

TIME TO PAUSE ON PERM? 6 REASONS THE NATIONAL INTEREST WAIVER IS RISING AS A WORKPLACE IMMIGRATION SOLUTION

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Employers looking to retain current foreign national employees or attract highly skilled talent should consider adding the National Interest Waiver to their immigration sponsorship toolset. Prior to the COVID-19 pandemic, most employers simply did not need to consider seemingly complex NIW petitions since the permanent labor certification program – known as PERM – was the more obvious option for green card sponsorship. However, with the viability of PERM labor certifications threatened by long processing times and widespread layoffs, the NIW has recently emerged from obscurity and poised itself as a valuable alternative. Here are six benefits for employers to consider.

1. Self-Petitioning and Flexibility in Employment

Unlike the PERM labor certification process, NIW petitions do not require a job offer from a U.S. employer. Rather, they are premised upon an individual's future potential in their employment endeavors. This allows individuals to self-petition, even if they are not currently employed or if their employer is unable to provide green card sponsorship. It is also permissible for the NIW beneficiary to pay for the filing fees and attorneys' fees for the process.

2. No Labor Market Test

Because NIWs are premised on the special qualifications of the individual and their position, rather than scarcity of qualified U.S. workers, it is not necessary to undertake a costly labor market test. This makes NIWs an attractive

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option for employers that regularly receive a substantial number of applicants and are unlikely to have a successful labor market test.

3. No “Notify-and-Consider” Requirement for Layoffs

Layoffs pose challenges for PERM labor certifications by indirectly increasing the number of potential applicants for a labor market test and directly imposing additional notification requirements for employers experiencing layoffs. Specifically, in the PERM context, employers must notify U.S. workers laid off within six months of the anticipated PERM filing date that there is a job opening. The employer must then determine whether the laid off workers meet the stated requirements listed in connection with the recruitment. If even one laid off worker meets the requirements, the labor market test cannot proceed. These factors may make a PERM labor certification unfeasible for many employers. The NIW category, however, does not contain a notify-and-consider requirement, and employers are not required to wait any period of time after a layoff before filing an NIW petition.

4. Faster Processing Times

Since the onset of the COVID-19 pandemic, [processing times](#) for PERM labor certifications have increased significantly to six months for Form ETA-9141 Prevailing Wage Requests and one year for Form ETA-9089 PERM labor certification applications. Since January 2023, NIW petitions are eligible for a modified premium processing service that provides a response from USCIS within 45 calendar days. This faster processing time could be critical for eligible employees approaching their six-year H-1B maximum or OPT/STEM OPT expiration.

5. Options for Entrepreneurs

The PERM labor certification process generally involves heightened scrutiny for employers petitioning for an individual holding a significant ownership interest in the company. Often, this can render a PERM risky or improbable for business owners, particularly in small or closely held companies. Company ownership is generally not a factor under the NIW category, as it does not require a bona fide labor market test. Further, entrepreneurs for endeavors poised to create jobs or introduce innovative products or services can be strong candidates for an NIW.



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6. Broad Definition of National Interest

Recognizing the importance of progress in Science, Technology, Engineering, and Mathematics (STEM) fields and the “essential role of persons with advanced STEM degrees in fostering this progress,” USCIS has provided [specific guidance](#) discussing how individuals in STEM fields may qualify for an NIW. USCIS has also highlighted certain areas that may qualify, such as endeavors focusing on improved manufacturing processes or medical advances. Employers or individuals in these areas should consider NIWs as a compelling complement to the PERM labor certification process.

Conclusion

While the PERM labor certification process remains a viable option for many employers, NIWs have a significant and growing appeal as a path that is often faster and more flexible. Qualifying beneficiaries and employers would be prudent to utilize this option in the near-term, as the growing popularity of the category could lead to changes in government processing, including the availability of premium processing.

If you are interested in the NIW process or have questions about employment-based green card sponsorship, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Immigration Practice Group](#). We will continue to monitor further developments in this area, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information.