

# HANDBOOK OF IMMIGRATION LAW



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🌐 IMMIGRATION VIEWPOINT PRESS 🌐

4TH EDITION

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Mark A. Ivener  
and  
David R. Fullmer

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## **BIOGRAPHY**

### ***IVENER & FULLMER LLP***

**IVENER & FULLMER** has a global immigration practice with its principal office in Los Angeles, California, and associate offices in New York, Vancouver and Tokyo. Members of our staff are fluent in Japanese, Spanish, French, Chinese and Farsi.

Representing domestic/international companies and individuals in all business immigration matters, IVENER & FULLMER works to open doors for clients ranging from Fortune 500 corporations to movie stars. The scope of work includes representation of foreign executives, managers, investors, professionals and entertainers for temporary and permanent visas.

### ***MARK A. IVENER, Managing Partner***

**Mark Ivener** has been practicing law in Los Angeles for over 35 years. He has lectured on U.S. immigration law for the World Trade Institute in New York, Houston, Chicago, and San Francisco. He has lectured for the International Bar Association in Munich, Madrid, and New York, New York. Mr. Ivener has also participated in many immigration seminars for the Law Societies of British Columbia and Alberta as well as for the American Immigration Lawyers Association. He has authored the books, *Handbook of Immigration Law, Volumes I and II*; the Canadian publications of *Doing Business in the U.S.A. Under Free Trade* and *Get The Right Visa A Complete Guide To Getting An American Visa* (in Japanese); and *Have you Thought About Immigrating To The U.S.?* (in Spanish). In addition, he has written many articles on immigration law, which have appeared in, among other publications, the *International Law Journal*, the *Canadian-American Bar Association Newsletter*, *Business and the Law* and *World Trade Trends*. Mr. Ivener is a founding member of IMMLAW, The National Consortium of Immigration Law Firms and ABIL, the Alliance of Business Immigration Lawyers.

### ***DAVID R. FULLMER, Partner***

**David Fullmer** is a partner in the firm in the firm was educated at Brigham Young University, (B.A. 1992) and at Loyola Law School, Los Angeles (J.D., 1996). He is a member of the California State Bar and the American Immigration Lawyers Association. Mr. Fullmer is a co-author of the Handbook of Immigration Law. Mr. Fullmer regularly speaks at corporate functions and seminars and community functions throughout Southern California on immigration related topics. Mr. Fullmer also contributes articles and interviews to the local Japanese media on Immigration law. For the years of 2004, 2005 and 2006, Mr. Fullmer was named by Law and Politics as a “Southern California Rising Star”, a list of Southern California’s top attorneys under the age of 40. This list was published in Los Angeles Magazine. Mr. Fullmer is also fluent in Japanese.



## **PART 1 - NONIMMIGRANT VISAS**

### **INTRODUCTION**

When non-U.S. citizens seek temporary entry into the United States to accomplish a specific, business-related task, whether it be for two days or six years, they require a temporary or nonimmigrant visa. The Department of Homeland Security's Citizenship and Immigration Services has established specific rules and procedures to regulate the temporary entry of foreign persons for employment and at the same time, to protect border security, indigenous labor, and permanent employment. These rules apply to all foreign nationals, including foreign nationals seeking classification as temporary visitors for business, as well as those seeking permission to work in the United States. This chapter will cover general information regarding nonimmigrant visas, and will also discuss the B-1 Nonimmigrant Visa Category for Business Visitors.

### **CHAPTER 1 - BUSINESS VISA CATEGORIES**

Business travel has been divided into the following nonimmigrant visa categories:

1. B-1 Visas - Business Visitors
2. E-1 and E-2 Visas - Treaty Traders and Investors
3. H-1B Visas - Visas for Professionals
4. H1-B1 Visas - Professional Visas for Singapore and Chile
5. H-2, H-3 Visas and J-1 Visas - Temporary Workers, Trainees and Interns
6. TN and E-3 Visas - Canadian and Mexican Professionals and Consultants and Australian Professionals
7. L-1 Visas - Intracompany Transferees
8. O Visas - Foreign Nationals of Extraordinary Ability
9. P Visas - Performing Artists and Athletes
10. R Visas - Religious Workers

#### **A. VISA REQUIREMENTS**

E, TN-2, B, and R visa applications are processed by U.S. Consulates in countries around the world. However, it is important to be aware that not all Consulates process all visas, and that it is necessary to contact the individual Consulates to ensure that they will process all types of visas, and also that they will process visas for third-party nationals, if an individual is wishing to enter the U.S. from a country of which the person is not a citizen.

TN-1, L, B and R visas for Canadians are adjudicated by U.S. Customs and Border Protection (USCBP) at international airports in Canada or ports of entry. H, L, O, P

and TN-2 visa petitions are processed by the U.S. Citizenship and Immigration Service (USCIS). Furthermore, H-1B and H-2A and B visas additionally require involvement of the U.S. Department of Labor to ensure that the U.S. labor force will not be adversely effected by issuance of the visa.

## 1. PROOF

To receive any type of nonimmigrant visa, you must demonstrate the following:

- a. that your stay is temporary;
- b. that you have sufficient funds to support yourself while visiting the United States (unless the nonimmigrant visa permits you to work while in the United States); and
- c. for all nonimmigrant visas other than E, H-1B, or L visas, that you intend to return to your foreign national residence.

In your visa petition or application, you should present documents proving your permanent ties to your country, such as a job in that country to which you will return, a bank account, home ownership, or family ties. You can prove your intentions by supplying, for example, a letter from your company indicating that your stay is temporary, a copy of a bank statement or your bankbook to show that you have sufficient funds, and a copy of a deed or lease from your landlord proving that you have a residence in your country. You may also present notarized affidavits from family members indicating your ties, as well as indicating financial support, if necessary.

Note that the requirement that you retain your foreign residence is applied differently according to the type of visa for which you apply. When you apply for a B-1, F-1, H-2B, H-3, J-1, P, or R visa, you must show that you have a residence in your country that you have no intention of abandoning. When applying for an E visa, you need only state that you intend to leave the United States when your visa expires. There is no “intent to return to your home country” issue for H-1B, L, or O-1 visas. For the E-3 visa for Australians, the TN visa for Canadians and Mexicans, and the H1-B1 visa for Singapore and Chile, there is a requirement that you state that you intend to return to your home country.

## 2. CONDITIONS AND RESTRICTIONS

When you receive a nonimmigrant visa from a U.S. Consulate, the Consular officer places a visa stamp in your valid passport. This stamp, which features a photograph of you, as well as a machine-readable bar code, specifies: (a) the type of nonimmigrant visa granted; (b) the length of time for which the visa is valid, and (c) the number of times you may use the visa to enter the United States. For example, an E-2 visa which is valid for five years with multiple entries will allow you to enter and leave the United States as many times as you desire during the five year period, subject to inspections by an Immigration Officer at the U.S. border or port of entry (e.g. airport terminal).

Each time you present yourself at an airport or port of entry in the United States, you will be inspected by an Immigration Officer. The officer will determine the following:

- a. whether or not you are an intending immigrant;
- b. whether you are excludable from the United States (e.g., for prior illegal status, or for crimes); and
- c. the temporary period for which you will be allowed to stay in the United States. The Immigration Officer writes the period of time granted for that particular trip to the United States on a Form I-94 Departure Record, which is given to you upon entry into the United States. Note that this time period does not necessarily coincide with the time allowed on the visa itself, and it quite often will be for a much shorter period of time, necessitating that you extend your visa at a later date. You keep the Form I-94 in your possession (generally stapled into your passport) while you are in the United States, and then surrender it when you leave the country.

Once you enter the United States, you may pursue your desired activities so long as you respect the limitations of your visa. If you violate your status by engaging in activities not authorized by your visa, or by staying in the United States beyond the period specified on your Form I-94 Departure Record, you may be deported. For example, if you enter the United States on an H-1B Specialty Occupation work visa for Company X for one year, and six months later, you begin to work for Company Y without prior USCIS approval for the change of employer; you have violated your status and may be subject to removal. Furthermore, should you be removed, this will have an impact on when you are allowed to attempt to reenter the United States in the future.

### 3. CHANGING YOUR STATUS

A foreign national who enters the United States under any type of nonimmigrant classification discussed in this book can change his or her status to another type of nonimmigrant status by making proper application to the USCIS. In order to apply for an extension of stay in the United States, you must apply before the end of your initial term.

## **B. SOME COMMON PROBLEMS**

The most common problems people encounter when applying for a business visa to enter the United States are (a) ignorance of the law relating to visa requirements, (b) not knowing what alternatives are available, and (c) not supplying the proper documentation to support their application.

### 1. VISA REQUIREMENTS

The law spells out which government agency or department is responsible for processing which visas. For example, Mexican foreign nationals wishing to apply for a TN must apply straight through a U.S. Consulate, and are not

required to petition the Citizenship and Immigration Services (CIS) arm of the Department of Homeland Security. Those applying for H-1Bs, however, are required to petition the CIS. Make sure you apply to the right government agency or department to avoid having your application delayed or even denied.

## 2. ALTERNATIVES

You can save yourself a lot of time and trouble if you become familiar with the various types of visas available, and apply for the one that most appropriately fits the purpose of your business travel. For example, if you qualify to enter the United States with an E visa based on a new business, you are granted a visa on your initial approval for up to five years. If you were unaware that an E visa was available to you, and instead entered on a L visa, your initial approval would be for only one year.

## **CHAPTER 2 - B-1 VISAS - BUSINESS VISITORS**

### **A. WHO IS ELIGIBLE**

A foreign national who wishes to visit the United States for business reasons that do not involve receiving a salary or payment of any kind in the U.S. may apply for a B-1 visa.

In your visa application, you must state the specific purpose of your business visit. The following are some examples of acceptable business purposes:

1. Employees of a foreign employer (whose salaries are paid from abroad) who come to the U.S. to solicit sales, negotiate contracts, or take orders from established customers for work that will be performed in foreign countries;
2. An employee of a foreign company or a foreign office of a U.S. company who comes to the U.S. to engage in consultations with U.S. business associates;
3. Foreign national business people attending professional or business conferences, conventions, or executive seminars in the U.S.;
4. Foreign national business employees or independent business people who come to the U.S. to undertake independent research, such as market or product research;
5. Foreign national investors who come to the U.S. to set up their investment; or
6. Foreign national key employees who come to open or be employed in a U.S. office, subsidiary, or affiliate of the foreign national employer, provided said key employees will qualify for L-1 status once suitable physical premises have been obtained for the office.

### **B. HOW TO APPLY**

Business visitors wishing to gain temporary entry into the United States on a B-1 visa can apply either at any U.S. Consulate in a foreign country, or with the Immigration Officer at the U.S. port of entry on a Visa Waiver application. You must state your business purpose and submit a business purpose letter, if requested.

### **C. DURATION OF THE VISA**

Any B-1 visitor who receives a visa at a U.S. Consulate may be admitted for up to one year, and may be granted an extension of a temporary stay while in the United States, in increments of not more than six months each. However, a B-1 visa issued at the point of entry by the CIS on a Visa Waiver is only available for a maximum of three months, with no extensions or change of nonimmigrant status allowed.

## **CHAPTER 3 - E-1 AND E-2 VISAS FOR TRADERS AND INVESTORS**

### **A. E-1 AND E-2 VISAS**

The United States signs treaties with other countries, which treaties are designed to promote trade and investment between the U.S. and the other country or countries, thereby encouraging good relations and peace. More recently the U.S. has signed a number of Bilateral Investment Treaties with mainly former communist states, designed to promote investment but not generally conferring any trade-related immigration privileges. Nationals (individuals or companies) of countries with such Treaties with the United States can obtain visas to work in the USA in order to develop and direct their investment in and/or trade with the U.S. Such visas are called E-visas, and come in two types: E-1 treaty trader visa is set aside for companies that trade goods and services, while the E-2 investor visa is for an individual or enterprise that invests a substantial amount of funds in the United States with the prospect of job creation.

The E visa can be used by companies owned by a single investor, as well as by large multinational companies. It is also available to key foreign personnel of companies that are Treaty Foreign National (TFN) owned within the requirements listed below. TFNs are from the following countries:

#### **1. COUNTRIES WITH TREATIES FOR E-1 VISAS**

Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Canada, Chile, China (Taiwan), Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Federal Republic of Yugoslavia (Serbia and Montenegro), Finland, France, Germany, Gibraltar, Greece, Herzegovina,, Honduras, Iran, Ireland, Israel, Italy, Japan, Jordan, Korea (South), Latvia, Liberia, Luxembourg, Macedonia, Mexico, Netherlands, Norway, Oman, Pakistan, Paraguay, Philippines, Poland, Singapore, Slovenia, Spain, Suriname, Sweden, Switzerland, Thailand, Togo, Turkey, United Kingdom.

#### **2. COUNTRIES WITH TREATIES FOR E-2 VISAS**

Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Cameroon, Canada, Chile, China (Taiwan), Colombia, Congo (Brazzaville), Congo (Kinshasa), Costa Rica, Croatia, Czech Republic, Ecuador, Egypt, Estonia, Ethiopia, Federal Republic of Yugoslavia (Serbia and Montenegro), Finland, France, Georgia, Germany, Grenada, Honduras, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Korea (South), Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Mexico, Moldova, Mongolia, Morocco, Netherlands, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Romania, Senegal, Singapore, Slovenia Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Ukraine, United Kingdom.

\* Note that the above was current as of March 26, 2009. Please check with the State Department for recent changes.

## **B. THE E-1 VISA**

To qualify for an E-1 trader visa, a foreign business person must be seeking entry into the United States to carry on “substantial trade in goods or services in a capacity that is supervisory or executive or involves essential skills.” E-1 visas were previously restricted to a trade of goods and specific services, including banking, finance, and the airline industry. This limited definition of services has been greatly expanded so that trade can be in goods or services without specification or restriction.

The term “trade” means the exchange, purchase, or sale of goods and/or services. Goods are tangible commodities or merchandise having intrinsic value. Services are economic activities whose outputs are other than tangible goods. Such service activities include but are not limited to banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism, and technology transfer.

As a TFN, you may be issued a treaty trader (E-1) nonimmigrant visa if all of the following requirements are met:

1. You or your firm is a TFN (at least 50% of the company is owned by TFNs);
2. You enter the United States to carry on substantial trade (more than 50%) between your U.S. business and a TFN country; it does not matter if your TFN company is engaged primarily in trade with countries other than the United States, if the U.S. business is a separate legal entity (e.g. not a branch office of the foreign entity).
3. The trade is already in existence at the time you apply for E-1 status; existing trade includes successfully integrated contracts binding upon the parties which call for the immediate exchange of trade items;
4. You engage in executive or managerial duties or possess special skills that make your services essential to the employer’s operations; and
5. You confirm you intend to depart the United States upon termination of this status.

## **C. THE E-2 VISA**

To qualify for an E-2 investor visa, the applicant must “develop and direct operations of an enterprise in which he or she has invested or is actively in the process of investing a substantial amount of capital.” As a foreign citizen, you may be issued an E-2 nonimmigrant visa if all of the following requirements are met:

1. You or the firm are TFNs (at least 50% of the company is owned by TFNs)
2. You or the firm for which you work will invest or have invested substantial capital (generally in excess of \$100,000) which is at risk, meaning subject to potential loss if the business does not succeed, in a bona fide enterprise in the United States. The term “substantial” means:
  - a. The investment must be significantly proportional to the total investment (usually more than half of the value of the business), or
  - b. An amount normally considered necessary to establish a new business.
3. You engage in executive or managerial duties or possess special skills that make your services essential to the employer’s operations.
  - a. An executive position provides the employee great authority to determine the policy of and direction for the business or a major component of the business. The executive functions must be the primary functions of the employee, and not just incidental or collateral to other duties.
  - b. A supervisory position grants the employee ultimate control and responsibility for a large proportion of the enterprise’ operations or a major component of the enterprise. It does not involve the supervision of low-level employees. The supervisory element of the employee’s position must be a principal and primary function, and not an incidental or collateral function.
  - c. The essential nature of a foreign national’s “special skills” is determined by assessing the degree of proven expertise of the foreign national in the area of specialization, the uniqueness of the specific skills, the length of experience and training with the firm, the period of training needed to perform the contemplated duties, and the salary the special expertise commands. The consular officer must be convinced that the nature of the respective employment is such that the foreign national’s eventual replacement by a U.S. worker is not feasible or that the employer is making reasonable and good-faith efforts to recruit and/or train U.S. workers to perform the job.
4. The investment is not marginal (not your sole means of support and/or the goal of the investment is to create jobs for U.S. citizens or permanent residents)
5. The investment enterprise actually exists or you are actively in the process of investing
6. You confirm you intend to depart the United States upon termination of this status.

#### **D. HOW TO APPLY**

Trader and investor visas must be applied for at a U.S. Consulate with a visa application.

An interview is conducted by a U.S. consul who is well versed in the rules and regulations pertaining to E visas. For the correct forms and the time for adjudication of your E visa application, check with the U.S. consulate where you intend to apply.



## **E. DURATION OF THE VISA**

E visas are generally issued for a five year period and can be reissued (formerly called revalidation) through a U.S. Consulate or Embassy for a time equal to that originally issued. Admission for each entry to the United States during the life of the visa (recorded on the I-94) is granted for a period of two years. Extensions may be obtained for up to two years at a time from the Citizenship and Immigration Services' Service Center having jurisdiction over the place where the business is located.

Traders and investors can remain in the United States indefinitely, so long as they maintain their eligibility and treaty status.

## **F. STATUS OF SPOUSE AND MINOR CHILDREN**

A spouse and unmarried minor children are eligible for E visas, and can also enter under this category; a spouse can apply for work authorizations after entry. Unauthorized employment will not cause their deportation, as in the case of a spouse or child who holds a B, TN, or H visa, and in addition, servants of the E visa holder can be issued B-1 visas with work authorization.

## **CHAPTER 4 - H-1B VISAS FOR PROFESSIONALS**

### **A. WHO IS ELIGIBLE**

The H-1B nonimmigrant visa may be issued to individuals for employment by companies who seek temporary entry for employees as professional workers in a specialty occupation. Some examples of “specialty occupations” include: accountant, computer analyst, engineer, financial analyst, scientist, architect and lawyer.

In order for a position to qualify as a specialty occupation, the position must generally require a bachelor’s degree in a specific discipline related to the position. The beneficiary must also hold the appropriate degree or its equivalent. There are two ways in which a beneficiary might have the equivalent of the appropriate degree.

1. Beneficiary obtained a baccalaureate degree from a foreign university. The petition must be accompanied by evidence that the foreign university degree is equivalent to 4 year university degree at a U.S. college or university;
2. The Beneficiary has a combination of college or university course work, plus three years work experience for each year of university education missing. For H-1B purposes, this combination may be deemed equivalent to a four-year bachelor’s degree.

### **B. HOW TO APPLY**

A Labor Condition Application (LCA), which is discussed at the end of this Chapter, (see section E., *infra*), must first be filed with the U.S. Department of Labor (DOL). Once the LCA is approved, the employer fills out a Form I-129, Petition for Nonimmigrant Worker, and the supplemental form, along with supporting documentation, including the approved LCA. The forms and documentation are then filed with the U.S. Citizenship and Immigration Services (USCIS) Service Center having jurisdiction over the city of intended employment. The prospective U.S. employer files the petition along with the appropriate filing fee (see Appendix A). Once the USCIS approves the H-1B petition, a visa may be issued at a U.S. Consulate.

#### **THE H-1B CAP**

Congress has established an annual H-1B cap of 65,000 petitions per fiscal year (FY), which runs from October 1st to September 30th. Of that number, 6,800 are set aside for the H-1B1 program under terms of the U.S.-Singapore and U.S.-Chile Free Trade Agreements. Thus, the total H-1B cap number available for each FY is 58,200.

The earliest start date for work by a petitioner each year is October 1<sup>st</sup>, the first date of the fiscal year. Applications for October 1<sup>st</sup> start dates may be filed as early as April 1<sup>st</sup> of each year.

Petitions for extension or change of status for current H-1B workers do not count towards the congressionally mandated H-1B cap. Furthermore, exempt from the H-1B cap are the first 20,000 H-1B workers to file who have earned a U.S. Master's degree or higher. Also exempt from the annual H-1B cap are foreign nationals who will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization.

### **C. DOCUMENTATION REQUIREMENTS**

For those individuals seeking to perform temporary services in a specialty (H-1B) occupation, the petition must be filed with the following documentation:

1. An approved LCA from the DOL.
2. Documentation that the job qualifies as a specialty occupation. A "specialty occupation" is defined as one that requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate degree or higher as a minimum requirement for entry into the occupation in the United States. The employer may meet this requirement by showing that the degree is normal in the industry or common at a similar place of employment; that the nature of the specific duties are so complex or unique that they can be performed only by an individual with the required degree; or that the employer normally requires a degree or its equivalent for the position.
3. A copy of the foreign national's U.S. college degree (bachelor's, master's or Ph.D.) and/or foreign degree with evidence that it is equivalent to a U.S. baccalaureate degree or higher. Evidence of education, specialized training, or experience that is equivalent to a U.S. baccalaureate degree may also be submitted to fulfill this requirement. To determine equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college level education that the foreign national lacks. To show equivalency to a master's degree, the foreign national must have a baccalaureate degree and at least five years of progressively responsible experience in the specialty.
4. A copy of any required license to practice the occupation in the state of intended employment.
5. A copy of any written contract between the employer and the foreign national or a summary of the terms under which the foreign national will be employed if there is no written agreement.

In the event that the employer terminates the employment of the foreign national prior to expiration of the H-1B visa, the employer is responsible for providing return transportation of the foreign national to his or her last place of foreign residence.

## **D. DURATION OF VISA**

An H-1B is approved by USCIS for an initial period of up to three years. Generally, the maximum term of an H-1B visa is six years, including extensions, with the following exceptions.

