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## Sir Andy & Sir Mo Take A Bow

Tennis World No. 1 Murray, British athlete Mo Farah knighted **P 23**

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## Ruling by US court to quicken green card process

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The Administrative Appeals Office (AAO) of the US Citizenship and Immigration Services (USCIS), in a recent landmark decision, has provided more clarity and liberalized the tests used to grant a National Interest Waiver (NIW) to EB-2 category of green card applicants. Those having an advanced degree or exceptional ability fall in the EB-2 category.

Indian entrepreneurs and qualified individuals will have a fairer chance of obtaining an NIW, which will speed up the process of obtaining a green card. Normally, a permanent job offer and an approved labour certificate are prerequisites to file for a green card. However, a NIW allows individuals in the EB-2 category to skip the lengthy 'labour certification' process.

► Boost for STEM grads, P 13

# Boost for entrepreneurs, STEM graduates

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In general terms, this certification process, which is a protectionist measure, requires the employer to determine whether US workers are available for the job.

The AAO in its decision, dated December 27, has redefined the existing tests for obtaining an NIW. These tests were perceived as subjective and often resulted in similar applicants being treated differently — with a denial of an NIW in one case and a grant in another.

In its order, the AAO states: USCIS may grant an NIW if the applicant demonstrates that his or her proposed endeavour (activity) in the US has both substantial merit and national importance. That he or she is well-positioned to carry it forward and lastly that on balance it would be more beneficial for the US to waive the job offer and the labour certification requirements.

“The decision provides for a more flexible legal standard that can be applied for individuals who are entrepreneurs, as well as those who are involved in occupations geared to-

## OUT WITH THE OLD

Old subjective tests (NYS DOT case)	New tests (Dhanasar case)	Impact
<ul style="list-style-type: none"> <li>► The applicant's area of employment is of substantial 'intrinsic' merit</li> </ul>	<ul style="list-style-type: none"> <li>► The applicant's proposed endeavour has both substantial merit and national importance</li> </ul>	<ul style="list-style-type: none"> <li>► Removal of the term 'intrinsic' will reduce subjectivity</li> </ul>
<ul style="list-style-type: none"> <li>► Proposed benefit from the applicant's endeavour (activity) is 'national in scope'</li> </ul>	<ul style="list-style-type: none"> <li>► The applicant is well positioned to advance the proposed endeavour</li> </ul>	<ul style="list-style-type: none"> <li>► It is a test focused on skills and qualifications of the applicant and offers more clarity</li> </ul>
<ul style="list-style-type: none"> <li>► National interest would be adversely affected if a labour certification was required</li> </ul>	<ul style="list-style-type: none"> <li>► On balance, it would be beneficial to the US to waive the requirements of a job offer &amp; labour certification</li> </ul>	<ul style="list-style-type: none"> <li>► A more balanced approach, which favours entrepreneurs and qualified applicants</li> </ul>

wards science, technology, engineering and mathematics (STEM),” says David H Nachman, managing attorney, at NPZ Law Group.

In this case, Dhanasar (name as appearing in the decision), a researcher and educator in the field of aerospace engineering, sought an NIW. This petition was denied by the director of the Texas Service Centre resulting in the matter coming up before the AAO. The appeals office had a

relook at the existing framework, redefined the tests and granted the NIW. While it appears that the applicant is of Indian origin, the same could not be directly affirmed.

NIW was introduced by the Immigration Act, 1990, but conditions for obtaining the waiver were not explicitly set down in the law. “About a decade later, the New York State Department of Transportation (NYS DOT) case laid out a legal standard

which required that the applicant seeking an NIW benefit the nation as a whole. This case made a subjective determination that the applicant needed to prove that the benefit of waiving the labour certification outweighed the nation's interest in the labour certification process. The new decision sets out a completely different analysis and it does not require the arbitrary subjectivity set forth in the NYSDOT case,” explains Nachman.

“A key point is that now USCIS will perform a balancing test on whether it would be more beneficial to the US to waive the requirement of a job offer and thus of a labour certification,” explains Rajiv S Khanna, US-based immigration attorney at Immigration.com (see graphic). “Apart from offering speedier process in the path towards a green card, NIW holders can also avail of an unlimited H-1B extension, and their spouses can apply for work authorisation. Normally, the USCIS does not consider itself bound by a decision of the AAO. But this decision is binding. It has been so adopted by the USCIS,” adds Khanna.