposed STEM endeavor promises to advance a critical and emerging technology or is otherwise important for purposes of maintaining the United States' technological prominence.

Detailed letters of government or quasi-governmental interest that provide relevant information about how well-positioned the person is to advance the endeavor are valuable for purposes of assessing the second prong. Finally, an interested government agency or quasi-governmental entity can help explain how granting the waiver may outweigh the benefits of the job offer and labor certification requirement by explaining a particular urgency or detailing how the United States would benefit from the prospective noncitizen's contributions, even if other U.S. workers are available.

Q5: Do DHS and USCIS plan to implement additional measures to attract and retain STEM and talent and expertise? If so, would you please discuss them. Would you be interested in receiving recommendations for such additional measures from NAFSA?

A5: USCIS welcomes recommendations. On April 19, 2021, USCIS published a Request for Public Input (RPI) and in December 2021, USCIS held a listening session dedicated to I-140s in preparation for rulemaking. USCIS received some recommendations that would be relevant for individuals working in STEM, and those suggestions are under consideration along with other programmatic reform suggestions USCIS received.