### **EXTENSIONS BEYOND THE SIX YEAR LIMITATION**

The American Competitiveness in the 21<sup>st</sup> Century Act (AC21), effective beginning in 2002, provides for extensions of H-1B status beyond the 6-year limit in two circumstances:

1. USCIS may extend H-1B status in one-year increments for any H-1B foreign national who is the beneficiary of an employment-based immigration petition or labor certification which has been filed at least 365 days prior. Extensions may continue annually until the foreign national's adjustment is adjudicated. Thus, whether the alien labor certification or the immigrant petition is pending or approved, the H-1B visa holder in question may take advantage of the extension provision. Furthermore, this provision applies regardless of country of origin.
2. Beneficiary of an employment-based first, second or third preference petition who is eligible to adjust in the US, but is required to wait for a visa number due to the per-country limits, may obtain three year H-1B status extensions until the Adjustment of Status is decided. This provision applies to persons subject to the State Department's backlogs due to the retrogression in the numbers of available visas, and is especially relevant for foreign nationals born in India, China, Mexico or the Philippines, or all 3rd Preference countries, all of whom have the longest backlogs for immigrant visa processing.

## **E. H-1B VISA PORTABILITY**

### **1. PROVISIONS AND REQUIREMENTS**

Visa portability provisions in AC21 allow a nonimmigrant foreign national who was previously issued an H-1B visa or otherwise accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files a "non-frivolous" H-1B petition for the foreign national. A "non-frivolous" petition is one that is not without basis in law or fact. Since portability provisions apply to H-1B petitions filed "before, on, or after" enactment, all foreign nationals who meet the requirement benefit from the provisions.

The portability provisions described in AC21 relieve the foreign national and the employer from the need to await approval notification from the USCIS before commencing new H-1B employment. In order to be eligible for the visa portability provisions:

- a. The foreign national must have been lawfully admitted into the United States;

- b. An employer must have filed a non-frivolous petition for new employment before the date of expiration of the period of stay authorized; and
- c. The foreign national must not have accepted unauthorized employment subsequent to his or her admission and before the filing of the new petition.

## 2. INTERNATIONAL TRAVEL UNDER H-1B PORTABILITY

An H-1B portability applicant who is no longer working for the original petitioner is admissible at any Port of Entry, pursuant to the portability provisions in AC21, as long as the conditions listed below are met. If these conditions are met, the H-1B applicant is admissible until the validity date of the previous H-1B petition. Dependents of H-1B foreign nationals employed pursuant to visa portability provisions, apply for admission as H-4 applicants, and they must meet these same requirements. The conditions are that:

- a. The applicant is otherwise admissible.
- b. The applicant, unless Canadian or otherwise visa exempt, be in possession of a valid, unexpired passport and visa (including a valid, unexpired visa endorsed with the name of the original petitioner). Note, however, that as of January 23, 2007, all Canadians, citizens of the British Overseas Territory of Bermuda and Mexican citizens entering the U.S. via air travel will be required to present a valid passport for entry, and expect that by summer 2008, this rule will apply to all border crossings, whether by land, sea or air.
- c. The applicant establish to the satisfaction of the inspecting officer that he or she was previously admitted as an H-1B or the otherwise accorded H-1B status. If a visa exempt applicant is not in possession of the previously issued I-94, the applicant may present a copy of the Form I-94, Arrival/Departure Record, a copy of the previously issued I-94, or a copy of the Form I-797, Notice of Action, with the original petition's validity dates.
- d. The applicant present evidence that the new petition was filed in a timely manner with the Service Center, in the form of a dated filing receipt, Form I-797, or other credible evidence of timely filing that is validated through a query of the USCIS "CLAIMS" database. In order to be a timely filing, the petition must have been filed prior to the expiration of the H-1B's previous period of admission. It must be emphasized that the burden of proof remains with the foreign national to prove that he or she is admissible as an H-1B and eligible for visa portability provisions described in AC21.

## F. STATUS OF SPOUSE AND MINOR CHILDREN

A spouse or unmarried child of an H-1B visa holder is entitled to an H-4 visa for the same length of stay as the principal. The spouse and dependent minor children cannot accept employment, but may attend school in the United States. In addition, domestic workers of an H-1B visa holder can receive a B-1 business visa and obtain work authorization.

## **G. LABOR CONDITION APPLICATION**

There have been major changes in the Immigration laws and regulations affecting the H-1B visa for professional employees. In particular, the U.S. Department of Labor (DOL) has recently published implementing regulations under the American Competitiveness in the Twenty-First Century Act (ACWIA). Some particularly onerous requirements have been placed on “H-1B dependent employers”, but the regulations also provide guidance on issues affecting all employers, such as:

- A new Labor Condition Application Form
- New record keeping requirements.
- Regulations regarding payroll deductions for H-1B processing fees.
- A requirement that the Labor Condition Application be certified in order to take advantage of the
- H-1B portability provision.
- New work-site posting requirements.
- Eased filing requirements for companies undergoing mergers and acquisitions

### **1. LCA NOTICE REQUIREMENT**

The new regulations provide that when there is no collective bargaining representative an employer must post within the 30 days prior to the filing date of the LCA a notice of the filing of the LCA. The notice must indicate that:

- a. H-1B nonimmigrants are being sought;
- b. The number of such nonimmigrants the employer is seeking;
- c. The occupational classification;
- d. The wages offered;
- e. The period of employment;
- f. The location(s) at which the H-1B nonimmigrants will be employed; and
- g. That the LCA is available for public inspection at the H-1B employer’s principal place of business in the U.S. or at the work site.

The notice shall also contain the statement: “complaints alleging misrepresentation of material facts in the Labor Condition Application and/or failure to comply with the terms of the Labor Condition Application may be filed with any office of Wage and Hour Division of the United States Department of Labor.”

The notice can be provided in one of two manners:

- a. Hard copy notice. By posting a hard copy notice in at least two conspicuous locations at each place of employment where the H-1B nonimmigrant will be employed (whether such place of employment is owned or operated by the employer or by some other person or entity). The notice should be in a conspicuous place, such as the place where occupational safety and health notices are posted. The notices shall be posted for at least 10 days.
- b. Electronic notice. The regulations now provide that an electronic notification to employees in the occupational classification (including employees both of the H-1B employer and employees of another person or entity which owns or operates the place of employment) will satisfy the notice requirement. The notification can be in the form of a home page, electronic bulletin board or email message. Again, the electronic notice must be posted for at least 10 days.

Where the employer places any H-1B nonimmigrants at one or more work sites not contemplated at the time of filing the application, but which are within the area of intended employment listed on the LCA, the employer is required to post electronic or hard copy notices at those work sites, as well.

Additionally, the employer must provide the H-1B nonimmigrant with a copy of the Labor Condition application and must provide the H-1B nonimmigrant with a copy of the cover pages of the form ETA 9035 CP, which includes instructions for completing the LCA and attestations made by the employer.

## 2. MINIMUM RECORD KEEPING REQUIREMENTS

- a. Determination of H-1B Dependency. The employer should memorialize the data used to determine H-1B non-dependence for each LCA filed.
- b. A copy of the LCA.
- c. Documentation of the sources and methods used to determine the actual and prevailing wages.
- d. A copy of benefit plan descriptions provided to employees; a copy of the benefit plans themselves and any rules used for differentiating benefits among groups of employees; evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants; and the benefit elections made by those employees.
- e. A signed statement from the H-1B Beneficiary acknowledging receipt of a copy of the LCA.
- f. Payroll records for all employees with similar qualifications and experience in the position, throughout the period of employment. Such records should include:

- i. Employee's name;
- ii. Home address;
- iii. Occupation;
- iv. Rate of pay and information used to calculate the rate;
- v. Actual salary;
- vi. Total pay period additions or deductions; and
- vii. Total wages paid each pay period, the period covered, and the date of payment.

The company must maintain this documentation for three years from the date of the creation of the records.

### 3. WAGES

The regulations use a new term, “the required wage,” to describe the minimum wage that must be paid to an H-1B worker in a specific position and located in the US. The required wage is the prevailing wage or the actual wage paid to similarly employed employees, whichever is higher.

**The “dynamic” nature of the wage.** The new regulation provides that the prevailing wage as to any particular H-1B employee is governed by the LCA that supports that individual's petition and that prevailing wage determination on later LCAs for the same occupation do not operate as an “update” of the prevailing wage of earlier LCAs. However, the regulation seems to indicate that, because the DOL views actual wage as a “dynamic” matter, an increase in pay for new employees because of an increase in the prevailing wage could cause the actual wage to also rise and create an obligation to increase the wages of the H-1B employees under old LCAs.

**Benefits.** ACWIA requires that benefits be offered to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as they are offered to the employer's U.S. workers.

### 4. THE “NO PENALTY” PENALTY

ACWIA prohibits employers from imposing the payment of a penalty on the H-1B employee for ceasing employment prior to an agreed date, except that the employer may receive liquidated damages in such a case. The interim regulation does not contain the requirement that was in the proposed regulation that a court order would be necessary for a repayment to constitute liquidated damages, and instead defines liquidated damages by reference to state law. However, the regulation indicates that liquidated damages cannot be collected by deduction from the employee's paycheck. Furthermore, the preamble to the law states that recoupment of attorney fees may be included in liquidated damages. And in any



event, the regulation indicates that the \$750 or \$1,500 “training” fee could never be a part of liquidated damages and cannot be recouped in any form.

## **H. CORPORATE REORGANIZATIONS**

As long as the conditions specified by the DOL are met, no new LCA will need to be filed to continue employment of existing H-1B employees when there is a corporate reorganization. However, the new entity will be required to maintain a list of the H-1B employees transferred to it, and to maintain in the public access file a list of the affected LCA numbers and their dates of certification, a description of the new entity’s actual wage system, the FEIN of the new entity, and a sworn statement from an authorized representative of the new entity expressly assuming the liabilities and obligations of the existing LCAs and containing certain specified language (including, according to the preamble, assumption of liability for any violations by the previous entity under the LCA). According to the new regulation, the new entity “shall not” employ any of the predecessor’s H-1B employees unless either this statement is executed and placed in the public access file or new LCAs and petitions are filed. Successors will not be able to use existing LCAs of the predecessor company to file new petitions or extend existing petitions. If the restructuring results in a change in the company’s dependency status, there will be no effect on the employer’s obligations with respect to existing H-1B employees, but any new H-1B hire or extension of status for existing H-1Bs would be subject to whatever rules would now apply to the company (dependent or non-dependent.)

## **I. TRAVELING FOREIGN NATIONAL EMPLOYEES**

A multi-leveled inquiry is required in determining what needs to be done when H-1B employees travel from their home office. The first level involves determining whether the travel needs to be of concern at all. Where an employee travels to a location that does not constitute a new “place of employment,” then the LCA obligations are tied to the regular work location, and the employer need not be concerned with any special rules for traveling employees.

However, if the travel constitutes going to a new place of employment, a second level of inquiry is necessary. If the travel is within the same area of intended employment shown on the LCA, the Regulation requires that notices be posted at new worksites within that area on or before the date that the H-1B employee reports to that site. If the travel is outside the area of intended employment shown on the LCA, the Regulation requires either that a new LCA must be filed before the travel can take place, or that detailed “short-term placement” rules must be complied with as follows: “short-term placements” are limited to 30 workdays at any worksite not listed on the LCA in any given fiscal or calendar year, but a “short-term placement” can be for up to 60 workdays in a one-year period if the H-1B employee continues to maintain a work station at the “permanent” worksite and spends a substantial amount of time there during the year, and if the employee’s place of abode is in the area of the “permanent” worksite.

The Regulation prohibits employers from making the employee's initial assignment at a short-term placement location. It also prohibits use of the "short-term placement" rules in any area of employment where the employer has a separate, certified LCA for that employee's occupational classification. In the latter case, the employer must apply the conditions of that LCA (wage rate, strike or lockout rules) to the new H-1B employee. The Regulation's preamble states that if the employer's LCA has open "slots"—meaning that the LCA indicated that a certain number of positions were open, and fewer than that number had been filled—nothing more need be done. However, if the employer moves more H-1B employees into the area than it has available "slots", the DOL states in the preamble that it expects the employer will take steps to correct the situation by filing new LCAs. In an enforcement context, the DOL may, "in its discretion, overlook 'overcrowding' of the LCA, if it is not substantial."

The regulation includes a new and detailed definition of "place of employment." It is not a "place of employment" if the "nature and duration" of the employee's job functions necessitate frequent changes of location with little time at any one place. To meet this criterion, the job must be "peripatetic" in nature, the duties must require that most work time be spent at one location but occasional travel for short periods is needed to other locations, and the travel must be on "a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a "peripatetic" worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations)."

Examples cited that could meet the criteria for not being a new place of employment, and thus not triggering the rules for traveling employees, include computer engineers who troubleshoot at customer sites and sales representatives making customer calls. Examples of those not meeting these criteria, and therefore going to "places of employment," include computer engineers who work on projects for weeks or months at a time and sales representatives who are assigned on a continuing basis to locations away from the home office. It is also not considered a "place of employment" if the H-1B employee is temporarily at a different location for developmental activity (seminars, etc.), unless he or she is an instructor or a member of support staff who "continuously or regularly" performs duties at such locations. There is no time limit for attendance at a different location for developmental activity, according to the preamble to the Regulation.

Employers are required to reimburse for travel expenses during travel which does not constitute travel to a new "place of employment." Employers choosing to use the "short-term placement" rule (rather than filing a new LCA) for areas where they do not already have an LCA must continue to pay the required wage based on the permanent worksite, and must pay the employee's actual cost of travel, lodging, meals and incidentals for workdays and non-workdays at the short-term site. The employer is not required to meet GSA per diem schedules, but, according to the Regulation's preamble, in an enforcement proceeding, if the employer cannot document the actual expenses, the DOL will use the GSA schedules to determine appropriate reimbursement.

Once the workday limit is reached at a location, the employer must either file an LCA for that site (the language of the Regulation is vague as to whether the LCA must be certified at the time the limit is reached) or remove the number of employees surpassing the LCA limit. Furthermore, if any employee exceeds the time limit, or the employer in any other way “violates the terms of” the LCA, the “short-term placement” option cannot thereafter be used by that employer for any H-1B employees in that occupational classification in that area of employment. Employers also are “cautioned” against continuously rotating H-1B nonimmigrants to an area of employment “in a manner that would defeat the purpose of the short-term placement option.”

## **J. THE “NO BENCHING” RULE**

Part-time employees in nonproductive status must be paid at least the number of hours indicated on the petition. If a range of hours is indicated on the petition, then the employee must be paid for the average number of hours he or she ordinarily works. The preamble indicates that if an employee regularly works more than the designated number of part-time hours stated on the petition, DOL might charge the employer with misrepresentation.

If the nonproductive period is due to “conditions unrelated to employment” at the employee’s “voluntary request and convenience” (such as caring for a sick relative or touring the U.S.) or due to circumstances like maternity leave that render the employee unable to work, the employer is not obligated to pay the employee, provided the period is not subject to pay under the employer’s benefit plan or under other statutes. The preamble makes clear that the DOL cannot “forgive” employers from compliance with this rule due to annual plant shutdowns or holidays or other events that affect both U.S. workers and H-1B nonimmigrants. However, DOL indicates its view that laying off U.S. workers in such situations while retaining H-1B nonimmigrants may violate other nondiscrimination laws. Such an action would also be a violation of the ACWIA layoff attestation for H-1B dependent employers, in the DOL’s view.

These payment obligations commence once the H-1B employee “enters into employment,” which is deemed to occur when the individual first makes him or herself available. The regulation indicates that “even if the nonimmigrant has not yet ‘entered into employment,’” once the petition is approved, the required wage must start to be paid 30 days after the nonimmigrant is first admitted to the U.S., or if he or she is already here, 60 days after the nonimmigrant first becomes eligible to work for the employer. The latter is deemed to be the later of the start date set forth on the petition or the date USCIS renders a status decision. Payment obligation ends if there has been a “bona fide” termination of the employment relationship. While the language of the regulation itself is less than clear on this point, the preamble indicates that a “bona fide” termination will be deemed to have occurred only when the employer notifies the USCIS of the termination, the H-1B petition is canceled, and the return fare obligation is fulfilled.

## K. EQUAL BENEFITS

The Regulations define “equal benefits” to mean that H-1Bs must be offered the same benefit package as U.S. workers in substantially similar positions, cannot be subjected to stricter eligibility criteria, and cannot be treated as “temporary employees” for benefits purposes by virtue of their nonimmigrant status. The benefits received by the H-1B employee do not have to be identical to those received by U.S. workers, as long as the same benefits package was offered and the H-1B voluntarily chose different benefits (and the employee actually receives the benefits elected). Multinational companies can keep transferred employees on the foreign payroll and offer “home country” benefits under certain circumstances.

The regulations require that employers retain, as documentation of the benefits attestation, a copy of benefit plan descriptions provided to employees, a copy of the benefit plans themselves, any rules used for differentiating benefits among groups of employees, evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants, and the benefit elections made by the employees. If the employer is a multinational employer providing “home country” benefits, evidence of the benefits provided to the H-1B nonimmigrant before and after the move to the U.S. also must be maintained. For violations of this provision, the DOL gives itself authority in Section 655.810 to assess payment of “back...fringe benefits.” The preamble discusses the DOL view that certain benefits “are in the nature of compensation for services rendered” and have a monetary value (such as paid vacations and holidays, bonuses and termination pay, which are taxable to the employee when earned, deferred compensation such as retirement plans and stock options funded by employers, and health, life and disability insurance). The preamble also states the DOL’s view that these items are more “in the nature of wages than working conditions,” and that the department will enforce violations of this nature under the wage regulations.

## L. ADDITIONAL H-1B VISA CATEGORIES: THE H-1B2 AND THE H-1B3

### 1. H-1B2 RESEARCH AND DEVELOPMENT PROJECT

#### **Who is Eligible**

The **H-1B2** category applies to an alien coming temporarily to perform services of an exceptional nature relating to a **cooperative research and development project** administered by the Department of Defense.

#### **How to Apply**

The U.S. employer fills out a Form I-129, Petition for Nonimmigrant Worker, with the H Supplement, along with supporting documentation. The forms and documentation are then filed with the Citizenship and Immigration Service (USCIS) Regional Service Center having jurisdiction over the city of intended employment. The prospective U.S. employer files the petition along with the

appropriate filing fee (see Appendix A). Once the USCIS approves the H-1B petition, it will forward the approval to a U.S. Consulate.

### **Petition Document Requirements**

The petition (Form I-129) must be filed by the U.S. employer and must be filed with:

- a. A description of the proposed employment and evidence the services and project meet the above conditions; and
- b. A statement listing the names of all aliens who are not permanent residents who have been employed on the project within the past year, along with their dates of employment.

Note: this category does not require an LCA.

### **Duration of Visa**

Identical as those for the H-1B.

## 2. H-1B3 FASHION MODEL

### **Who is Eligible**

The H-1B3 category applies to a **fashion model** who is nationally or internationally recognized for achievements, to be employed in a position requiring someone of distinguished merit and ability.

### **How to Apply**

An LCA must first be filed with the DOL. Once the LCA is approved, the U.S. employer fills out a Form I-129, Petition for Nonimmigrant Worker, with the H Supplement, along with supporting documentation. The forms and documentation are then filed with the Citizenship and Immigration Service (USCIS) Regional Service Center having jurisdiction over the city of intended employment. The prospective U.S. employer files the petition along with the appropriate filing fee (see Appendix A). Once the USCIS approves the H-1B petition, it will forward the approval to a U.S. Consulate.

### **Petition Document Requirements**

The petition (Form I-129) must be filed by the U.S. employer and must be filed with:

- a. A certified labor condition application from the Department of Labor;
- b. Copies of evidence establishing that the alien is nationally or internationally recognized in the field of fashion modeling. The evidence must include at least two of the following types of documentation which show that the person:

Has achieved national or international recognition in his or her field as evidenced by major newspaper, trade journals, magazines or other published material;

Has performed and will perform services as fashion model for employers with a distinguished reputation;

Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies or other recognized experts in the field; and

Commands a high salary or other substantial remuneration for services, as shown by contracts or other reliable evidence.

- c. Copies of evidence establishing that the services to be performed require a fashion model of distinguished merit and ability and either:

Involve an event or production which has a distinguished reputation; or

The services are as participant for an organization or establishment that has a distinguished reputation or record of employing persons of distinguished merit and ability.

**Duration of Visa**

Identical as those for the H-1B.

## **CHAPTER 5 - H-2 VISAS for TEMPORARY WORKERS, H-3 VISAS for TRAINEES AND J-1 VISAS for INTERNS AND TRAINEES**

### **A. H-2 VISAS: TEMPORARY WORKERS**

#### **1. WHO IS ELIGIBLE**

The H-2 nonimmigrant visa is for temporary workers coming to the United States to fill positions, which are temporary in nature. Such positions are usually linked with a specific time frame or contract, and are positions which will cease to exist in the foreseeable future. The H-2A category applies to foreign nationals coming to the U.S. to perform agricultural work of a temporary or seasonal nature. The H-2B classification is suitable for athletes or those in the performing arts who have not yet achieved international renown, as well as skilled workers in crafts and trades who are able to perform tasks for which the employer obtains a certification that no U.S. workers are available. The H-2B category has a quota of 66,000 per year, with 33,000 H-2B visas available for the first half of each year, and 33,000 available for the second half.

#### **2. HOW TO APPLY**

Obtaining an H-2B visa is a two-step process. A U.S. employer must first submit an application for a temporary labor certification to the U.S. Department of Labor (DOL). The DOL reviews the application to ensure that there are no adverse effects on the U.S. domestic labor market. It will then issue either a temporary labor certification or a notice that such certification cannot be made. If a labor certification is approved by the DOL, the U.S. employer then files a Form I-129 with supporting documentation with the USCIS Regional Service Center having jurisdiction over the city of the intended place of employment. Once the USCIS approves the H-2 petition, the petition approval is forwarded to a U.S. Consulate, and a visa can then be stamped in the foreign national's passport.

#### **3. DOCUMENTATION REQUIREMENTS**

The documentation required to be filed with the I-129 petition varies depending on the H-2 sub-category in which the foreign national is seeking to provide temporary services.

#### **4. H-2A, AGRICULTURAL WORKERS**

For some individuals seeking to perform temporary services as an H-2A in agricultural employment, the petition must be filed with the following documentation:

- a. A single valid temporary agricultural labor certification; and

- b. Copies of evidence that each foreign national named in the petition meets the minimum job requirements stated in the certification at the time it was applied for.

## 5. H-2B TEMPORARY WORKERS

A new rule effective in January of 2009 permit the approval of H-2B petitions only for nationals of certain countries designated as participating countries by the Secretary of Homeland Security. The list of countries which will be published in the Federal Register annually includes; Brazil, Bulgaria, Chile , Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine and United Kingdom.

H-2B petitions for beneficiaries from countries not listed by the DHS may be approved only upon a showing of “extraordinary circumstances,” which is when an employer cannot find a qualified employee in the U.S. or in any of the designated countries.

For the H2B, there are four basic types of temporary need. These are:

- a. One-time occurrence: The employer must show that it is experiencing a temporary event, such as a conference or sporting event, and that it has not previously employed workers to fill the position, and will not need such services in the future.
- b. Seasonal need: The services are for a fixed and predictable time period, and the employer must specify the time of year when the workers are needed, and the dates the services are not needed.
- c. Peak-load need: The employer must show that it regularly employs permanent workers to perform the services but has a temporary need for additional staff because of a short-term demand. The temporary workers must not become a permanent part of the employer's workforce; that is, the need must not be ongoing.
- d. Intermittent need: The employer must demonstrate that it has a need for workers from time to time, but not on an ongoing, regular basis.

For those individuals seeking to perform temporary services in an H-2B capacity, the petition must be filed with the following documentation:

A temporary labor certification from the DOL indicating that qualified U.S. workers are not available, and that employment of the foreign national will not adversely affect the wages of working conditions of similarly employed U.S. workers; or

Copies of evidence, such as employment letters and/or training certificates, documenting that the foreign national met the minimum job requirements stated in the certification when the labor certificate application was submitted to DOL.



## 6. DURATION OF THE VISA

An H-2B visa is granted for the validity of the labor certification, or for an initial period of up to one year. The H-2B visa holder's visa may be renewed for periods of up to 12 months, but the total period of stay may not exceed three years. The new rule allows U.S. employers and eligible foreign workers the maximum flexibility to complete projects that could be for a specific one-time need of up to 3 years without demonstrating extraordinary circumstances. Individuals for whom extensions are filed are not counted against the annual 66,000 cap discussed above.

If H-2 visa holder has remained in the U.S. for the maximum period of time, as stated above, he or she may not seek a change of status, extension, or readmission to the U.S. until he or she has resided outside of the U.S. for a period of three months.

## 7. STATUS OF SPOUSE AND MINOR CHILDREN

A spouse or unmarried child of an H-2B visa holder is entitled to an H-4 visa, and the same length of stay as the principal. The spouse and dependent minor children cannot accept employment, but can attend school in the United States.

## **B. H-3 VISAS: TRAINEES**

### 1. WHO IS ELIGIBLE

The H-3 visa is for a foreign national who is coming to the United States to receive training from an employer in any field other than graduate education or training. This covers a specific course of job-related training that has been planned in the United States, which may include employment incidental to the training period.

When an application is made in this category, the employer must state that the training is not available in the foreign nationals' home country, and why it is necessary for the foreign national to receive training in the U.S.

“Special Exchange Visitors” may also apply for nonimmigrant visas under the H-3 category. A “Special Exchange Visitor” is one who seeks to enter the U.S. to gain practical training in educating children with physical, mental, or emotional disabilities. The foreign national must have a foreign residence they have no intention of abandoning, and they may stay in the U.S. for up to eighteen months. Only 50 foreign nationals per year may enter the U.S. in the Special Exchange Visitor category.

### 2. HOW TO APPLY

The Form I-129 visa petition must be submitted by the U.S. employer to the USCIS Regional Service Center that has jurisdiction over the place of intended employment.

### 3. DOCUMENTATION REQUIREMENTS

The documentation that is required to be filed with the I-129 petition varies depending on the H-3 sub-category in which the foreign national is seeking to obtain training.

For those individuals seeking to obtain training in a special education training program, the petition must be filed with the following documentation:

- a. A description of the training, staff, and facilities;
- b. Evidence that the program provides special education to children with physical, mental, or emotional disabilities, and that any custodial care of the children is only incidental to the training program;
- c. Details of the foreign national's participation in the program; and
- d. Documentation that the foreign national is nearing the completion of a baccalaureate degree in special education, already holds such a degree, or has extensive experience in teaching children with physical, mental, or emotional disabilities.

For those individuals seeking to obtain training from an employer in any other field (other than graduate education or training), the petition must be filed with the following documentation:

- a. A detailed description of the structured training program, including the number of classroom hours per week, and the number of hours of on-the-job training per week;
- b. A summary of the prior training and experience of the foreign national; and
- c. An explanation of why the training is required, whether similar training is available in the foreign national's country, how the training will benefit the foreign national in pursuing a career abroad, and why the employer is willing to incur the cost of providing the training without significant productive labor.

### 4. DURATION OF THE VISA

An H-3 visa for a foreign national trainee may be valid for a period of up to two years.

An H-3 visa for a foreign national participant in a special education training program may be valid for up to 18 months.

If an H-3 visa holder has remained in the U.S. for the maximum period of time stated on his or her visa, as stated above, he or she may not seek a change of status, extension, or readmission to the U.S. in H or L status until he or she has resided outside of the U.S. for a period of six months.

## 5. STATUS OF SPOUSE AND MINOR CHILDREN

A spouse or unmarried child of an H-3 visa holder is entitled to an H-4 visa, for the same length of stay as the principal. Neither the spouse and dependent minor children can accept employment, but they can attend school in the United States.

### C. J-1 VISAS FOR INTERNS AND TRAINEES

The Department of State, rather than the Citizenship and Immigration Service (“USCIS”), administers the J-1 visa program. In order to obtain a J-1 visa for an employee, a company must either become designated by the Department of State as a J-1 visa program sponsor or initiate an application through an approved third-party training sponsor organization.

Applying for Department of State authorization as a program sponsor may well be worthwhile for large, publicly-traded corporations; however, as a practical matter, it will not solve an immediate Human Resource need because it is a lengthy and complex process.

The first step is to find an appropriate third party training sponsor. There are dozens of organizations that are authorized by the Department of State to act as third-party sponsors of J-1 training programs. These organizations review and approve the application and training program of a proposed U.S. employer and issue a Form DS-2019, which is a Certificate of Eligibility for J-1 training. Each third-party program sponsor has different requirements, filing fees and procedures, but almost all third-party sponsor applications require that the employer submit a detailed training program. The training program must spell out in explicit detail the type and chronology of training, which will be accomplished, even if it will take place through on-the-job training. Third party sponsors generally take about a month to review and approve J-1 applications and training programs.

Once the application is approved, the third-party sponsor sends a Form DS-2019 to the employee abroad. The employee then submits the Form DS-2019 to the U.S. Consulate in his or her home country and obtains the J-1 Visa. Processing times are generally from 1 day to 2 weeks, depending on the U.S. Consular post where the visa application is made. Canadians are visa exempt, and are thus not required to obtain the visa at a U.S. Consulate. These visa exempt individuals merely submit Form DS-2019 and proof of nonimmigrant intent to the CBP officer at the time of admission to the United States.

#### 1. MINIMUM QUALIFICATIONS

The U.S. Department of State regulations effective July 19, 2007 established a new J-1 Intern category and revised significantly the regulations governing the J-1 Trainee program. The Trainee and Intern programs are designed to allow students and professionals to come to the United States to gain exposure to U.S.

culture and receive training and exposure to U.S. business practices in their chosen field. Upon completion of their programs, participants are expected to return to their home countries where they will be able to utilize their newly learned skills and knowledge to advance their careers, and to share their experience with their peers and others.

a. The Intern Category

The Intern category was created to allow a learning experience for current post-secondary students and recent graduates. Both the Trainee and the Intern programs must directly relate to the participant's career field of study. The Intern category applies to:

*Foreign nationals who:*

- Are currently enrolled in and pursuing studies at a foreign degree or certificate granting post-secondary academic institution outside the United States, OR
- Graduated from such an institution no more than 12 months prior to his or her exchange visitor program start date.  
Maximum duration in any field is 12 months.

b. The Trainee Category

The trainee must be a foreign national who has:

- A degree or professional certificate from a foreign post-secondary academic institution outside the United States and at least one year of prior related work experience in his or her occupational field outside the United States, OR
- Five years of work experience in his or her occupational field outside the United States.

Maximum duration remains 18 months except for certain field restrictions:

- Agriculture field has been limited to a training maximum of 12 months unless at least 6 months of the program is classroom participation, and studies.
- Hospitality field training programs also have been limited to a maximum of 12 months; all programs longer than six months must have at least three departmental relations. However, management training in hospitality may have a maximum duration of 18 months if categorized under Management field.

### REGULATIONS AFFECTING BOTH TRAINEE AND INTERN CATEGORIES

Trainee and Intern positions cannot displace a permanent or temporary American worker. The positions must be designed solely for the purpose of hosting an Intern or a Trainee.

Regulations prohibit Training or Intern placements to unskilled or casual labor positions, in positions that require child care or elder care, or in any kind of position that involves patient care or contact – this includes animal contact as in the cases of Veterinary Sciences.

Trainees and Interns cannot perform more than 20 percent of their on-the-job experience in clerical work.

- New form DS-7002 (Training/Internship Placement Plan) must be signed by participant, host company (company offering the training or internship) and sponsor organization. *Faxed and digital signatures will be accepted, however, all three signatures must appear on the final form.*
- Midterm and final evaluations are required at a minimum from both the participant and host company supervisor for all programs exceeding 6 months. For programs six months and less, a final evaluation is required. All evaluations must be signed by both the participant and their immediate host company supervisor.

#### c. Changes For Most Sponsoring Organizations

##### i. Sponsoring Organization must:

- Conduct site visits to host company that:
- Has not previously participated successfully in the sponsor's programs and
- Has fewer than 25 employees OR
- Less than three million dollars in annual revenue.

##### ii. Obtain the following information from all host companies:

- Dun and Bradstreet number,
- Employer Identification Number (EIN),
- Proof of Worker's Compensation Insurance Policy, and
- Verification of participant's English language skills by documenting interview.

It is common to see age guidelines such as, “age 20 to age 35”, however in most cases these age guidelines are somewhat flexible depending on the other factors involved in the application.

## 2. NONIMMIGRANT INTENT

As the J-1 visa is a nonimmigrant visa, applicants must demonstrate that they have a residence abroad, which they do not intend to abandon. As is the case with the F-1 student visa or the B-2 visitor visa, an applicant for a J-1 visa must show the U.S. Consulate that he or she has strong enough family, economic and social ties to his or her own country to prove that he or she will not immigrate to the United States, but will depart the United States when the training program is completed. As a practical matter, nonimmigrant intent can generally be demonstrated by obtaining an offer of future employment from a company in the foreign national’s home country abroad commencing at the time the US training is completed.

## 3. BENEFITS

The spouse and single children (under 21) of a J-1 principal applicant may come to the United States on J-2 visas for the same period as the J-1 training program. One benefit of the J-1 visa is that the spouse may obtain Employment Authorization through the USCIS by submitting Form I-765. However, a J-2 foreign national spouse may only use his or her income to support the family’s customary recreational and cultural activities and related travel, among other things. The USCIS will not authorize employment for J-2 dependants if the income is needed to support the J-1 principal foreign national.

While the employment of the J-1 principal is limited to the employer as set forth in the application made to through the third-party sponsor, the employment authorization offered to a J-2 dependant permits employment in the open market. Another benefit of the J-1 visa is that J-1 employees are exempt from FICA tax withholdings. In general, 7.65% of the earnings of U.S. employees and holders of other nonimmigrant visas is withheld from all earnings for Social Security and Medicare. In addition, the employer pays another 7.65%, for a total of 15.3% of the employee’s total wages. (Withholding drops to 1.45% from the employee and 1.45% paid by the employer after an employee has earned \$90,000.00 in any given year.) Therefore, if a trainee is paid \$40,000 per year, the employer and the trainee would each save \$3,060.00 per year just because the trainee is in the U.S. on a J-1 Visa rather than an H-1B visa, or \$4,590.00 over the life of the 18 month training program. This would provide a total savings of \$9,180.00 through the use of the J-1 visa.

## 4. SOMETHING TO WATCH OUT FOR: THE TWO-YEAR HOME RESIDENCE REQUIREMENT

Nationals of certain countries who will be obtaining training in areas listed on the Department of State’s “skills list” are not allowed to change to any other nonimmigrant status in the U.S. or immigrate to the United States until they

have returned to their home country—and not to any third country—for at least two years. The skills list is organized by country and contains several skills groups, each of which contains numerous categories of skills. Because of the difficulty of obtaining a waiver of the two-year home residence requirement, it is important to check the skills list before applying for the Certificate of Eligibility. Most European and Asian countries do not fall under the skills list. The skills list is available through the U.S. Department of State.

While the J-1 visa is not a very well-known visa category, it should be considered in situations where it is not practical or possible to obtain an H-1B visa for a foreign hire. While the 18-month term is shorter than the 36 month term of the H-1B visa, the J-1 can be obtained relatively quickly, and the requirements for obtaining a J-1 visa are less stringent than those for an H-1B visa.

#### 5. STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM (SEVIS)

The Student and Exchange Visitor Information System (SEVIS) is a government, computerized system that maintains and manages data about foreign students and exchange visitors during their stay in the United States. As of February 15, 2003, SEVIS monitors the status of persons who enter the U.S. with an F (academic students), J (exchange visitors), and M (non-academic students) temporary foreign visitors.

In order for students/exchange visitors and their dependents to qualify for an F, M or J visa, the school or exchange program in the U.S. must issue a Certificate of Student Status (I-20) or Certificate of Exchange Visitor Status (DS-2019) on a SEVIS-generated form and must register each person on the SEVIS website. Each applicant must submit a SEVIS-generated I-20 or DS-2019 with a unique barcode number and must be listed on the SEVIS website.

USCIS is required by Congress to maintain updated information on the approximately one million non-immigrant foreign students and exchange visitors during the course of their stay in the United States each year. SEVIS implements section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.

## **CHAPTER 6 - L-1 VISAS FOR INTRACOMPANY TRANSFEREES**

### **A. WHO IS ELIGIBLE**

Employees being transferred from a foreign company to a U.S. company require an L-1 visa. The employee must be an executive, manager or a person with specialized knowledge with at least one year of foreign experience with a foreign company.

The requirements for an L-1 visa include proof of continuous foreign employment for one year in the previous three years immediately prior to the application. The foreign employment requirement is satisfied even if there is a valid interruption in the performance of duties for the foreign company. If an L-1 beneficiary enters the U.S. in his or her capacity as an employee of the organization on some other type of visa, the time spent working in the U.S. under a valid visa will not be counted in assessing the one year requirement. However, neither will it be counted as applicable to the one-year previous foreign employment.

#### **1. L-1A, EXECUTIVES AND MANAGERS**

- a. An executive is one who directs the management of an organization or a major component or function of the organization. He or she establishes goals and policies and exercises wide latitude in discretionary decision making, receiving only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.
- b. A manager is one who has supervision and control over the work of other supervisory, professional or managerial employees, or who manages an essential function, department or subdivision of an organization. A manager has the authority to execute or recommend personnel actions if others are directly supervised. If no other employees are supervised, he or she must function at a senior level within the organization or with respect to the function managed, and must exercise discretion over the day-to-day operations of the organization or function managed.

#### **2. L-1B, EMPLOYEES WITH SPECIALIZED KNOWLEDGE**

To qualify as an employee with specialized knowledge, the individual must possess special knowledge of the petitioning organization's product, service, research, equipment, techniques, management or other interests, and its application in the international markets. The employee may also qualify under L-1 classification if he or she has an advanced level of knowledge or expertise in the organization's processes or procedures.

In July 2005, the USCIS released a memo addressing the standards and procedures for review of L-1B petitions, after the implementation of the L-1 Visa Reform Act of 2004. The rules apply only to L-1B employees with specialized knowledge, and not to L-1A executives or managers. The standards and procedures for review basically provide that the L-1B classification is not appropriate in certain situations where the worker is stationed primarily at a



worksite other than that of the petitioning employer (or an affiliate, subsidiary, or parent of the petitioning employer). However, offsite placement alone does not automatically disqualify the L1B petition, and in order a petition to be disqualified, it is necessary for either:

- a. The employee to be principally under the control or supervision of the unaffiliated worksite employer; or
- b. The offsite placement work duties to consist essentially of labor-for-hire, as opposed to the offsite placement being connected with the specialized knowledge concerning the petitioning company's product or service.

The ineligibility provisions relate only to those workers engaged in offsite employment, and do not apply if the L-1B beneficiary will be working at the sponsoring employer's physical location. Where the L-1B visa holder works at both the employer's offices and at an offsite placement, the USCIS will examine what the L1B beneficiary does when he or she is at each location to determine where the work is primarily performed.

### 3. THE L-1 EMPLOYER

The petitioning employer must be a subsidiary, affiliate or branch office, and there must be a relationship between the foreign and U.S. companies in which there is either more than 50% stock control, or a 50/50 joint venture with joint veto power. The relationship between companies is demonstrated either by showing that the corporations are the same or that one is a subsidiary, affiliate or branch office of the other.

## **B. DURATION OF THE VISA**

For a start-up business, an L-1 visa is valid for one year. For businesses that have been doing business for a year or longer, the visa is valid for up to three years with two-year extensions available for a total of up to five years for an employee with specialized knowledge, and up to seven years for an executive or manager.

## **C. HOW TO APPLY**

An L-1 visa application must be approved through a USCIS Regional Service Center. The USCIS then sends the approval notice to a U.S. Consulate, where the applicant obtains the L-1 visa or approves a status change.

## **D. STATUS OF SPOUSE AND MINOR CHILDREN**

The foreign national spouse or unmarried minor children of a foreign national with an L-1 visa are entitled to the same nonimmigrant classification, for the same length of stay, as the employee. The foreign national's spouse and children are admitted with L-2 visas. The employee's spouse may seek employment authorization from USCIS. Domestic workers of an L-1 visa holder can receive a B-1 visa with work authorization.

## **CHAPTER 7 - TN-1 VISAS FOR CANADIAN PROFESSIONALS AND CONSULTANTS**

### **A. WHO IS ELIGIBLE**

A Canadian citizen who seeks temporary entry as a professional may be admitted to the United States under the provisions of Appendix 1603.D.1 of Chapter 16 of NAFTA on a TN visa.

This classification of work visa is limited to Canadian professionals employed on a professional level (see List of Professionals at the end of this Chapter). Activities at a “professional level” refer to undertakings that require an individual to have at least a baccalaureate degree or appropriate license demonstrating status as a professional, where a professional is generally defined as a person with a minimum of a bachelor’s degree where the job in question requires this degree as its minimum entry-level requirement. Unless otherwise specified, a bachelor’s degree of three or four years is the minimum requirement for professionals.

On the List of Professionals, Canadian management consultants are required to have either a bachelor’s degree or “five years of experience in consulting or related field.” Management consultants provide services that are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity’s goals, objectives, policies, strategies, administration, organization or operation. A management consultant should generally not be a regular, full-time employee of the entity requiring service. There are, however, instances where full-time employment is a possibility. In these cases, the management consultant should not be assuming an existing position, replacing someone in an existing position, or filling a newly created permanent position. In short, the management consultant should either be an independent consultant or the employee of a consulting firm under contract to a U.S. entity, or the consultant, if salaried, should be in a temporary position.

Unlike business persons and professionals listed in the “general service” business visitor category, professionals are permitted to be employed in the United States by either Canadian or U.S. companies and receive remuneration in the United States. Athletes and entertainers are specifically omitted from the List of Professionals. Also, self-employment is specifically precluded from TN status.

### **B. HOW TO APPLY**

Filing for a TN visa must be made at a Class A port of entry or at a U.S. pre-flight inspection (PFI) station. The application fee for a TN visa application is to be paid at that time, and approval of the visa is obtained the same day of travel.

Labor Dispute Denial - A citizen of Canada may be denied TN visa status if the Secretary of Labor certifies to the USCIS Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress at the place where the foreign national is or intends to be employed, and that the temporary entry of the

foreign national may adversely affect either the settlement of any labor dispute that is in progress at the place or intended place of employment or the employment of any person who is involved in such dispute.

### **C. DOCUMENTATION REQUIREMENTS**

To demonstrate business activity at a professional level, the applicant must submit documentation in the form of a job offer letter from the prospective employer in the United States or Canada, as well as supporting documents such as licenses, diplomas, degrees, certificates, or membership in professional organizations.

As set out in the Citizenship and Immigration Services (USCIS) regulations under NAFTA, the documentation should confirm the following:

- ✓ The nature of the professional activity;
- ✓ The purpose of the entry;
- ✓ The anticipated length of stay;
- ✓ That their stay is for a temporary period that has a reasonable, finite end that does not equate to permanent residence;
- ✓ The educational qualifications or appropriate credentials that demonstrate that the Canadian citizen has professional status;
- ✓ That the Canadian citizen complies with all applicable state laws and/or licensing requirements for the occupation; and
- ✓ The arrangements for remuneration for services to be rendered.

### **D. DURATION OF VISA**

A TN visa is granted for up to three years. At the end of each three-year period, the Canadian citizen may reapply for another TN visa. An extension of a TN visa can be filed in the U.S. only at the USCIS Vermont Service Center, and the law does not give a limit to the number of extensions that will be allowed, however all TN employment is temporary.

### **E. STATUS OF SPOUSE AND MINOR CHILDREN**

A Canadian or non-Canadian spouse or unmarried minor child of a TN visa holder is entitled to a TD classification for the same length of stay as the principal.

A visa from a U.S. consulate is required when applying for admission for a non-Canadian citizen, while a border crossing identification card (Form I-94) is issued to a Canadian citizen, and no visa is required.

The spouse and unmarried minor children of a TN holder cannot accept employment in the United States. Domestic workers of TN visa holders can receive a B-1 visa.

## F. EXTENSIONS OF TN

Canadians can apply for extensions of a TN visa either by returning to the border and applying through U.S. Customs and Border Protection (USCBP), or by filing Form I-129 with appropriate filing fee and copies of required documents, and the Form I-94. Applications with Form I-539 must be filed, concurrently by dependent family members, with appropriate filing fees.

## G. LIST OF PROFESSIONALS

### OCCUPATIONS AND PROFESSIONS ELIGIBLE FOR TEMPORARY ENTRY TO THE UNITED STATES

Sec. 214.6 Canadian citizens seeking temporary entry to engage in business activities at a professional level.

1. *General.* Under section 214(e) of the Act, a citizen of Canada or Mexico who seek temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the North American Free Trade Agreement (NAFTA).
2. *Definitions.* As used in this section the terms:
  - a. **Business activities at a professional level** means those undertakings which require that, for successful completion, the **individual** has at least a baccalaureate degree or appropriate credentials demonstrating status as a professional.
  - b. **Business person**, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.
  - c. **Engage in business activities at a professional level** means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be self-employed.
  - d. **Temporary entry**, as defined in the NAFTA, means entry without the intent to establish permanent residence.

Appendix 1603 D.1. to Annex 1603 of the NAFTA. Pursuant to the NAFTA, an applicant seeking admission under this section shall demonstrate business activity at a professional level in one of the professions set forth in Appendix 1603.D1 to Annex 1603. The professions in Appendix 1603.D.1 and the minimum requirements for qualification for each are as follows:

*Accountant*-Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A or C.M.A.

*Actuary*-Baccalaureate or Licenciatura Degree, or satisfaction of the necessary requirements to be recognized as an actuary by a professional actuarial association or society.

*Architect*-Baccalaureate or Licenciatura Degree; or state/provincial license.

*Computer Systems Analyst*-Baccalaureate or Licenciatura Degree: or Post-Secondary Diploma or Post Secondary Certificate and three years' experience

*Disaster relief insurance claims adjuster* (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)--Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims.

*Economist*—Baccalaureate or Licenciatura Degree.

*Engineer*—Baccalaureate or Licenciatura Degree; or state/provincial license

*Forester*—Baccalaureate or Licenciatura Degree; or state/provincial license

*Graphic Designer*—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years experience.

*Hotel Manager*—Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management.

*Industrial Designer*—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

*Interior Designer*—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

*Land Surveyor*—Baccalaureate or Licenciatura Degree or state/provincial/federal license.

*Landscape Architect*—Baccalaureate or Licenciatura Degree.

*Lawyer* (including Notary in the province of Quebec)--L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar.

*Librarian*—M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).

*Management Consultant*—Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement.

*Mathematician* (including Statistician)--Baccalaureate or Licenciatura Degree.

*Range Manager/Range Conservationist*—Baccalaureate or Licenciatura Degree.

*Research Assistant* (working in a post-secondary educational institution)--  
Baccalaureate or Licenciatura Degree.

*Scientific Technician/Technologist*<sup>1</sup>--Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.

*Social Worker*—Baccalaureate or Licenciatura Degree.

*Sylviculturist* (including Forestry Specialist)--Baccalaureate or Licenciatura Degree.

*Technical Publications Writer*—Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

*Urban Planner* (including Geographer)--Baccalaureate or Licenciatura Degree.

*Vocational Counselor*—Baccalaureate or Licenciatura Degree.

## **MEDICAL/ALLIED PROFESSIONALS**

*Dentist*—D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license.

*Dietitian*—Baccalaureate or Licenciatura Degree; or state/provincial license.

*Medical Laboratory Technologist* (Canada)/*Medical Technologist* (Mexico and the United States)<sup>2</sup>--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

*Nutritionist*—Baccalaureate or Licenciatura Degree.

*Occupational Therapist*—Baccalaureate or Licenciatura Degree; or state/provincial license.

*Pharmacist*—Baccalaureate or Licenciatura Degree; or state/provincial license.

*Physician* (teaching or research only)--M.D. Doctor en Medicina; or state/provincial license.

*Physiotherapist/Physical Therapist*—Baccalaureate or Licenciatura Degree; or state/provincial license.

*Psychologist*—state/provincial license; or Licenciatura Degree.

*Recreational Therapist*—Baccalaureate or Licenciatura Degree.

*Registered nurse*—state/provincial license or Licenciatura Degree.

*Veterinarian*—D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.

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<sup>1</sup> A business person in this category must be seeking temporary entry to work in a direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.

<sup>2</sup> A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment or prevention of disease.

## **SCIENTISTS**

*Agriculturist* (including *Agronomist*)--Baccalaureate or Licenciatura Degree.

*Animal Breeder*—Baccalaureate or Licenciatura Degree.

*Animal Scientist*—Baccalaureate or Licenciatura Degree.

*Apiculturist*—Baccalaureate or Licenciatura Degree.

*Astronomer*—Baccalaureate or Licenciatura Degree.

*Biochemist*—Baccalaureate or Licenciatura Degree.

*Biologist*<sup>1</sup>—Baccalaureate or Licenciatura Degree.

*Chemist*—Baccalaureate or Licenciatura Degree.

*Dairy Scientist*—Baccalaureate or Licenciatura Degree.

*Entomologist*—Baccalaureate or Licenciatura Degree.

*Epidemiologist*—Baccalaureate or Licenciatura Degree.

*Geneticist*—Baccalaureate or Licenciatura Degree.

*Geochemist*—Baccalaureate or Licenciatura Degree.

*Geologist*—Baccalaureate or Licenciatura Degree.

*Geophysicist* (including *Oceanographer* in Mexico and the United States)--  
Baccalaureate or Licenciatura Degree.

*Horticulturist*—Baccalaureate or Licenciatura Degree.

*Meteorologist*—Baccalaureate or Licenciatura Degree.

*Pharmacologist*—Baccalaureate or Licenciatura Degree.

*Physicist* (including *Oceanographer* in Canada)--Baccalaureate or Licenciatura  
Degree.

*Plant Breeder*—Baccalaureate or Licenciatura Degree.

*Poultry Scientist*—Baccalaureate or Licenciatura Degree.

*Soil Scientist*—Baccalaureate or Licenciatura Degree.

*Zoologist*—Baccalaureate or Licenciatura Degree.

## **TEACHERS**

*College*—Baccalaureate or Licenciatura Degree.

*Seminary*—Baccalaureate or Licenciatura Degree.

*University*—Baccalaureate or Licenciatura Degree.

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<sup>1</sup> Also, *Plant Pathologist*.

## **CHAPTER 8 – TN-2 VISAS FOR MEXICAN PROFESSIONALS AND CONSULTANTS**

### **A. WHO IS ELIGIBLE**

A Mexican citizen who seeks temporary entry as a professional may be admitted to the United States under the provisions of Appendix 1603.D.1 of Chapter 16 of NAFTA on a TN visa.

This classification of work visa is limited to Mexican professionals employed on a professional level (see List of Professionals at the end of the previous Chapter). Activities at a “professional level” generally mean undertakings that require an individual to have at least a baccalaureate degree or appropriate license demonstrating status as a professional. A professional is generally defined as a person with a minimum of a bachelor’s degree, where the job in question requires this degree as its minimum entry-level requirement. Unless otherwise specified, a bachelor’s degree of three or four years is the minimum requirement for professionals.

On the List of Professionals, Mexican management consultants are allowed to have either a bachelor’s degree or “five years of experience in consulting or related field.” Management consultants provide services that are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity’s goals, objectives, policies, strategies, administration, organization or operation. A management consultant should generally not be a regular, full-time employee of the entity requiring service. There are, however, instances where full-time employment is a possibility. In these cases, the management consultant should not be assuming an existing position, replacing someone in an existing position, or filling a newly created permanent position. In short, the management consultant should either be an independent consultant or the employee of a consulting firm under contract to a U.S. entity, or the consultant, if salaried, should be in a temporary position.

Unlike business persons and professionals listed in the “general service” business visitor category, professionals under TN status must be employed in the United States by a U.S. company, and must receive remuneration in the United States. Athletes and entertainers are specifically omitted from the List of Professionals. Also, self-employment is specifically precluded from TN status.

### **B. HOW TO APPLY**

On and after January 1, 2004, Mexican citizens who qualify for TN visas must file the necessary paperwork with a U.S. Consulate anywhere in the world in order to receive a TN visa. As part of the visa application process, an interview at the Embassy or Consulate is required for most visa applicants. Interviews are generally by appointment only. As part of the visa interview, a quick, two-digit, ink-free fingerprint scan can generally be expected. The waiting time for an interview



appointment for most applicants is a few weeks or less, but for some embassy consular sections it can be considerably longer.

The Mexican citizen seeking a TN visa is not required to obtain petition approval from the CIS, nor is a Labor Condition Application (LCA) required. Furthermore, Mexicans are no longer subject to numerical limitation for these professionals. Mexican citizens still require a visa to request admission to the United States.

### **C. DOCUMENTATION REQUIREMENTS**

To demonstrate business activity at a professional level, the applicant must submit documentation in the form of a job offer letter from the prospective employer in the United States, as well as supporting documents such as licenses, diplomas, degrees, certificates, or membership in professional organizations. The documentation should confirm the following:

- ✓ The nature of the professional activity;
- ✓ The purpose of the entry;
- ✓ The anticipated length of stay;
- ✓ That their stay is for a temporary period that has a reasonable, finite end that does not equate to permanent residence;
- ✓ The educational qualifications or appropriate credentials that demonstrate that the Mexican citizen has professional status;
- ✓ That the Mexican citizen complies with all applicable state laws and/or licensing requirements for the occupation; and
- ✓ The arrangements for remuneration for services to be rendered.

### **D. LICENSURE**

While a license is required to practice certain professions in the U.S., possession of such a license is not required for visa issuance or admission. Local authorities must enforce any licensure requirements. For example, an applicant who has a law degree, but no U.S. license to practice in this country may be issued a visa and admitted to the U.S. to practice law. It is the responsibility of the local authorities to ensure the foreign national obtains all necessary licenses to practice.

### **E. DURATION OF VISA**

A TN visa is granted for up to six months by a U.S. Consulate, even though upon admission to the U.S., USCIS will grant up to a one year stay on Form I-94 and extensions or a new TN visa of up to one year. An extension of a TN visa can be filed in the U.S. only at the USCIS Nebraska Service Center, and the law does not give a limit as to the number of TN extensions that are allowed to one individual. However, all TN employment is temporary.

## **F. STATUS OF SPOUSE AND MINOR CHILDREN**

A Mexican or non-Mexican spouse or unmarried minor child of a TN visa holder is entitled to TD classification for the same length of stay as the principal. The spouse and unmarried minor children cannot accept employment in the United States. There is a reciprocity visa fee for admission of the Mexican spouse and dependent minor children under TD classification. Domestic workers of TN visa holders can receive a B-1 visa.

## **G. LIST OF PROFESSIONALS**

### **OCCUPATIONS AND PROFESSIONS ELIGIBLE FOR TEMPORARY ENTRY TO THE UNITED STATES**

Sec. 214.6 Mexican citizens seeking temporary entry to engage in business activities at a professional level. See List of Professionals under Chapter 7G.

## **H. EXTENSIONS OF TN**

Mexicans apply for extensions of a TN visa by filing Form I-129 with appropriate filing fee and copies of required documents, and the Form I-94. Applications with Form I-539 must be filed concurrently by dependent family members with appropriate filing fees.

## **CHAPTER 9 – E-3 VISAS FOR AUSTRALIANS IN SPECIALTY OCCUPATIONS**

### **A. WHO IS ELIGIBLE**

An Australian citizen who seeks temporary entry as a professional may be admitted to the United States under Section 501 of the Real ID Act of 2005, enacted in 2005, which amends the Immigration and Nationality Act to include a new category of E treaty visas, the E-3 Nonimmigrant Visa for Australians in Specialty Occupations. The new law, which has a quota of 10,500 nationals of the Commonwealth of Australia plus their spouses and dependent children, will largely take Australians out of the H-1B quota and offer them a visa that is similar, but more flexible, than the H-1B. It also has some of the elements of an E treaty visa and can be viewed as a hybrid that should be highly useful to Australian nationals seeking work in the US.

The E-3 visa is available to Australian nationals who enter the U.S. to work in a “specialty occupation.” A “specialty occupation” is defined similarly to the definition used for H-1B professionals. The statutory definition of “specialty occupation” is “...an occupation that requires:

1. theoretical and practical application of a body of specialized knowledge; and
2. attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”

Identical to the occupations allowed under the H-1B, examples of specialty occupations include lawyers, physicians, engineers, accountants, etc. In addition, the E-3 eligibility requirements (like the H-1B qualifications), require an individual to have at least a baccalaureate degree or appropriate license demonstrating status as a “professional,” which is generally defined as a person with a minimum of a bachelor’s degree where the job requires this degree as its minimum entry-level requirement. Unless otherwise specified, a bachelor’s degree is the minimum requirement for professionals.

E-3 visa holders can work for any U.S. employer, and the employer does not have to be majority-owned by citizens of their home country.

### **B. HOW TO APPLY**

Filing for an E-3 visa must be made at U.S. Embassy or Consulate changes of status or extensions may be made on Form I-129 at the USCIS, similar to an H-1B petition. The application fee (see Appendix) is two-part: a fee must be paid via the Australia Post, and receipt of such payment must be presented to the Consulate at the time of the prospective nonimmigrant visa holder’s interview, and another fee must be paid directly to the Consulate. Prospective applicants should check with the local U.S. Consulate for the specific rules on fees and payment thereof.

As this is a new visa, approval times are not well known, but it is generally assumed that approval of the visa can be obtained within a week of the applicant’s interview

at the Consulate. The applicant is instructed to take a self-addressed envelope along with his or her documentation to his or her interview, and the Consulate will then send the approved visa and documentation back to the applicant. It is advisable not to make any formal, finalized plans for a travel date to the United States until the applicant receives official approval for his or her visa from the Consulate.

### **C. DOCUMENTATION REQUIREMENTS**

To demonstrate business activity at a professional level, the applicant must submit documentation in the form of a job offer letter from the prospective employer in the United States, as well as supporting documents such as licenses, diplomas, degrees, certificates, or membership in professional organizations.

The following documentary evidence must be submitted in connection with an application for an E-3 visa:

1. A certified Form ETA 9035, clearly annotated as "E-3 - Australia - to be processed." (Note: DOL is currently updating the Form ETA 9035 to include an option check box for E-3 classification, which will eliminate the need for the interim handwritten annotation). The form may be mailed or submitted online.
2. Evidence of academic or other qualifying credentials as required under INA 214(i)(1), and a job offer letter or other documentation from the employer establishing that upon entry into the United States, the applicant will be engaged in qualifying work in a specialty occupation and that the alien will be paid the actual or prevailing wage referred to in INA 212(t)(1). A certified copy of the foreign degree and evidence that it is equivalent to the required U.S. degree could be used to satisfy the "qualifying credentials" requirement. Likewise, a certified copy of a U.S. baccalaureate or higher degree, as required by the specialty occupation, would meet the minimum evidentiary standard.
3. In the absence of an academic or other qualifying credential(s), evidence of education and experience that is equivalent to the required U.S. degree.
4. Evidence establishing that the applicant's stay in the United States will be temporary.
5. A certified copy of any required license or other official permission to practice the occupation in the state of intended employment if so required or, where licensure is not necessary to commence immediately the intended specialty occupation employment upon admission, evidence that the alien will be obtaining the required license within a reasonable time after admission.
6. Evidence of payment of the Machine Readable Visa (MRV) Fee, also known as the application fee.

### **D. DURATION OF VISA**

An E-3 visa is granted for up to two years. At the end of each two-year period, the Australian citizen may reapply for another E-3 visa. At present, there is no maximum number of times that an Australian citizen may renew his or her E-3 visa.

## **E. STATUS OF SPOUSE AND MINOR CHILDREN**

An Australian spouse or unmarried minor child of an E-3 visa holder is entitled to an E-3 classification for the same length of stay as the principal.

A visa from a U.S. Consulate is required when applying for admission, whether for an Australian or non-Australian citizen.

Unlike most employment-based visas, with the E-3, the spouse and unmarried minor children can accept employment in the United States, after obtaining a work authorization document.

## CHAPTER 10 – H-1B1 VISAS FOR NATIONALS FROM SINGAPORE AND CHILE

The U.S. Free Trade Agreements (FTA) with Singapore and Chile, which took effect on January 1, 2004, both contain provisions that permit temporary entry of businesspersons from Singapore and Chile, respectively, to the U.S. to facilitate free trade opportunities. The FTAs establish four categories of nonimmigrant entry for business persons, including: business visitors (B-1), traders/investors (E1/E2), intra-company transferees (L-1), and nonimmigrant professionals (H-1B).

The nonimmigrant professionals' category is actually split into two categories, the H-1B and H-1B1. The H-1B category encompasses the current H-1B program, whereas within the H-1B1 category, 5,400 visa numbers will be available to Singapore and 1,400 visa numbers to Chile. The H-1B1 visas will be renewed annually, with new attestations required every third year. The numerical limitations for the FTAs are set aside within the overall H-1B Program cap.

Nationals of Singapore or Chile may apply at consular sections around the world for the nonimmigrant H-1B1 visa, at which time evidence of eligibility for H-1B1 classification must be made. Qualification requires professions to meet the definition of "specialty occupation" as set forth in the respective FTA or submit proof of alternative credentials as set forth in the respective FTA. The prevailing wage requirements would also apply to the H-1B1 subset. A job offer letter from the employer, proof of labor attestation (certified ETA 9035 or 9035E), proof of payment of any special fee, if applicable, and payment of the MRV fee, are all also required. The employer of an H-1B1 professional is not required to submit a petition to DHS as a prerequisite for classification or visa issuance.

The FTA also requires all Singaporean and Chilean H-1B1 professionals to overcome the presumption of immigrant intent, a higher threshold than H-1B visa holders meet.

### A. H-1B1 PROFESSIONAL VISA – SINGAPORE

To qualify for the **H-1B1 U.S.-Singapore Free Trade Agreement (USSFTA) Professional** visa, an applicant has to meet the following criteria:

1. The applicant must be engaged in a "specialty occupation" as defined at 8 U.S.C. 1184(i)(1)(A) and (B). This position requires theoretical and practical application of a body of specialized knowledge and the attainment of a post-secondary degree involving at least four years of study in his or her field of specialization. Examples of specialty occupations include, but not limited to, jobs in the fields of engineering, mathematics, physical sciences, computer

sciences, medicine and health care, education, biotechnology, and business specialties such as management and human resources.

2. There are two exceptions to the degree requirement with respect to citizens of Singapore: Management Consultants and Disaster Relief Claims Adjusters. Depending on the particular occupation, persons seeking to engage in any of these professions will be required to present evidence of a combination of work experience and/or alternate education training.
3. A U.S. employer has to furnish a letter of employment specifying the details of the temporary position (including job responsibilities, salary and benefits, duration, description of the employing company, qualifications of the applicant, etc.) and confirming the employment offer. The U.S. employer must also provide a certified form ETA 9035 or 9035E, clearly annotated as “H-1B1 C Singapore” or “H-1B1 Chile,” from the U.S. Department of Labor.
4. The applicant must submit evidence that the employer has paid any applicable fee imposed. Currently there are no special fees required of the petitioner or employer of an H-1B or H-1B1 worker for initial classification or extensions of stays for the global H-1B program.
5. The applicant cannot be self-employed or an independent contractor.
6. The period of employment in the United States must be temporary. As such, the applicant must establish non-immigrant intent. Note: this requirement makes the USSFTA Professional visa (H-1B1) different from the traditional H-1B Temporary Worker visa, as applicants for traditional H-1B visas do not have to demonstrate that they intend to return to Singapore when their temporary job is finished. Singaporeans are still eligible to apply for traditional H-1B visas.
7. Unlike a traditional H-1B visa, submission by the employer of Form I-129, Petition for Nonimmigrant Worker, to the USCIS (DHS) is not required, and the applicant does not need to obtain a Notice of Approval, Form I-797, before submitting their visa application.
8. Extensions are allowed, but change status to another non-immigrant category or Adjustment of Status to legal permanent residency is not permitted.
9. H-1B1 visas will be multiple-entry, valid for 12 months.

## **B. H-1B1 PROFESSIONAL VISA - CHILE**

The US-Chile Free Trade Agreement is similarly defined as the US-Singapore Free Trade Agreement, above.

For citizens of Chile, there are four exceptions to the degree requirement, which include the two professions/occupations mentioned above, and Management Consultants and Disaster Relief Claim Adjusters.

## **C. REQUESTS FOR CHANGE OF STATUS TO H-1B1 PROFESSIONAL**

A national of either Singapore or Chile, currently admitted to the United States as a nonimmigrant in a category eligible to change nonimmigrant status may apply to the NSC in order to change to H-1B1 nonimmigrant status. To do so, one must submit Form I-129 with the following:

1. A letter from the U.S. employer stating the activity to be engaged in, the anticipated length of stay and the arrangements for remuneration;
2. Evidence the foreign national meets the educational requirement for the profession or occupation, which normally is a bachelor's degree or higher.
3. For nationals of Singapore and Chile, a U.S. Department of Labor issued H-1B1 certified Labor Condition Application.

## **D. DIFFERENCES BETWEEN SINGAPORE AND CHILE FREE TRADE AGREEMENTS AND EXISTING H-1B NONIMMIGRANT SPECIALTY OCCUPATION WORKER CATEGORY**

There is no petition requirement with the USCIS on behalf of a Singaporean or Chilean desiring free trade nonimmigrant H-1B1 status. Individuals who are not in the U.S. who wish to be admitted initially in the H-1B1 nonimmigrant classification must apply directly to the Department of State for an H-1B1 nonimmigrant visa. Such persons must submit a job offer letter, relevant credentials, and an H-1B1 labor attestation (in the form specified by the Department of Labor), and any other relevant documentation required by the Department of State. The USCIS role in adjudicating H-1B1 cases is limited to requests for either a change of nonimmigrant status to that of H-1B1 or a request for an extension of stay in that classification.

Unlike the H-1B category, which generally requires possession of a relevant professional license as a condition to admission, the H-1B1 category does not require such licensure as a prerequisite to admission as an H-1B1 nonimmigrant. Professionals admitted in H-1B1 classification will, however, be expected to comply with all applicable State and Federal licensure requirements for engaging in their respective profession following their admission to the United States.



Unlike H-1B specialty occupation workers who may be admitted for up to three years initially, with extensions available normally up to six years, professionals from Singapore and Chile may be admitted initially for a maximum of one-year, and they may extend their H-1B1 stay an indefinite number of times, in one-year increments, as long as they continue to demonstrate that they do not intend to remain or work in the United States permanently. Note that, unlike the H-1B statute, which specifically allows for “dual intent,” there is no similar provision with request to an H-1B1 nonimmigrant.

#### **E. EXTENSIONS OF E1/E2 TREATY TRADER/TREATY INVESTOR PRIVILEGES UNDER THE U.S.-SINGAPORE & U.S.-CHILE FREE TRADE AGREEMENTS**

Effective January 1, 2004, nationals of Singapore and Chile were eligible for E-1/E-2 nonimmigrant classification. Requests for change to E nonimmigrant status filed by such persons shall be treated in the same manner as similar request from nationals of countries that are currently eligible to apply for E nonimmigrant status.

## **CHAPTER 11 – O-1 VISAS FOR INDIVIDUALS WITH EXTRAORDINARY ABILITY**

The O nonimmigrant visa category applies to foreign nationals of extraordinary ability in the arts, athletics, sciences, education, business, or the motion picture or television industry who are coming to the United States to perform temporary services relating to an event or events. The O-2 visa is additionally available to accompanying foreign nationals who are coming to assist in the artistic or athletic performance of a foreign national of extraordinary ability.

### **THE O-1 VISA**

#### **A. WHO IS ELIGIBLE**

A foreign national who has extraordinary ability in the arts, athletics, sciences, education, or business, and is coming to the United States temporarily to perform services for a U.S. employer in his or her area of expertise may be granted an O-1 visa. According to the USCIS, “extraordinary ability” means that the foreign national has reached a level of expertise indicating that he or she is one of a small percentage who has risen to the very top of his or her field of endeavor. In addition, the position the foreign national is coming to fill must require the services of an individual of extraordinary ability.

The “Arts” may also include foreign nationals in the motion picture or television industry. To qualify for an O-1 visa, individuals in this industry are held to a slightly different standard than others applying for an O-1 visa. They must document “extraordinary achievement” through a demonstrated record of “distinction” or prominence. “Distinction” means a high level of achievement and skill substantially above that ordinarily encountered, to the extent that the foreign national in question is considered renowned, leading, or well-known in the field.

#### **B. HOW TO APPLY**

An employer may file a petition with the USCIS Service Center having jurisdiction over the where the job will be performed. If the job requires the foreign national to work in different locations, then the petition must be filed with the USCIS Service Center that has jurisdiction in the area where the petitioner is located. If a foreign employer, working through a U.S. agent, files on behalf of the foreign national, the petition must be filed with the Service Center that has jurisdiction in the area where the foreign national will first work.

The petition must establish that the foreign national is an individual with extraordinary ability. Individuals who work in professions where self-employment is common or where agents are normally used to arrange short-term employment may file applications with an agent as the petitioner. While the regulations use the terms “agent”, this does not mean that only an entertainment agent can file a petition under

this provision. Accountants, lawyers or other companies involved in the particular business may also function as an “agent” and file an O-1 petition.

In the case of an O-1 filed through an agent, the petition must be filed with an itinerary and contracts with *all of the actual employers*.

To establish that the foreign national has extraordinary ability in his or her field, the petition must be filed along with supporting documentation that demonstrates sustained national or international acclaim and recognition. The foreign national may present evidence of receipt of a major, internationally recognized award, such as a Nobel Peace Prize, or in lieu of such award, the foreign national may also qualify by submitting at least three (3) of the following forms of documentation:

1. Documentation of the receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
2. Documentation of membership in associations in the field, which requires outstanding achievements as judged by recognized international experts;
3. Published material in professional or trade publications or newsletters about the foreign national and his work in the field;
4. Evidence that the foreign national has participated on a panel, or individually, as a judge of the work of others in the field or an allied field;
5. Evidence of original scientific or scholarly research contributions of major significance in the field;
6. Evidence of authorship of scholarly articles in the field in professional journals or other major media; or
7. Evidence the foreign national commands a high salary or other high remuneration for services.

However, in order to qualify as a foreign national of extraordinary achievement in the motion picture or television industry, or as a foreign national of extraordinary ability in the field of arts, the foreign national may demonstrate his or her record of extraordinary achievement with the following:

1. Evidence that the foreign national has been nominated for or has been the recipient of significant national or international awards or prizes in the particular field, such as an Academy Award, an Emmy, a Grammy, or a Director’s Guild Award; or
2. Documentary evidence of at least three (3) of the following:
  - a. Evidence that the foreign national has performed or will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidences by critical reviews, advertisements, publicity release, publications, contracts, or endorsements;

- b. Evidence that the foreign national has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspaper, trade journals, magazines, or other publications;
- c. Evidence that the foreign national has performed in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publication, or testimonials;
- d. Evidence that the foreign national has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, credit for original research or product development, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
- e. Evidence that the foreign national has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the foreign national is engaged. Such testimonials must be in a form which clearly indicated that author's authority, expertise, and knowledge of the foreign national's achievement; or
- f. Evidence that the foreign national has commanded or now commands a high salary or other substantial remuneration for services in relation to others in the field, as evidence by contracts or other reliable evidence.

Also, before the USCIS can approve an O-1 visa petition an appropriate peer group, or labor and/or management organization, must provide a written advisory opinion regarding the nature of the work to be done by the foreign national, and the foreign national's qualifications for such work. To facilitate USCIS' adjudication, the petitioner should obtain the written advisory opinion, and submit it to USCIS with the petition. The advisory opinion should set forth a statement of facts which supports the conclusion reached in the advisory opinion. It must be signed by an authorized official of the group or organization. In the case of a foreign national who will be employed in the fields of arts, entertainment, or athletics where the USCIS determines that the petition merits expeditious handling, the USCIS may obtain the advisory opinion telephonically.

### **C. DURATION OF THE VISA**

An O-1 visa may be valid for the period necessary to accomplish the event or activity, but must not exceed three years. Extensions of one year may be obtained indefinitely.

Should the foreign national's employment terminates for other than voluntary resignation, the employer is responsible for the reasonable cost of return transportation of the foreign national to his or her last place of residence prior to his or her entry into the United States.

## **D. STATUS OF SPOUSE AND MINOR CHILDREN**

A spouse and unmarried minor children of a foreign national who holds an O-1 visa are eligible for O-3 visas. They may not accept employment while in the United States while on an O-3 visa.

## **THE O-2 VISA - ACCOMPANYING FOREIGN NATIONALS**

### **A. WHO IS ELIGIBLE**

A foreign national who is coming to the United States temporarily for the purpose of accompanying and assisting in the athletic or artistic performance of a foreign national who has been granted an O-1 nonimmigrant visa may be granted an O-2 nonimmigrant visa. The O-2 visa applicant must have critical skills or experience with the principal foreign national, or must be an integral part of the actual performance. In the case of an O-2 foreign national who will work in a motion picture or television production, he or she must have skills and experience with the O-1 foreign national which are not of a general nature, and which are critical, either based on a pre-existing and longstanding relationship, or because significant production will take place both inside and outside of the United States, and the continuing participation of the foreign national is essential to the successful completion of the production. The O-2 visa applicant must have a foreign residence that he or she has no intention of abandoning.

### **B. HOW TO APPLY**

The employer may file a petition with the USCIS Service Center having jurisdiction over where the job will be performed. If the job requires the foreign national to work in different locations, the petition must be filed with the USCIS Service Center that has jurisdiction in the area where the petitioner is located. If a foreign employer working through a U.S. agent files on behalf of the foreign national, the petition must be filed with the Service Center that has jurisdiction in the area where the foreign national will first work.

Consultation with a labor organization with expertise in the foreign national's skill area is required for an O-2 foreign national accompanying an O-1 foreign national. In the case of a foreign national seeking entry for a motion picture or television production under an O-2 visa, consultation with a labor organization and a management organization is required. The opinion must describe the foreign national's essentiality to and working relationship with the O-1 foreign national. It must further state whether there are available U.S. workers who can perform the support services, and it must address the foreign national's skills and experience with the O-1 foreign national, and whether the foreign national has a pre-existing, longstanding working relationship with the O-1 foreign national, or whether significant production will take place in the U.S. and abroad, and if the continuing participation of the foreign national is essential to the success of the production.

### **C. DURATION OF THE VISA**

An O-2 visa may be valid for the period necessary to accomplish the event or activity, but must not exceed three years. As is the case with O-1 visas, extensions may be obtained one year at a time.

### **D. STATUS OF SPOUSE AND MINOR CHILDREN**

A spouse and unmarried minor children of a foreign national who holds an O-1 visa are eligible for O-3 visas. They may not accept employment while in the United States on an O-3 visa.

## **CHAPTER 12 - P VISAS FOR ENTERTAINMENT GROUPS AND ATHLETES**

Certain artists, entertainers, and athletes may come to the United States temporarily to perform services for an employer or a sponsor under the P nonimmigrant visa category. The foreign national must have a residence in a foreign country which he or she has no intention of abandoning.

### **THE P-1 VISA**

A foreign national who is coming to the United States to perform as an internationally recognized athlete or member of an internationally recognized athlete or a member of an internationally recognized entertainment group may qualify under the P-1 category.

#### **A. WHO IS ELIGIBLE**

To qualify for a P-1 visa, the foreign national must be coming temporarily either to perform at specific athletic competition, individually or as part of a team, at an internationally recognized level of performance, or to perform with an entertainment group that has been recognized internationally as being outstanding in their discipline. He or she must be an integral and essential part of the performance and have had a sustained and substantial relationship with the group for at least one year. An exception to this rule may be made in the case where a foreign national augments a group by performing in a critical role, or where a foreign national because of illness or unanticipated circumstances, replaces a member of a P-1 group.

#### **B. HOW TO APPLY**

A P-1 petition may be filed by a U.S. or foreign employer on Form I-129, "Petition for Nonimmigrant Worker", with the USCIS Service Center having jurisdiction. Consultation with a labor organization that has expertise in the area of the foreign national's sport or entertainment field is required. The advisory opinion must evaluate and/or describe the foreign national's or group's ability and achievements in the field of endeavor, comment on whether the foreign national or group is internationally recognized for achievements, and state whether the services the foreign national or group is coming to perform are appropriate for an internationally recognized athlete or entertainment group.

1. In the case of an athlete, the athlete must have an internationally recognized reputation as an international athlete, or must be a member of a foreign team that is itself internationally recognized. The athlete or team must be coming to the U.S. to participate in an athletic competition which has a distinguished reputation, and which requires participation of an athlete or athletic team that has an international reputation. The petition must be accompanied by the following documentation:

- a. A tendered contract with a major U.S. sports league or team, or a contract in an individual sport commensurate with international recognition; and
  - b. At least two of the following:
    - i. Evidence of having participated to a significant extent in a prior season with a major U.S. sports league;
    - ii. Evidence of having participated in international competition with a national team;
    - iii. Evidence of having participated to a significant extent in a prior season for a U.S. college or university in intercollegiate competition;
    - iv. A written statement from an official of a major U.S. sports league or an official of the governing body of sports which details how the foreign national is internationally recognized;
    - v. A written statement from a member of the sports media or a recognized expert in the sport, which details how the foreign national or team is internationally recognized;
    - vi. Evidence that the individual or team is ranked if the sport has internationally rankings; or
    - vii. Evidence that the foreign national or team has received a significant honor or award in the sport.
2. In the case of an entertainment group, it must be established that the group has been internationally recognized as outstanding for a sustained and substantial period of time. Seventy five percent of the members of the group must have had a sustained and substantial relationship with the group for at least one year, and must provide functions integral to the group's performance. The petitions must be accompanied by the following documentation:
- a. Evidence that the group, under the name shown on the petition, has been established and performing regularly for at least one year;
  - b. A statement from the petitioner listing each member of the group and the exact dates for which each member has been employed on a regular basis by the group; and
  - c. Evidence that the group has been internationally recognized in the discipline. This may be demonstrated by evidence of the group's nomination or receipt of significant international awards or prizes for outstanding achievement in its field, or by three of the following:
    - i. Evidence that the group has performed and will perform as a starring or leading entertainment group in productions or events that have a distinguished reputation as evidenced by critical reviews, advertisements, publicity released, publications, contracts, or endorsements;



- ii. Evidence that the group has achieved international recognition and acclaim for outstanding achievements as evidenced by reviews in major newspapers, trade journals, magazines, or other published materials;
- iii. Evidence that the group has performed and will perform services as a leading or starring group for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trader journal, publications, or testimonials;
- iv. Evidence that the group has a record of major commercial or critically acclaimed successes as evidenced by such indicators as ratings, standing in the field, box office receipts, record, cassette, or video sales, and other achievements in the field as reported in trade journals, major newspaper, or other publications;
- v. Evidence that the group has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field. Such testimonials must be in a form which clearly indicated the author's authority, expertise, and knowledge of the foreign national's achievements; or
- vi. Evidence that the group has commanded or now commands a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence.

### **C. DURATION OF THE VISA**

A P-1 petition for an individual athlete may initially be valid for up to five years. Extensions of stay may be granted thereafter; however, the total period of stay may not exceed ten years. An approved petition for an athletic team or entertainment group may be valid for the period of time necessary to complete the competition or event, but may not initially exceed one year. Extensions of stay may thereafter be authorized by USCIS in one-year increments.

### **D. STATUS OF SPOUSE AND MINOR CHILDREN**

The spouse and unmarried minor children of P-1 visa holders are eligible for P-4 visas. They are subject to the same period of admission as the principal foreign national. The spouse and children may not accept employment on a P-4 visa.

## **THE P-2 VISA**

### **A. WHO IS ELIGIBLE**

To qualify for a P-2 Visa, the applicant must be coming to the United States to perform as an artist or entertainer, individually or as part of a group, under a reciprocal exchange program between an organization in the United States and an organization in another country.

## **B. HOW TO APPLY**

The petition must be filed with the USCIS Regional Service Center having jurisdiction over the area in which the foreign national will work. The petition may be filed by a sponsoring organization in the United States, a U.S. employer, or an agent. It must be filed with the following documentation:

1. A written consultation from an appropriate labor organization that verifies the existence of a viable exchange program;
2. A copy of the formal reciprocal exchange agreement between the U.S. organization sponsoring the foreign national or group and the organization in the foreign country which will receive the U.S. artists or entertainers;
3. A statement from the sponsoring organization describing the reciprocal exchange program, including the name of the receiving organization abroad, names and occupations of U.S. artist or entertainers being sent abroad, length of their stay, activities in which will be engaged, and the terms and conditions of their employment; and
4. Evidence that the foreign national or group and the U.S. artists or entertainers involved in the reciprocal program are experienced artists with comparable skills, and that the terms and conditions of employment are similar. Tendered contracts, proposed itineraries, and reciprocity agreements can be used to fulfill this requirement.

## **C. DURATION OF THE VISA**

The P-2 Visa may be valid for the period of time necessary to complete the event, activity, or performance, however, it may not initially exceed one year. Thereafter, the USCIS may authorize extension of stay in increments of one year to complete the same event to activity for which the foreign national was admitted.

## **D. STATUS OF SPOUSE AND MINOR CHILDREN**

A spouse and unmarried minor children are eligible for P-4 Visas, and are entitled to the same period of admission and limitations as the principal foreign national. The spouse and unmarried minor children may not accept employment on a P-4 visa.

## **THE P-3 VISA**

### **A. WHO IS ELIGIBLE**

A P-3 visa may be granted to artists or entertainers (individually or as a group) who are recognized in a particular field for excellence in developing, interpreting, representing, coaching, or teaching a culturally unique or traditional ethnic folk, cultural, musical, theatrical, or artistic performance or presentation. The applicant must be coming to the United States to further the understanding or development of his or her art form. The applicant must be sponsored by educational, cultural, or

governmental organizations, which promote international cultural activities and exchange. The program may be commercial or noncommercial in nature.

## **B. HOW TO APPLY**

The Petition must be filed no more than 6 months before the foreign national or group intends to enter the U.S. with the USCIS Service Center, which has jurisdiction over the area in which the foreign national will work. The petition may be filed by the sponsoring organization in the United States, a U.S. employer. If the individual or group intends to perform in different Service Center areas, the petition should be filed with the Service Center having jurisdiction over the area where the employer or agent in the U.S. is located. It must be filed with evidence of one of the following qualifying factors:

1. Documentation that the foreign national or group has performed or was involved teaching or coaching productions or events involving the presentation of culturally unique performances for a substantial period of time;
2. Documentation that the foreign national or group has achieved national or international recognition for excellence in the field as evidenced by critical reviews in newspapers, journals, or other published materials; or
3. Documentation that the foreign national or group has received recognition for achievements from organizations, critics, government agencies, cultural agencies, or other recognized experts in the field.

In addition, a P-3 petition must also be accompanied by:

1. Affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the foreign nationals or group's skill in performing, coaching, teaching or presenting the unique art form. It must also explain the level of recognition accorded to the foreign national or group in the native country or another country, and give the credentials of the expert;
2. Evidence that most of the performances will be culturally unique events sponsored by educational, cultural, or governmental agencies; or
3. Written consultation with an appropriate labor organization, which evaluates the cultural uniqueness of the foreign national's skills. Whether the events are mostly cultural in nature, and stating whether U.S. workers are available who can perform support services.

## **C. DURATION OF THE VISA**

The P-3 Visa may be valid for the period of time necessary to complete the event, activity, or performance, however, it may not initially exceed one year. Thereafter, the USCIS may grant extensions of stay in increments of one year to complete the event to activity for which the foreign national was admitted.

#### **D. STATUS OF SPOUSE AND MINOR CHILDREN**

A spouse and unmarried minor children are eligible for P-4 visas, and are entitled to the same period of admission and limitations as the principal foreign national. The spouse and unmarried minor children may not accept employment on a P-4 visa.

## **CHAPTER 13 – Q VISAS FOR INTERNATIONAL CULTURAL EXCHANGE EMPLOYEES**

The Q nonimmigrant visa category is available to foreign nationals who will be participating in an international cultural exchange program designed to provide practical training, employment and sharing of the participant's native culture.

### **A. WHO IS ELIGIBLE**

A foreign national of at least 18 years of age who is coming temporarily to work for a U.S. employer that offers an international cultural exchange program may qualify for a Q visa.

### **B. HOW TO APPLY**

A Q visa petition may be filed by a U.S. sponsor on Form I-129Q with the USCIS Service Center having jurisdiction in the area where the foreign national will be employed. A new petition must be filed each time a qualified employer wants to bring additional persons into the United States in Q status.

The following supporting documentation should be submitted:

Before a petition may be filed with the USCIS, the following criteria must be met:

1. Evidence that the culture-sharing will place in a school, museum, business or other establishment where the public is exposed to aspects of a foreign culture as part of a structured program;
2. Evidence that the cultural component is an essential and integral part of the participant's employment and training, and is designed to exhibit the attitude, customs, history, heritage, philosophy and/or tradition of the alien's country of nationality; and
3. Evidence that the foreign national's employment and training is not independent of the cultural component.

Furthermore, the organization must demonstrate that it has the ability to conduct a responsible international cultural exchange program and has the financial ability to remunerate the participant and offer him/her wages and working conditions comparable to those accorded local domestic workers similarly employed.

### **C. DURATION OF VISA**

A Q visa petition is initially approved for the length of the program or for fifteen months, whichever period is shorter. The holder of a Q visa who has spent fifteen months in the United States may not be issued a visa or be readmitted under the Q visa classification unless he or she has resided and been physically present outside the United States for at least one year.

#### **D. STATUS OF SPOUSE AND MINOR CHILDREN**

There is no derivative visa category for spouses and children of the beneficiary of a Q petition. Spouses and/or children who wish to accompany the Q visa holder to the United States for the duration of the program are required to qualify for visas in their own right. Those who have no intention of working or studying may apply for a tourist (B-2) visa. When applying for a B-2 visa, they will be required to furnish evidence proving that they have a residence abroad to which they have no intention of abandoning, and to which they intend to return at the end of their stay in the United States. This is generally established by evidence of family, professional, property, employment or other ties and commitments to some country other than the United States, sufficient to cause the applicant to return there at the conclusion of his/her stay in the United States.

## **CHAPTER 14 - R VISAS FOR RELIGIOUS WORKERS**

The R nonimmigrant visa category is available to a foreign national who has been a member of a religious denomination for at least two years, and is coming to the United States temporarily to work for a bona fide, non-profit religious organization in the United States.

### **A. WHO IS ELIGIBLE**

A foreign national who has been a member of a religious denomination for at least two years immediately preceding application to the U.S., who is coming temporarily to work for a bona fide, non-profit religious organization in the same denomination in the U.S. in one of the following categories may qualify for an R nonimmigrant visa:

1. As a minister of the same denomination;
2. In a professional capacity in a religious vocation for the organization. Positions in this category require that the individual have a baccalaureate degree or equivalent; or
3. In a religious vocation (formal lifetime commitment to a religious way of life) or occupation for the organization or one of its affiliates, that the occupation relate primarily to a traditional religious function that is recognized as a religious occupation with the denomination. The category, however, does not include such positions as janitors, maintenance workers, or office clerks.

### **B. HOW TO APPLY**

Every petition must be initiated by a prospective or existing employer through the filing with the USCIS California Service Center regardless of where the temporary religious worker will be employed. The following supporting documents should be submitted:

1. Completed Form I-129 and I-129 R Supplement;
2. A letter from the U.S. religious organization establishing that the proposed job position and the foreign national qualify as above;
3. A letter from the authorized officials of the religious denomination or the foreign organization attesting to the foreign national's membership in the denomination, explaining in detail the person's religious work and all employment for the past two years; and
4. Supporting documents can include:
  - Evidence that the applicant is working as a minister of religion, in a religious occupation, or for a bona fide non-profit religious community;
  - Certificates that show the applicant has been a member of the religious group for at least two years prior to the visa application;

- Tax exempt certificate showing the religious organization, and any affiliate which will employ the person, is exempt from taxation as a non-profit organization – 501(c ) (3) of the Internal Revenue Code. If not classified as “religious organizations” by the IRS, must establish the religious nature and purpose of the organization and certify that they are affiliated with a religious denomination that is tax exempt by completing the Religious Denomination Certificate in Form I-129;
  - Proof that the applicant is eligible for the work designated in the United States; and
  - Documentation showing arrangements for financial support.
- \*\* USCIS may conduct on-site inspections of organizations seeking to employ religious workers.

### **C. DURATION OF VISA**

An R visa may initially be granted for a period of up to 30 months. The USCIS may grant a subsequent extension of stay for up to another 30 months, however, the total period of stay may not exceed five years. An R visa holder who reaches the five year limit must reside outside of the United States for a period of one year before he or she may be readmitted in R status.

### **D. STATUS OF SPOUSE AND MINOR CHILDREN**

The spouse and unmarried minor children of the R visa holder are also entitled to R visa status. They are subject to the same period of stay as the principal foreign national, and may not be employed in the United States on an R visa.

### **E. INTENT TO RETURN**

An R visa holder is required to have the intent to return.



## **CHAPTER 15 - F-1 VISAS FOR STUDENTS**

### **A. WHO IS ELIGIBLE**

A foreign national who wishes to come to the United States to pursue a course of study at an academic institution accredited by the USCIS may qualify for an F-1 visa. The foreign national must have a valid educational purpose for coming to the United States, must be able to support himself or herself while in the United States without working, and must have a residence in a foreign country which he or she has no intention of abandoning.

Foreign nationals who seek to study at a (public elementary school) or a publicly funded adult education program, or even at a public secondary school, are not eligible for F-1 visas *unless* the aggregate period of study at that school is 12 months (after November 30, 1996) or less and the foreign national has reimbursed the school authorities in advance for the full, unsubsidized cost of the education. The status of foreign nationals switching from privately funded schools to publicly funded schools is deemed void unless the foreign national student in question meets the 12-month test and the reimbursement requirement stated above. The violators of these provisions must remain outside the U.S. for a continuous period of 5 years after the date of the violation.

### **B. HOW TO APPLY**

F-1 visa status may be obtained by making an application directly to a Consular Officer at a U.S. Embassy or Consulate, or, if the applicant is in the U.S. in lawful status (excluding the 90-day visa waiver), by submitting an application to USCIS to change his or her status to that of an F-1 student. In either case, the applicant must first be accepted at a school that is authorized by the USCIS to accept foreign students. Such schools may include established colleges, universities, seminaries, conservatories, academic high schools, other academic institutions, or accredited language programs in the United States. The requirements for application vary somewhat depending whether the prospective student applies while abroad or while physically present in the United States.

#### **1. APPLYING FOR A STUDENT VISA FROM ABROAD**

To apply for F-1 visa status from outside the United States, the prospective student must submit the following documents to a U.S. Consular Officer:

- a. Form DS-156, Application for Nonimmigrant Visa and filing fee, Form DS-157 (for males between the ages of 17 and 45), Form DS-158;
- b. A valid passport;
- c. Form I-20, documenting that the foreign national has been accepted for a course of study by a school authorized by the USCIS to accept foreign students;

- d. Evidence of financial support sufficient to meet the student's needs during the course of study; and
- e. Evidence of intention to return to his or her home country upon the completion of the course of study.

## 2. CHANGING STATUS WHILE IN THE U.S.

A foreign national who is physically present in the U.S., and in lawful visa status, such as B-2 visitor (not a 90-day visa waiver), may request that his or her status be changed to that of student under F-1 by submitting the following documentation to the USCIS Service Center Service Center having jurisdiction over the location of the student's school:

- a. Form I-539, "Application for Change of Nonimmigrant Status";
- b. Form I-20, documenting that the foreign national has been accepted for a full course of study by a school authorized by the USCIS to accept foreign students;
- c. I-94 Departure Record (a small white card) that was issued to the foreign national upon his or her entry to the U.S. The card is usually stapled in the foreign national's passport by the USCIS Inspecting Officer at the port of entry;
- d. Evidence of financial support, which may include an affidavit of support from relatives, evidence of scholarships, and/or bank statements in the student's name;
- e. Evidence of the applicant's intent to return to his or her home country at the completion of the course of study; and
- f. The filing fee check.

## C. DURATION OF VISA

An applicant for a change of status from a B visa cannot start school until USCIS approves the F-1 status. However, an applicant for change of status from any other visa (e.g., H-1B) can begin school upon filing the petition. F-1 visa status will be granted for the period of time, referred to as the "duration of stay" ("D/S") by USCIS, required to complete the course of study. The student's Form I-20 notes the expected date of completion of the student's program. If the student fails to meet the program completion date, an extension may be granted at the discretion of the USCIS if the school certifies that the delay was caused by a compelling medical or academic reason such as illness or a change in the student's major or research topic.

## D. STATUS OF SPOUSE AND MINOR CHILDREN

The spouse and minor, unmarried children of an F-1 visa holder are eligible for F-2 nonimmigrant visa status. They are subject to the same period of stay as the

principal foreign national and may not work in the United States on an F-2 visa, but can attend school.

## **E. AUTHORIZED EMPLOYMENT FOR F-1 STUDENTS**

Under certain circumstances, foreign students holding F-1 visas may be authorized to be employed. The circumstances include:

1. *On-Campus Employment:* An F-1 student may be employed on-campus for up to twenty hours per week while school is in session, and full-time when school is not in session, without permission from USCIS. The student should obtain a letter from the school's foreign student advisor or another appropriate official at the school stating that the student is authorized to perform the on-campus work. The student may obtain a valid social security card by presenting the letter, a copy of his or her I-20 ID, and a valid passport to the local office of the Social Security Administration.
2. *Off-Campus Employment:* An F-1 student who has completed one full academic year and is in good academic standing may work up to 20 hours per week while school is in session, and full-time when school is not in session, by obtaining written permission from the foreign student advisor or other appropriate official at the school (e.g., Dean, academic advisor, director of school). The student may obtain a valid Social Security Card by presenting his or her I-20 ID, a valid passport, and the written permission to the local office of the Social Security Administration. Employers of F-1 students must follow certain procedures established by the U.S. Department of Labor (DOL), including recruitment, and filing a Labor Attestation with the DOL.
3. *Curricular Practical Training:* Alternate work/study programs, internships, cooperative education programs, or any type of required practicum which is offered by sponsoring employers through cooperative agreements with a school considered to be curricular practical training. To qualify for curricular practical training, a student must have been in F-1 status for nine consecutive months, except in the case where a graduate student is required to begin practical training immediately. In any case, the practical training must be directly related to the student's major area of study. A designated school official may authorize this type of practical training by endorsing the student's I-20 ID. Authorization from the USCIS is not required.

A student who has engaged in one year or more of curricular practical training is prohibited from post-graduation practical training.

4. *Post-Graduation Practical Training:* After graduation, a designated official from the school may recommend to the USCIS that the student be authorized to participate in a one-year period of practical training, so long as the student has not engaged in a year or more of curricular practical training. The student must then apply to USCIS for an employment authorization document (EAD) by

submitting: (a) a completed I-765 application; (b) his or her I-20 bearing the practical training recommendation of the school official; and (c) the I-765 filing fee (see Appendix A) to an USCIS District Office. The student must apply for the EAD during the 120-day period that falls between 90 days before completion of his or her studies and 30 days after the studies are completed.

#### **F. STUDENT AND EXCHANGE VISITOR INFORMATION SYSTEM (SEVIS)**

The Student and Exchange Visitor Information System (SEVIS) is a government operated computerized system that maintains and manages data about foreign students and exchange visitors during their stay in the United States. As of February 15, 2003, SEVIS has monitored the status of persons who enter the U.S. with an F visa (academic students), a J visa (exchange visitors), or an M visa (non-academic students) for temporary foreign visitors.

In order for students/exchange visitors and their dependents to qualify for an F, M or J visa, the school or exchange program in the U.S. must issue a Certificate of Student Status (I-20) or Certificate of Exchange Visitor Status (DS-2019) on a SEVIS-generated form and must register each person on the SEVIS website. Each applicant must submit a SEVIS-generated I-20 or DS-2019 with a unique barcode number and must be listed on the SEVIS website.

USCIS is required by Congress to maintain updated information on the approximately one million non-immigrant foreign students and exchange visitors during the course of their stay in the United States each year. SEVIS implements section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.

For more information on SEVIS, visit [http://www.ice.gov/graphics/enforce/imm/imm\\_sevis.htm](http://www.ice.gov/graphics/enforce/imm/imm_sevis.htm) and [www.nafsa.org](http://www.nafsa.org).

## **CHAPTER 16 – K-1 AND K-3 VISAS AWAITING AN IMMIGRANT VISA**

In order to address the severe backlogs on the processing of petitions for family members, the LIFE Act created a remedy for the spouses of United States citizens who are outside of the United States and waiting for the approval of an immigrant petition. Any minor children who are seeking to accompany the spouse are also provided protection. By expanding the eligibility for a K visa, the new law will allow the spouse of a U.S. citizen to enter the United States and obtain work authorization while waiting for the petition to be approved.

The K-1 Visa was available only to fiancés of U.S. citizens who were coming to the United States to get married within 90 days of arrival. The new K-3 status is available to spouses of U.S. citizens. The K-4 status is available to their children living abroad. The legislation is meant to provide a speedy mechanism for the foreign national spouse of a U.S. citizen to join their U.S. citizen spouse and obtain the immigrant visa or status in the United States, rather than wait for long periods of time outside the United States.

### **A. LEGAL REQUIREMENTS**

The requirements for obtaining the K-3 nonimmigrant classification are as follows:

1. The foreign national must be married to a U.S. citizen who has filed an I-130 petition for an immigrant visa on behalf of the foreign national; and
2. The U.S. citizen petitioner must also file a second petition, the I-129F, with the USCIS for a non-immigrant visa on behalf of the foreign national spouse. The I-129F must be filed in the United States. This second petition must be approved by the USCIS before the foreign national can begin K-3 processing overseas. The K-3 visa must be issued in the country where the marriage took place if the marriage occurred outside of the United States. If the marriage took place in the U.S., the visa may be issued in the country where the foreign national spouse currently resides.

The USCIS will grant only a two-year admission period when the K-3 foreign national/applicant enters the United States. Work authorization is also granted in two-year increments. The two-year admission period can be made permanent by applying with the USCIS to lift the conditional admission.

To qualify for K-4 issuance, an applicant must be the minor, unmarried child (under 21 years of age) of a qualified K-3 applicant. K-4 applicants are to be listed on the I-129F petition for the spouse.

### **B. DOCUMENTARY REQUIREMENTS**

Applicants for K-3 visas will be processed with similar documentary requirements as those for K-1 fiancé visa applications. The applicants will need to undergo the

standard Immigrant Visa medical examination by a certified civil surgeon (panel physician). An NCIC name check will be done by National Visa Center for each applicant. The applicants will need to present a local police certificate. At the time of the interview, applicants will be expected to present evidence of family relationship to the petitioner.

Furthermore, applicants must demonstrate to the satisfaction of the consular officer an ability to overcome public charge considerations. Evidence might be a letter from the petitioner's employer, a job offer for the applicant, or evidence that the applicant will be self-supporting in the United States, or any other relevant evidence. Form I-134 Affidavit of Support may be required when the consular officer deems it useful. Form I-864 Affidavit of Support is not required.

## **CHAPTER 17 – V VISAS FOR SPOUSES AND MINOR CHILDREN OF LEGAL PERMANENT RESIDENTS AWAITING AN IMMIGRANT VISA**

In order to address the severe backlogs on the availability of visas for families, the LIFE Act also provided a remedy for the spouses and minor children of legal permanent residents. The “V” Visa allows the spouses and minor children of lawful permanent residents (the Family 2A category only) who have been waiting more than 3 years for a green card, to enter the United States and be granted work authorization.

The V nonimmigrant visa is available to the spouse of a legal permanent resident (V-1), the child of a legal permanent resident (V-2), and the child of a V-1 or V-2 foreign national (V-3). Foreign nationals granted V nonimmigrant status must still wait until an immigrant visa number or priority date becomes available to apply for a Green Card.

The spouse or unmarried child (under 21 years of age) of a lawful permanent resident is eligible for the V nonimmigrant classification if he or she:

1. Had a Form I-130 (Petition for Foreign National Relative) filed with the USCIS on his or her behalf by the lawful permanent resident spouse or parent on or before December 21, 2000; and
2. Has been waiting for at least three years after the Form I-130 was filed for their immigrant status – either because a visa number (priority date) has not yet become available, or because USCIS has not yet adjudicated the Form I-130 or the Form I-485 (Application for Adjustment to Permanent Residence).

The unmarried child (under 21 years of age) of a person who meets the above requirements is also eligible for V status.

### **A. CONSULAR PROCESSING OF VISAS**

For V visa applicants living abroad, the procedures require filing of a Nonimmigrant V Visa Application, DS-3052, with a U.S. Consulate. The Nonimmigrant Visa form DS-156 must also be submitted, along with the V visa application fee for the Machine Readable Visa. The fees must be paid according to specific instructions for each consular section. The special procedures for medical exams and the appropriate fee information can be procured from the U.S. Consulate or Embassy. Applications for the V visa must be processed at the post where the immigrant visa was to be processed. Applicants are required to have marriage and birth certificates proving their relationship to the petitioner, as well as foreign police certificates. Furthermore, applicants must prove that they will not become a public charge in the United States and must provide evidence such as a letter from the petitioner’s

employer, a job offer or a form I-134 affidavit of support, if deemed useful by the consular officer.

## **B. V VISA APPLICATIONS IN THE UNITED STATES**

Eligible individuals residing in the United States must apply for V nonimmigrant status with the Citizenship and Immigration Service by submitting the following forms and documents:

1. A completed Form I-539, Application to Extend/Change Nonimmigrant Status along with required documentation, the \$140 application filing fee and an additional \$50 fingerprint fee, unless exempt from fingerprinting;
2. The information required by Supplement A to Form I-539; and
3. Form I-693 (Medical Examination) completed by a certified civil surgeon without the vaccination supplement.

All V-related applications and fees submitted to the Citizenship and Immigration Service should be mailed to the following address:

U.S. Citizenship and Immigration Service  
P.O. Box 7216  
Chicago, IL 60680-7216

## **C. EVIDENTIARY REQUIREMENTS**

An individual applying for V nonimmigrant status should submit proof of filing of the immigrant petition that qualifies the foreign national for V status. Proof of filing requirement may be satisfied by presenting Form I-797, Receipt Notice or Approval Notice. If the foreign national does not have such proof, the Service will review other forms of evidence, such as correspondence to or from the Service regarding a pending petition. If the foreign national does not have any of the above listed items, but believes he or she is a beneficiary of a qualified petition and as such is eligible for V nonimmigrant status, he or she should provide information indicating where and when the petition was filed, the name and foreign national number of the petitioner, and the names of all the beneficiaries.

## **D. EMPLOYMENT AUTHORIZATION**

To obtain Employment Authorization in the United States, applicants should file a completed Form I-765, Application for Employment Authorization, including the application fee (see Appendix A) at the address listed above. The USCIS will accept a combined filing of Form I-539 and Form I-765 applications.



## **E. TRAVELING ABROAD**

V nonimmigrants may travel to and from the United States while they await their immigrant status approval. If the V nonimmigrant status holder wishes to travel abroad while waiting for immigrant status, he or she does not need to obtain permission or advance parole from the USCIS prior to the departure. However, in order to return to the United States, the individual must obtain a valid V visa from U.S. Embassy or Consulate abroad before the individual can be readmitted into the United States.

Individuals who have been unlawfully present in the United States for more than 180 days and depart the country must carefully consider the consequences of departure for possible inadmissibility repercussions. The three or ten year bars for unlawful presence do not prevent eligible persons from obtaining V status, or from being readmitted to the United States with a V visa following travel abroad. However, unless granted a waiver, these grounds for inadmissibility will prevent these individuals from adjusting status to lawful permanent resident status.

## **PART II: EMPLOYMENT BASED AND FAMILY BASED PERMANENT RESIDENCE**

There are several avenues available to foreign nationals who seek to become permanent residents of the United States. Generally speaking, an individual must be a close relative of a U.S. citizen or permanent resident, or have recognized “extraordinary ability” in the sciences, arts, education, business, or athletics, or must have a firm job offer which cannot be filled by a legal U.S. worker. Certain multinational executives or managers, investors, religious workers, and others may also be eligible to obtain permanent resident status. The following chapters will discuss the various employment-based avenues for obtaining permanent residence, commonly referred to as the “Green Card” process.

## **CHAPTER 18 - OBTAINING A LABOR CERTIFICATION**

This chapter will cover job offers which cannot be filled by a legal U.S. worker. This is called Labor Certification processing for permanent residence (also called the “Green Card” process).

On March 28, 2005, in an effort to streamline the Labor Certification system and shorten the period of time to obtain a Labor Certification, the Department of Labor (DOL) significantly changed the procedures for procuring a Labor Certification (LC). All LC applications filed on or after March 28, 2005, must now use what the DOL calls the Program Electronic Review Management Labor Certification (PERM) process, which includes standardized recruitment procedures and invokes the use of the new Form 9089. The DOL encourages all employers to use the online 9089 form, though it does allow for submission of the 9089 via regular mail.

LC applications that were filed under the old system, called Reduction in Recruitment (RIR), that are still pending will still be processed according to the old procedures. However, the petitioner for the RIR application that is still pending has the option of “converting” the RIR application to a PERM application. Whether or not conversion is proper must be decided on a case-by-case basis, and the possible pros and cons will be discussed later in this chapter.

### **A. WHAT IS A “LABOR CERTIFICATION”?**

A Labor Certification application is the official form for a firm job offer by a U.S. Employer to assist a foreign national in obtaining permanent resident status. The LC demonstrates that 1) a valid job exists, and 2) there are no qualified U.S. workers available to fill the position. The Labor Certification application is handled entirely through the U.S. Department of Labor (DOL), independently of the U.S. Citizenship and Immigration Service (USCIS). Once a Labor Certification has been approved by DOL, it is then submitted to the USCIS as the basis for permanent residency.

The principle object of the Labor Certification is to ensure that the foreign national will not displace any U.S. workers. For this reason, the application requires the employer to conduct recruitment for the position.

### **B. HOW DOES THE LABOR CERTIFICATION PROCESS WORK?**

Under both the old and new systems, the initial Labor Certification process required and requires recruitment efforts for recruiting U.S. workers, and the submission of a certification form to the Department of Labor which includes a description of the employer, the job being offered, the efforts made to recruit U.S. workers, and the qualifications of the foreign national worker.

## 1. THE OLD SYSTEM: SUPERVISED RECRUITMENT AND REDUCTION IN RECRUITMENT (RIR)

Under the former Regular Processing system, the LC application was filed at either the State Workforce Agency (SWA), or the local branch of the DOL where the employer is located. The salary and experience requirements were closely scrutinized by SWA specialists. If the salary was below the prevailing wage standards, the employer would be asked to amend the wage to meet the prevailing wage, or to justify the salary offered. The SWA also insisted that the experience required was not excessive.

The SWA then instituted a 30-day job order recruitment period. The position (including salary) was advertised for three days in either a newspaper of general circulation or a professional journal. In addition, at the time of filing the application, the employer was required to notify his employee's bargaining representative that a Labor Certification was being filed. If there was no bargaining representative, the employer had to notify his employees by posting notices of the job opening (including salary) at his place of business for ten working days. At the end of the 30 day recruitment period, the employer would be asked to account for all persons referred from the SES, and give the results of the job posting.

Immediately following the recruitment period, the entire Labor Certification application, including evidence of all recruitment efforts was sent to DOL for final determination. This process took a few years to complete, depending on the backlog of cases at DOL and in which city the Labor Certification was filed. If DOL found no problem with the application, a Labor Certification was issued. If there were any problems, a Notice of Findings was issued, and the employer was given the opportunity to correct any deficiencies in the application or to rebut the findings.

If the employer made numerous unsuccessful attempts to recruit for the position prior to filing the Labor Certification application, Department of Labor (DOL) regulations allowed the employer to request a reduction in the regular recruitment process.

The recruitment efforts must have been made within the six months before filing the Labor Certification, and must have been sufficient to adequately test the labor market. When submitting the request for an RIR, the employer was required to include documentary evidence of its recruitment efforts, including copies of all six months of advertising, depending on the DOL Region, and a list of all the responses to the recruitment, as well as the reasons why none of the applicants were hired.

The SWA then forwarded this information to the regional Department of Labor office for a determination on the request for an RIR. If the request was granted and the application was otherwise in order, it would be approved generally

within a few months to a year, depending on the DOL Region where the case was filed. Since the institution of the new PERM program, the Department of Labor centralized all of the remaining Traditional and RIR applications from the various SWAs throughout the 50 states and the various Regional Department of Labor offices into 2 backlog reduction centers, located in Dallas and Philadelphia.

## 2. THE NEW SYSTEM: PERMANENT LABOR CERTIFICATION (PERM) PROCESS

Under the new system there is only one method by which a Labor Certification can be obtained. This new system is called “PERM”, and it is primarily a computerized system, although it is still possible to file labor certification applications manually with the DOL. Under PERM, the employer is required to: (1) conduct recruitment (newspaper, Internet, etc.) that includes the company name, salary and a specific job description; (2) post an internal notice announcing the filing (including the salary) at the worksite and in any in-house media; and (3) file an application, Form 9089, online or by mail with the regional DOL office, attesting to this recruitment. A computer system checks the application to screen for any “red flags.” Those applications that raise red flags as well as some randomly selected application will be audited.

Under PERM the definition of “employer” has been changed to allow a beneficiary to use experience gained at an affiliate or predecessor of the sponsoring company to qualify for the Labor Certification. Positions, which require a foreign language or excessive number of experience or education must be justified based on business necessity. Another change is that the employer must now offer 100% of the prevailing wage, as opposed to 95% under the previous regulations.

The PERM system requires that an employer file a Prevailing Wage Determination Request form with the local State Workforce Administration (SWA), and an Application for Permanent Labor Certification form (ETA Form 9089) with the DOL’s Employment and Training Administration (ETA). The prevailing wage determination requests are to be made on the local level with the SWA in the state where the employment is to be based. The application form 9089 requires the employer to respond to 56 items, primarily in the form of attestations. These attestations and other information required by the application form elicit information similar to that required by the former labor certification process. For example, the employer will have to attest to such items as: whether the employer provided notice of the application to the bargaining representative or its employees; whether the alien beneficiary gained any of the qualifying experience with the employer; whether the alien is currently employed by the employer; whether a foreign language requirement is required to perform the job duties; and whether the U.S. applicants were rejected solely for lawful job related reasons. The wage offered on the application form must be to equal to or greater than the prevailing wage determination entered by the SWA.

The application form, however, does not require the employer to provide any supporting documentation with the application, but would be required to furnish supporting documentation to support the attestations and other information provided on the form if the application was selected for an audit. The standards used to adjudicate applications under the new PERM system are substantially the same as those used in arriving at a determination in the former system.

The determination is still based on:

- a. Whether the employer has met the requirements of the Regulations;
- b. Whether there are insufficient workers who are able, willing, qualified and available; and
- c. Whether the employment of the alien will have an adverse effect on the wages and working conditions of U.S. workers similarly employed.

If an audit has not been triggered by the information provided on the application or because of a random selection, the application will be certified and returned to the employer. The employer may then submit the certified application to the USCIS in support of an employment-based I-140 petition. The regulation states that if selected for an audit, an employer should have a computer-generated decision within 45 - 60 calendar days of the date the application was initially filed, however, in practice applications may take 4 months or more to be approved.

### 3. WHAT ARE THE RESPONSIBILITIES OF THE SPONSORING EMPLOYER?

It is essential that the employer have a good-faith intent to hire the foreign national on a permanent basis once permanent resident status is granted. At the outset, of course, the employer must fill out and sign the PERM Form 9089 application and provide any information needed concerning the job duties, experience required, etc. If the DOL decides to audit the employer, the employer will be asked to respond to a request for more specific documentation of its recruitment efforts for U.S. workers.

The most crucial area of responsibility for the employer is the recruitment effort. The employer must notify his employee's bargaining representative that a Labor Certification is being filed, or if there is no bargaining representative, the employer must notify his employees by posting notices of the job opening at the place of employment for ten working days, the job posting must contain the job title, a detailed description of the job duties, the education and experience requirements, the salary and hours of the job, and the name and telephone number of the person to contact at the business for more information. In addition, the employer must be able to account for every individual referred by the various recruitment efforts taken by the employer. If the person is clearly unqualified, the employer must document the rejection of the applicant with valid job-related reasons. If a person may be qualified, on the basis of his or her resume, the employer must conduct an interview, and then give lawful, job-related reasons why the person is not qualified.

Once the recruiting has been completed and the Form 9089 filed with the DOL, no further paperwork is required until the Labor Certification has been approved by the DOL. At that time, the employer will be asked to complete and sign Form I-140, "Petition for Alien Worker." This form is merely a summary of the job offer, and the employer will then be asked to provide evidence that the U.S. employer has the ability to pay the wage offered. The evidence will be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Once the foreign national's priority date is current as indicated by the State Department's Visa Bulletin, the foreign national will be eligible to apply for permanent resident status either through Consular Processing at a U.S. Consulate or Embassy in a foreign country or Adjustment of Status in the U.S. at USCIS.

## **CHAPTER 19 - EMPLOYMENT-BASED PERMANENT RESIDENCE**

### **WHAT IS AN I-140 “IMMIGRANT PETITION FOR FOREIGN NATIONAL WORKER”?**

The Form I-140 is used to ask the USCIS for employment-based classification as an immigrant worker, as opposed to a nonimmigrant worker. Immigrant-based employment allows the foreign national to begin his or her process of applying for permanent residence in the United States.

There are several categories in which a foreign national may qualify for permanent resident status based on his or her employment. Who may file the form, and the documentary evidence required to be submitted with the form is determined by the category in which foreign national qualifies. This chapter will explain each of the categories, who may file the petition, and the documentary requirements for filing.

#### **A. A FOREIGN NATIONAL OF EXTRAORDINARY ABILITY**

Any person (including the foreign national himself or herself) may file an I-140 Petition on behalf of a foreign national who has extraordinary ability in the sciences, arts, education, business, or athletics. This category is reserved for a very small percentage of individuals who have risen to the top of their field of endeavor. Their abilities must have been demonstrated by sustained national or international acclaim in their field, and they must be coming to the U.S. to work in their field of recognized acclaim, although no job offer or labor certification is required at the time of filing the I-140 petition. Documentary evidence that must be filed in support of the petition must include either evidence of a one-time, major, internationally recognized award such as a Nobel Peace Prize, or Academy Award, or at least three of the following:

1. Documentation that the foreign national has received lesser nationally or internationally recognized prizes or awards for excellence in his or her field of endeavor.
2. Evidence of the foreign national’s membership in associations in the field for which the classification is sought which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines of fields.
3. Published material about the foreign national in professional or major trade publications or other major media relating to the foreign nationals work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
4. Evidence of the foreign national’s participation, either individually or on a panel, as a judge of the work of other in the same or an allied field for which classification is sought;
5. Evidence of the foreign national’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;



6. Evidence of the foreign national's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
7. Evidence of the display of the foreign national's work in the field at artistic exhibition or showcases;
8. Evidence that the foreign national has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
9. Evidence that the foreign national has commanded a high salary or other significantly high remuneration for services in relation to others in the field; or
10. Evidence of commercial successes in the performing arts, as shown by box office receipts, or record, cassette, compact disk, or video sales.

If the above standards do not readily apply to the foreign national's occupation, the petitioner may submit comparable evidence to establish the foreign national's eligibility for permanent residence.

## **B. OUTSTANDING PROFESSORS AND RESEARCHERS**

An I-140 petition may be filed by certain U.S. employers who intend to employ an foreign national professor or researcher who is outstanding in an academic field. The employer must be (1) a U.S. university or institution of higher learning offering the foreign national a tenured or tenured-track teaching position in the foreign national's academic field; or (2) a U.S. university or institute of higher learning offering the foreign national a permanent research position in the foreign national's academic field; or (3) a department, division, or institute of a private employer offering the foreign national a permanent research position in the foreign national's academic field.

The department, division, or institute must demonstrate that it employs at least three persons in full-time research positions, and that it has achieved documented accomplishments in an academic or scientific field. As stated above, the job offer must be permanent in nature, which means that it must be either tenured, tenured-track, or for an indefinite or unlimited duration, such that the employee would have an expectation of continued employment unless there was good cause for the termination of his employment.

Although a job offer is required in this category, obtaining an approved Labor Certification application is not required. The job offer is simply submitted in the form of a letter from the U.S. employer, and must include the name, title, and address of the writer, and a specific description of the job duties.

The evidence that must be submitted with the I-140 petition must clearly document that the professor or researcher is recognized internationally as outstanding in his or her academic field. The evidence must consist of at least two of the following:

1. Documentation of the foreign national's receipt of major prizes or awards for outstanding achievement in the academic field;

2. Documentation of the foreign national's membership in association in the academic field, which require outstanding achievements of their members;
3. Published material in professional publications written by others about the foreign national's work in the academic field; (The material must include the title, date, and author of the material, and must be accompanied by an English translation if it is written in foreign language.)
4. Evidence of the foreign national's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
5. Evidence of the foreign national's original scientific or scholarly research contributions to the academic field; or
6. Evidence that the foreign national has written scholarly books or articles in scholarly journals with international circulation in his or her academic field.

The professor or researcher must have at least three years experience in teaching and/or research in the academic field. Experience gained while working on an advanced degree is acceptable only if the foreign national was granted the degree. If his or her experience was in teaching, then he or she must have had full responsibility of the class or classes taught. If his or her experience was in research, then the research must have been recognized as outstanding in the academic field for which the visa is sought. Evidence of the foreign national's experience must be in the form of a letter or letters from the foreign national's current or former employer(s), and must include the name, address, and title of the author, and a detailed description of the duties to be performed by the foreign national.

### **C. MULTINATIONAL EXECUTIVES AND MANAGERS**

A U.S. employer which is a multinational business, or the U.S. subsidiary or affiliate of a multinational business, may file I-140 Petitions on behalf of foreign national employees who qualify under USCIS definitions as executives or managers, as set forth below.

A "multinational business" is one, which conducts business in two or more countries, one of which must be the United States. In addition, the U.S. employer must have been doing business for a least one year.

If the foreign national is outside the U.S. at the time the petition is filed, he or she must have been employed outside the U.S. for at least one year in the past three years in a managerial or executive capacity by a firm or corporation or other legal entity, or by its affiliate or subsidiary. If the foreign national is already in the U.S. working for the same employer, or a subsidiary, or affiliate of the firm or corporation or other legal entity by which the foreign national was employed abroad, he or she must have been employed by the entity abroad in a managerial or executive capacity for at least one year in the three years preceding his or her entry as a nonimmigrant.

No Labor Certification is required for this category; however, the U.S. employer must furnish a job offer letter indicating that the foreign national will be employed

in an executive or managerial capacity, and clearly describing the duties to be performed by the foreign national.

To qualify as an “executive”, the foreign national must primarily direct the management of the organization, or a major component or function of the organization. He or she will establish the goals and policies of the organization, component or function, exercising wide latitude in discretionary decision-making, while receiving only general supervision from higher level executives, the board of directors or stockholders of the organization.

A “manager” manages the organization itself, or a department, subdivision, function or component of the organization. The management of employees is not essential to qualify for classification in this category. The foreign national may supervise and control the work of other supervisory, professional, or managerial employees, or manage an essential function, a department or a subdivision of the organization. If he or she directly supervises other employees, the foreign national must have the authority to hire and fire, or to recommend other personnel actions such as promotions or leave authorization. If the foreign national does not directly supervise other employees, then he or she must perform at a senior level within the organization or with respect to the function managed, and must exercise direction over the day-to-day operations of his or her assigned activities. Furthermore, a first line supervisor cannot be considered a manager unless the employees he or she supervises are professionals.

The only evidence that must be initially submitted with the petition is a financial statement and letter from an authorized official of the U.S. employer that demonstrates that the U.S. employer has been doing business for a least one year. The U.S. employer must be either the same employer, or a subsidiary or affiliate of the employer, or a corporation by which the foreign national was employed overseas in a managerial or executive capacity for at least one year in the previous three years immediately preceding the filing of the petition.

#### **D. FOREIGN NATIONALS WHO ARE MEMBERS OF THE PROFESSIONS HOLDING ADVANCED DEGREES, OR FOREIGN NATIONALS OF EXCEPTIONAL ABILITY**

Any U.S. employer who intends to employ a foreign national who is a member of the professions, and who holds an advanced degree in his or her field, or who has exceptional ability in the sciences, arts, or business, may file an I-140 Petition on his or her behalf. A Labor Certification (discussed in the previous Chapter) is required under this classification except where the Director of the USCIS Regional Service Center having jurisdiction over the case determines that an exemption would be in the national interest. If a foreign national claims such as exemption, he or she or any interested person may file the petition on his or her behalf.

An advanced degree is any U.S. academic or professional degree above that of a baccalaureate degree, or an equivalent foreign degree. A foreign national may also qualify for classification under this category if he or she holds a baccalaureate degree, and additionally has five years of progressive experience in the profession.

The documentation required to be submitted with the petition includes the official academic record of the foreign national showing that he or she has been awarded an advanced degree or the foreign equivalent, or an official academic record showing that the foreign national has baccalaureate degree or a foreign equivalent and letters from current or former employers documenting that he or she has least five years of progressive experience in the specialty.

U.S. employers may also file petitions on behalf of foreign nationals who claim exceptional ability in the sciences, the arts, or business. Exceptional ability is defined by the USCIS as a degree of expertise significantly above that which ordinarily encountered in the sciences, arts, or business. To prove this level expertise, the petition must be accompanied by at least three of the following:

1. An official academic record showing that the foreign national has a degree, diploma, certificate, or similar award from college, university, school, or other institute of learning relating to the area of exceptional ability;
2. Evidence in the form of letter(s) from current or former employers showing that the foreign national has least ten years of full-time experience in the occupation for which he or she is being sought;
3. A license to practice the profession or certification for a particular profession or occupation;
4. Evidence that the foreign national has commanded a salary or other remuneration for services, which demonstrates exceptional ability;
5. Evidence of membership in professional associations; or
6. Evidence of recognition for achievements and significant contributions to the industry or field by peers, Governmental entities, or professional or business organizations.

If the above standards do not readily apply to the foreign national's specialty, the U.S. employer may submit comparable evidence to establish that the foreign national is eligible for permanent residence under this classification.

## **E. NATIONAL INTEREST WAIVERS**

As a general rule, in seeking permanent residence, an individual needs a job offer and an approved Labor Certification application. However, The Immigration Act of 1990 created a new category of the "National Interest Waiver" for employment-based immigration for members of the professions holding advanced degrees (Masters or Doctorate) and individuals of Exceptional Ability in the arts, sciences, or business. Therefore, if an Applicant has a Masters degree or higher, he or she does not have to prove Exceptional Ability. If Applicant has no advanced degree, Exceptional Ability must be shown by proof of three of the following six factors:

1. Bachelors degree relating to area of exceptional ability;
2. Letter from current or former employer showing at least 10 years experience;
3. License to practice profession;

4. Person has commanded a salary or remuneration demonstrating exceptional ability;
5. Membership in professional association; and / or
6. Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Once Applicant has proven that he or she either has an advanced degree or is of Exceptional Ability, then proof of one or more of the following eight factors are required for granting a National Interest Waiver.

1. Improving the U.S. economy;
2. Improving wages and working conditions of U.S. workers;
3. Improving education and training programs for U.S. children and under-qualified workers;
4. Improving health care;
5. Providing more affordable housing for young and/or older, poorer U.S. residents;
6. Improving the environment of the United States and making more productive use of natural resources;
7. Improving international cultural understanding; and/or
8. A request from an interested U.S. government agency.

Once both of the above criteria have been met, then it only takes approximately 12-24 months from time of filing petition with USCIS to obtain a Green Card through Visa Processing at a U.S. Consulate or Adjustment of Status at an USCIS office.

#### PRECEDENT DECISIONS ON NATIONAL INTEREST WAIVERS

The Administrative Appeals Office (AAO) issued its first precedent decision *Matter of New York State Department of Transportation (NYDOT)* in November 1998 on what constitutes "national interest" for the purposes of gaining a waiver of the labor certification requirement for persons of "exceptional ability" and persons with advanced degrees.

In the NYDOT matter, the AAO determined that an applicant for a national interest waiver must show that the national interest in his or her being in the United States is greater than the national interest of protecting the U.S. workforce by requiring a labor certification. In other words, the national interest must be *adversely affected* by requiring the beneficiary to undergo labor certification.

Specifically, the matter involved a foreign national with a civil engineering degree, who was to work on restoring the antiquated bridges in the State of New York. The AAO decision stated that the interest of the State of New York in improving its bridges was not the same as a "national interest". The decision also stated that although the beneficiary did seem to have unique qualifications for the position, such unique qualifications could have been proven through the labor certification process. AAO determined that it was insufficient to show that the immigrant will be

working in a position or in a field that is in the national interest. The petitioner must show that the individual will make such a substantial contribution to that field that his or her continued ability to work in the United States is in the national interest. It was not shown that the beneficiary in the NYDOT case would make a significant contribution.

#### NATIONAL INTEREST WAIVER ADVANTAGES

1. It is not necessary for the Applicant to have a job offer or show that employment will be in a permanent position.
2. Unlike the majority of employment-based immigrants, the individual eligible for a National Interest Waiver does not need to obtain Labor Certification from the Department of Labor.
3. No Employment Contract is required.
4. If an individual makes an application while employed with a company, the application is not effectively canceled by the termination of the Applicant's employment and/or his or her acceptance of a new position.
5. Finally, an individual who is applying for a National Interest Waiver does not have to be concerned about the amount of his salary.

#### **F. EXCEPTIONAL ABILITY IN THE SCIENCES OR THE ARTS; AND EXCEPTIONAL ABILITY IN THE PERFORMING ARTS**

The requirements for these categories known as Schedule A Group II are as follows:

1. An employer seeking Labor Certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will require exceptional ability. In addition, the employer must file documentation about the alien from at least two of the following seven groups:
  - b. Documentation of the alien's receipt of lesser nationally or internationally-recognized prizes or awards for excellence in the field of endeavor;
  - c. Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
  - d. Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which

classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

- e. Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;
  - f. Evidence of the alien's original scientific, scholarly, artistic, athletic, or business- related contributions of major significance in the field;
  - g. Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media; and / or
  - h. Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.
2. An employer seeking Labor Certification on behalf of an alien of exceptional ability in the performing arts must file documentary evidence that the alien's work experience during the past twelve months did require, and the alien's intended work in the United States will require, exceptional ability; and must submit documentation to show this exceptional ability, such as:
- a. Documentation attesting to the current widespread acclaim and international recognition accorded to the alien, and receipt of internationally recognized prizes or awards for excellence;
  - a. Published material by or about the alien, such as critical reviews or articles in major newspapers, periodicals, and/or trade journals (title, date, and author of such material will be indicated);
  - b. Documentary evidence of earnings commensurate with the claimed level of ability;
  - c. Playbills and other evidence of star billings;
  - d. Documents attesting to the outstanding reputation of theaters, concert halls, night clubs, and other establishments in which the alien has appeared or is scheduled to appear; and/or
  - e. Documents attesting to the outstanding reputation of theaters or repertory companies, ballet troupes, orchestras, or others organizations in which the alien has performed during the alien
  - f. Alien has performed during the past year in a leading or starring capacity.

Contrary to the PERM procedure in other PERM applications, Schedule A, Group II, applications are filed with USCIS together with a prevailing wage determination

and proof of posting with the appropriate union or at the employer's business premises.

## **G. SKILLED WORKERS, PROFESSIONAL, AND OTHER WORKERS**

To qualify for permanent resident status in any sub-category of this classification, the foreign national is required to have employer sponsorship and Labor Certification, or documentation to prove that the foreign national qualifies for one of the shortage occupations the Department of Labor has identified on a list known as "Schedule A." Schedule A occupations include physical therapists and professional nurses, foreign nationals of exceptional ability in the sciences or arts, certain religious occupations, and intracompany transferees in managerial or executive positions.

A "skilled worker" means a foreign national who, at the time the petition is submitted, is qualified and capable of performing a job that requires at least two years of training or experience for which no U.S. workers are available. The job must not be of a seasonal or temporary nature. In some instances, a foreign national with less than two years experience may be eligible for permanent resident status under this classification if relevant post-secondary education may be considered as training.

The skilled worker's petition must be accompanied by evidence that the foreign national meets the educational, training, or experience, and any other requirements set forth in the approved Labor Certification application. The evidence may be in the form of letters from trainers, or previous or current employers. The letter must contain the name, address, and title of the trainer or employers, and a detailed description of the training received or the experience of the foreign national. If the foreign national seeks status under the provisions of Schedule A, a fully executed uncertified Form ETA-750 must accompany the I-140 Petition.

A "professional" means a foreign national who holds at least a U.S. baccalaureate degree or a foreign equivalent degree, and who is a member of the professions. To show that the foreign national is a member of the professions, the employer must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation. The petition must be accompanied by an official college or university record showing the date the baccalaureate degree was awarded, and the area of concentration of study.

"Other workers" are those who, at the time the petitions is filed, are capable of performing unskilled labor, or labor that requires less than two years training or experience, for which U.S. workers are not available. The employment must not be of a temporary or seasonal nature. An I-140 petition for an unskilled worker must be accompanied by evidence that the foreign national meets any educational, training, or experience requirement of the approved Labor Certification application.



## **CHAPTER 20 - EMPLOYMENT CREATION INVESTOR IMMIGRANTS (EB-5)**

The Immigration Act of 1990 established a new investor category for obtaining permanent resident status. 10,000 immigrant visas are to be allocated annually to individuals in this category. In general, to qualify the foreign national investor must invest \$1,000,000 in a commercial enterprise that will benefit the U.S. economy and create at least ten full-time employment positions for lawful U.S. workers (excluding the principal foreign national, his or her spouse, and sons and daughter). An investment of only \$500,000 is required if the commercial enterprise is in a targeted employment area. The foreign national must be actively involved in the management of the business, either through the exercise of day-to-day managerial control, or through policy formulation. This chapter will discuss the specific requirements for qualifying for permanent resident status under this classification.

### **A. WHAT IS THE REQUIRED AMOUNT OF THE INVESTMENT?**

The amount of capital necessary to make a qualifying investment in a commercial enterprise varies depending on where the commercial enterprise is located and the unemployment rate in that geographic area. The amount of capital necessary to make a qualifying investment in most areas is one million U.S. dollars (\$1,000,000). This includes metropolitan areas, which at the time of investment has an unemployment rate significantly below the national average unemployment rates. These areas are called “high employment areas.” The amount of capital necessary to make a qualifying investment in a rural area, or an area which has experienced unemployment of at least 150% of the national average, is only five hundred thousand U.S. dollars (\$500,000). These areas are called “targeted employment areas.” Targeted employment areas are designated by the state government of each state in the U.S.

“Capital” is defined by the USCIS as cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the foreign national, provided the foreign national is personally and primarily liable. To constitute a bona fide investment, the foreign national must not contribute his or her capital in exchange for a note, bond, convertible debt, obligation or any other debt arrangement between the foreign national and the new commercial enterprise. In addition, the assets of the commercial enterprise upon which the petition is based may not be used to secure any of the foreign national’s indebtedness. All capital is computed at fair market value in U.S. dollars. Any assets acquired directly or indirectly by unlawful means (such as through drug trafficking or other criminal activities) may not be used for the purposes of this section.

### **MULTIPLE INVESTORS**

USCIS regulations allow the establishment of a single commercial enterprise to be used by more than one investor as the basis of a petition for classification as a foreign national entrepreneur. Each petitioning investor must have invested, or must be in the process of investing, the required amount for the area in which the enterprise is principally doing business, and each individual investment must result

in the creation of at least ten full-time positions for qualifying employees. Alternatively, the establishment of a commercial enterprise may be used as the basis of a petition for foreign national entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification, provided that all sources of capital invested are identified, and have been derived by lawful means.

## **B. WHAT IS A COMMERCIAL ENTERPRISE?**

A commercial enterprise is any for profit activity formed for the ongoing conduct of lawful business. It may be a sole proprietorship, partnership (limited or general), holding company, joint venture, corporation, business trust, or other entity, and may be publicly or privately owned. A commercial enterprise does not include a noncommercial activity such as owning and operating a personal residence.

The establishment of a new enterprise includes the creation of an original business, the purchase of an existing business, or the expansion of an existing business.

If the foreign national chooses to purchase an existing business, the business must be reconstructed or reorganized in such a way that a new commercial enterprise results. If the foreign national chooses to expand an existing business through the investment of the required amount of capital, a substantial change in the net worth of the business or the number of employees must result from the investment of capital. A “substantial change” means a 40% increase in the new worth or the number of employees in the business. This does not exempt the foreign national from the requirements relating to the amount of capital investment and the creation of full-time employment for ten qualifying employees.

### **EMPLOYEE CREATION**

For purposes of the Employment Creation Investor visa, an “employee” is defined by USCIS as an individual who provides services or labor for the commercial enterprise, and who receives wages or remuneration directly from the enterprise. A “qualifying employee” is a U.S. citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States. The definition may include conditional residents, temporary residents, asylees, refugees, or foreign nationals remaining in the U.S. under suspension of deportation. However, it does not include a foreign national entrepreneur, his or her spouse, sons or daughters, or any nonimmigrant foreign national. The qualifying employee must be employed in a position that requires a minimum of thirty-five (35) hours per week. A job-sharing arrangement is acceptable wherein two or more qualifying employees share a full-time position of at least 35 hours per week. Independent contractors, part-time employment, and combinations of part-time positions even if, when combined, meet the hourly requirement per week shall not be included as full-time employment.

An exception to the requirement of the creation of ten full-time positions is made in the case where a foreign national makes the required investment in a troubled business. A “troubled business” is one that has been in existence for at least two

years, and has incurred a net loss for accounting purposes during the twelve- or twenty-four month period prior to date the foreign national files his or her petition. The financial loss to the business must be at least equal to 20% of the business' net worth prior to the loss. If a foreign national invests the required amount of capital in a troubled business, the number of existing employees, whether greater or less than ten full-time employees, must be maintained at no less than the pre-investment level for a period of at least two years.

### **C. FILING THE PETITION**

The petition to obtain permanent resident status under this classification must be filed on Form I-526, "Immigrant Petition by Alien Entrepreneur." The petition must be signed by the foreign national and his or her authorized representative, and accompanied by the current fee amount. The foreign national may file the petition on his or her own behalf. It must be filed with the USCIS Service Center in California.

#### **SUPPORTING DOCUMENTATION:**

Extensive evidence must be submitted with the Form I-526, "Immigrant Petition by Alien Entrepreneur," to document that the foreign national has invested or is actively in the process of investing the required amount of lawfully obtained capital in a new commercial enterprise in the U.S. which will create at least ten full-time positions for qualifying employees.

To show that a new commercial enterprise has been established in the United States, the foreign national must submit:

1. As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new enterprise;
2. A certificate evidencing the authority to do business in a state or municipality, or if the form of the business does not require any such certificate, or the state or municipality does not issue such a certificate, a statement to that effect; or
3. Evidence that, as of a certain date after November 29, 1990, the required amount of capital for the area in which the enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. Evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth or number of employees.

To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of

generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The foreign national must show actual commitment of the required amount of capital. Such evidence may include but is not limited to:

1. Bank statement(s) showing the amount(s) deposited in U.S. business account(s) for the enterprise;
2. Evidence of assets that have been purchased for use in the U.S. enterprise, including invoices, sales receipt, and purchase contracts containing sufficient information to identify such assets, their purchase cost, the date of purchase and purchasing entity;
3. Evidence of property transferred from abroad for use in the U.S. enterprise, including U.S. Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
4. Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or non-voting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
5. Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

To show that the petitioner has invested or is actively in the process of investing capital obtained through lawful means, the petition must also be accompanied, as applicable, by:

1. Foreign business registration records;
2. Corporate, partnership, or any other entity in any form which has filed in any country or subdivision thereof personal tax returns including income, franchise, or property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
3. Evidence identifying any other sources of capital; or
4. Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

To show that a new commercial enterprise will create no fewer than ten full-time positions for qualifying employees, the petition must be accompanied by:

1. Documentation consisting of photocopies of relevant tax records, Forms I-9 or other similar documents for ten qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
2. A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten qualifying employees will result, including approximate dates within the next two years, and when such employees will be hired.

To show that a new commercial enterprise that has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being, or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees, and a comprehensive business plan must be submitted in support of the petition.

To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control, or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

1. A statement of the position title that the petitioner has or will have in the new enterprise, and a complete description of the position's duties;
2. Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or
3. If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. If the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

1. In the case of a rural areas, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and the Budget, or within any city or town having a population of 20,000 or more as based on the most recent U.S. census.
2. In the case of an area of high unemployment:
  - a. Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area or the county in which a city or town with a population of 20,000 or more is located, and in which the new commercial

enterprise is principally doing business, has experienced an average unemployment rate of 150% of the national average; or

- b. A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area, or of the city or town with a population of 20,000 or more in which the new commercial enterprise is doing business has been designated a high unemployment area.

#### **D. PRECEDENT AAO EB-5 DECISIONS**

There are four precedent decisions made by the Administrative Appeals Office (AAO) regarding EB-5 cases: *Matter of Soffici*, *Matter of Izumii*, *Matter of Hsiung*, and *Matter of Ho*.

In *Matter of Soffici*, the Associate Commissioner for Examinations held that the petitioner was ineligible for classification as a foreign national entrepreneur under INA §203(b)(5) because the applicant failed to show: (1) that he had invested, or was in the process of investing, the qualifying amount of capital; (2) that he had established a “new” commercial enterprise; or (3) that his business had engaged in the employment maintenance or employment creation of 10 full-time jobs for U.S. workers.

Two weeks subsequent to *Matter of Soffici*, a second precedent decision was issued in *Matter of Izumii*. In *Izumii*, the AAO dealt with three types of financial arrangements distinct from those used in *Soffici*, again raising serious questions regarding whether the investor’s capital is being placed “at risk” in creating the investment enterprise. The AAO held that the following investment and financing features of investor visa petitions no longer qualified as “investments” for EB-5 purposes.

Following *Soffici*, the AAO issued two other precedent decisions in *Matter of Hsiung* and *Matter of Ho*, denying two EB-5 visa petitions filed by petitioners who had: (1) failed to put their personal funds “at risk”; (2) not proved that they had obtained the funds in a lawful manner; and/or (3) failed to satisfy the employment creation requirement.

It is absolutely necessary to review the above cases for specific legal precedent holdings and conclusions to determine whether a case may qualify in the future. All cases must be prepared in direct compliance with these four precedent decisions as well as any future AAO decisions.

#### **E. REGIONAL CENTER PROCESSING AND ADVANTAGES**

##### **INTRODUCTION**

Foreign investors and others desiring to live and work long term in the United States may wish to consider the relatively little-known EB-5 Investor Green Card as an effective means to accomplish this goal.

As a general rule, foreigners (“non-resident aliens”) wishing to live and work full-time or part-time in the United States are called upon to choose between available immigrant (Green Card) and non-immigrant (long term temporary) visa options. In some cases, more than one option is applicable. In other cases, this may not be so.

Immigrant visas typically require either a close family connection with a U.S. citizen or permanent resident (Green Card holder) or an employment based connection (see complete explanation on [www.usworkvisa.com](http://www.usworkvisa.com)). Non-immigrant work visas can be applied for by foreign professionals (via H-1B visas), “treaty traders” or “treaty investors” from countries with treaties with the U.S. (via E visas) or intra-company transferees (via L visas).

For U.S. tax reasons, foreigners wishing to invest or spend significant time in the U.S. have often tended in the past to prefer non-immigrant visas, which may allow avoidance of U.S. tax resident status (and consequent exposure to the U.S. worldwide taxation system), by limitation of stays in the U.S. each year to less than 120 days, on the average.

However, non-immigrant visas may not always be available. For example, E visas are limited to nationals of countries which have treaties with the U.S. (see list of treaty countries on [www.usworkvisa.com](http://www.usworkvisa.com)) and require substantial trade between the U.S. and the treaty country or an investment of significant cash and management time in a qualifying active job-creating business. L visas are limited to executives, managers or specialized knowledge personnel who have been employed continuously abroad by a parent, branch and affiliate or subsidiary of a U.S. company for 1 of the 3 years preceding an application for admission to the U.S. H-1B visas for professionals are subject to quota restrictions and time delays. Even F-1 student visas from certain countries are becoming harder to qualify for and generally do not permit gainful employment in the U.S. Furthermore, non-immigrant visas are generally limited, duration-wise, and are not easily convertible to immigrant visas (except for L-1A managers or executives.).

Since overseas tax regimes and tax rates have tended to become more and more onerous, U.S. tax resident status may not now be materially disadvantageous as compared with tax residence in some other countries. In any event, U.S. income tax rates generally will apply to U.S. earned income and U.S. situs asset transfers. Treaties may be utilized to avoid or reduce double taxation of the same items in more than one country. Pre-immigration tax and business planning may effectively avoid the need to subject pre-owned foreign assets or income to adverse U.S. taxation. Also, family members who do not have substantial foreign assets or foreign income (e.g. students, young professionals, spouses, adult children, etc.) may be suitable applicants for EB-5 Investor Green Cards without adverse tax consequences.

Accordingly, EB-5 Investor Green Cards in the U.S. may be an attractive option for those intending long-term or permanent residence in the U.S.

For example, EB-5 Green Cards may provide the following advantages over non-immigrant and other types of visas:

- Only a minimum of approximately \$500,000 in certain cases or \$1 million may need to be invested (can be investor's own funds, a loan not secured by EB-5 investment or a gift);
- For Regional Center EB-5 programs, a separate active 10 job-creating business is not needed (indirect employment creation is accepted for Regional Center cases);
- Fast-track immigrant (Green Card) status (typically in about 1 ½ - 2 ½ years) may be available for EB-5 Regional Center cases;
- Avoid 5+ year quota backlogs for certain Employment based Green Card/Labor Certification applications;
- Avoid 5 – 20 year quota backlogs for all Family based Green Card categories except spouse or parent of a U.S. citizen;
- No requirement to live in area where investment is made in Regional Center EB-5 case; applicant can work, go to school or retire anywhere in the U.S.;
- No day-to-day management of an active business is required for Regional Center cases, however, applicant has a policy-making role as a limited partner; and
- Other typical non-immigrant visa restrictions (e.g. professional job requirements, prior overseas employment, single children who turn 21 no longer qualify under parent's visa, etc.) may be avoided.

## **EB-5 INVESTOR GREEN CARDS**

There are essentially two EB-5 programs, i.e. the Regular program and the Regional Center (pilot) program. In order for an applicant to qualify under the Regular program, the following three basic requirements must be met: (1) investment in a new commercial enterprise; (2) investment of at least \$1 million (or \$500,000 in certain cases) into the business, and (3) creation of employment for at least 10 full-time U.S. workers.

The investment may consist of the contribution of various forms of capital, including cash, equipment, inventory, property and other tangible equivalents. An investment amount of \$1 million is generally the minimum. However, \$500,000 is acceptable if the business is situated in a "targeted" employment area, i.e. a rural area or one that has experienced unemployment of at least 150 per cent of the national average rate, as designated by the U.S. Office of Management and Budget.

The second program within the EB-5 category, i.e. the Regional Center program, is ideal for the retiree or inactive investor due in large part to the "indirect employment creation" requirement and possible limited partner features of this program. The Regional Center program advantageously removes the 10 employee requirement of the Regular program and substitutes the less-restrictive "indirect employment creation," which allows the investor to qualify for an EB-5 Investor Green Card



without hiring 10 people in the company that the investor has invested in. So, in a nutshell, under a Regional Center program, the investor can qualify by presenting evidence that 10 jobs will be created throughout the Regional Center economy, supported by an economist's report obtained by the Regional Center.

Also, the EB-5 policy management requirement is minimal in that the investor can be a limited partner with only a policy-making role and still qualify. Thus, for those who are not interested in day-to-day management or running an active business, Regional Center programs offer a more acceptable form of investment for the inactive investor, than do most Regular program investments.

Another advantage of Regional Center programs that adds to the flexibility of this Green Card category is that the investor is not required to live in the place of investment; rather, he or she can live wherever he/she wishes in the United States. For example, the investor may invest in a Regional Center in the State of Washington, but choose to live in upstate New York.

Under mandate by Congress, Regional Center EB-5 petitions are given priority by CIS (formerly INS), which, among other benefits, often results in a quicker path to approval. Each Regional Center program must be pre-approved by CIS in order to be eligible to apply for EB-5 Green Cards. Currently available, among over 45 others, is the following long-term active EB-5 program:

- A real estate limited partnership program that offers an investment in industrial properties in Seattle. This program, which was granted CIS designation as a Regional Center in 1996, generally involves purchasing low-yielding industrial properties, and converting them to commercial, e.g., office space, retail shops, a hotel and storage space, etc. Investors participate as limited partners of a limited partnership, and can earn a monthly return from a share of tenant rentals after property renovation, as well as a share of future appreciation from the project when sold. Investment periods vary, but cannot end before receipt of the permanent Green Card by the investor.

The procedure for obtaining an EB-5 Investor Green Card is relatively straightforward. The investor must generally produce 5 years of tax returns to substantiate the source of investment funds. The funds can be the investor's own money or in the form of a loan not secured by the EB-5 investment or a gift, which would allow a parent to gift a son or daughter. Gift taxes, if required in the investor's home country, must be paid. He or she must also present evidence that traces the capital, through bank transfers and other documentation, from the investor directly to the EB-5 enterprise. This provision of the regulation, which requires clear evidence that the source of funds was procured by legal means, arose from earlier concerns of Congress over money laundering issues.

After the investor completes a thorough business and financial due diligence analysis of the viability of the EB-5 business, the investment is made and an I-526

petition is filed by the foreign investor with CIS, requiring CIS to certify that the applicant and the investment are eligible for EB-5 status. The approval of the petition takes on average 6 months for Regional Center cases and longer for Regular cases.

If the investor is already in the U.S., he or she then applies for a Green Card through CIS. No interview customarily is required, and approval for most cases has been taking approximately 12 months. If the investor resides abroad, an application for the Green Card is generally made at the U.S. Embassy or Consulate in the investor's home country; however, in this case, for Consular processing purposes, an interview is necessary. Approval of the Green Card in this case takes on average also about 10 months in most countries.

In either of the above scenarios, in most Regional Center cases, the entire process generally takes about 1 ½ years. This is the situation for most applicants, based on the April 2009 CIS and State Department Consular processing times, however times may vary depending on the circumstances of each case.

Once CIS approves the investor's Green Card, it is conditional for a period of two years. Conditional Green Card status confers the same rights as the permanent unconditional Green Card.

Between 21-24 months after the conditional Green Card has been approved, the investor must reconfirm that the investment has been made or is still in place and that the employment requirement has been fulfilled or maintained. An application to remove the conditional Green Card status is then filed with CIS.

Once the condition has been removed, a full Green Card is granted for indefinite permanent resident status in the United States. From the time of application for the conditional Green Card until approval of the Removal of Conditions, should usually take about four years in most cases. Thereafter, in approved Regional Center programs, depending on the terms of their agreement, the investment may be sold, and the investor will still maintain the permanent Green Card. U.S. Citizenship is possible about two and a half years later (five years after approval of the conditional Green Card), upon satisfaction of residence and other criteria.

Freedom to live anywhere in the United States, a passive form of investment with no required direct management responsibilities (other than a limited partner policy making role), priority standing within the Immigration process, and an accelerated path to Green Card procurement – all are important factors which make the little-known EB-5 Investor Green Card category via a Regional Center program an ideal investment vehicle for the inactive investor or retiree who wishes to live long term in the United States.

## **OTHER U.S. TAX AND BUSINESS CONSIDERATIONS**

As in all U.S. immigration planning situations, various additional planning considerations should be taken into account. For example:

1. Pros and cons of the EB-5 visa versus other types of visas (immigrant and non-immigrant);
2. Additional legal and financial due diligence to be carried out prior to commitment to any EB-5 (or other) U.S. investment or business project;
3. Pre-immigration tax and business planning desirable for incoming immigrants with significant non-U.S. assets and/or income;
4. U.S. family law considerations for immigrant married couples with children or separately owned assets, particularly if coming from non-community property jurisdictions;
5. Forward planning for non-immigrants (e.g. students, employees, diplomats, etc.) who may wish to remain permanently in the U.S. after their non-immigrant visas status expires;
6. Qualification, licensing and admission requirements for operation of local business, conduct of licensed profession, obtaining of local financing, establishment of credit, obtaining U.S. life and/or health insurance benefits, etc.; and
7. Choice of most appropriate family applicant for a visa in light of the foregoing issues.

## **CHAPTER 21 - FAMILY-BASED PERMANENT RESIDENCE**

The Immigration Act of 1990 significantly changed certain aspects of family sponsored immigration in the United States. Generally speaking, it increased the total number of visas available for some categories of close family members of U.S. citizens and lawful permanent residents. This chapter will briefly discuss the various categories of family sponsored petitions for permanent residence, the I-130 Petition, and the evidence that is required to accompany the petition.

### **THE FAMILY PREFERENCE CATEGORIES**

Just as employment based petitions may be filed in a variety of categories, so, too, are petitions based on family relationships divided into various categories. These include:

1. **FIRST PREFERENCE:** Unmarried adult sons and daughters of U.S. citizens. This category refers to the adult children of U.S. citizens or those who have reached the age of 21 years prior to issuance of the immigrant visa.
2. **SECOND PREFERENCE:** Spouses, sons and daughters of lawful permanent residents.
3. **THIRD PREFERENCE:** Married sons and daughters of U.S. citizens.
4. **FOURTH PREFERENCE:** Brothers and sisters of U.S. citizens.

You may note that there is no preference category for spouses or unmarried minor children of American citizens. This is because there is no numerical limitation placed on the immigration of the spouses or unmarried minor children of American citizens. Immigrant visas are always immediately available to them, however, they too must be admissible to the U.S. before a permanent resident visa can be issued to them. The actual request for permanent resident status for a foreign national in one of the above-listed preference categories is made on Form I-130, "Petition for Alien Relative." It must be filed with the USCIS Regional Service Center having jurisdiction over the place where the person filing the application (i.e. the petitioner) lives.

A U.S. citizen can file the petition on behalf of his or her:

1. Husband, wife, or child under the age of 21;
2. An unmarried child over the age of 21;
3. Married child of any age;
4. Brother or sister if the U.S. citizen is at least 21 years old; or
5. A parent if the U.S. citizen is at least 21 years.

A lawful permanent resident can file the petition on behalf of his or her:

1. Husband or wife; or
2. Unmarried child.

I-130 Petitions for Alien Relatives cannot be filed on behalf of the following persons:

1. An adoptive parent or adoptive child if the adoption took place after the child reached the age of 16, or if the child has not been in the legal and physical custody of the parents for a period a of at least two years;
2. A natural parent if the U.S. citizen gained permanent residence through adoption;
3. A stepchild or stepparent if the marriage that created the relationship took place after the child was 18 years of age;
4. A husband or wife if both were not physically present at the marriage ceremony, and the marriage was not consummated; and
5. A husband or wife if the person filing the petition gained permanent resident status by virtue of a prior marriage to a U.S. citizen or permanent resident unless a period of five years has elapsed since the petitioner became a permanent resident, or the prior marriage was terminated by the death of the spouse, or he or she can establish by clear and convincing evidence that the prior marriage was not entered into to evade any provision of the immigration law.

Certain documentation must be submitted with the petition to prove the legal status of the petitioner, and that the stated relationship exists between the petitioner and his or her relative.

To prove that the petitioner is a U.S. citizen, he or she must submit a certified copy of his or her birth certificate, an original Certificate of Naturalization, a Certificate of Citizenship, or a valid U.S. passport. To prove that a petitioner is a lawful permanent resident, he or she must submit his or her valid foreign national registration receipt card (Green Card).

To prove the family relationship between:

1. A husband and wife, the petitioner must provide a certified copy of the relevant marriage certificate, and proof of the legal dissolution of all previous marriage of both parties;
2. A child and parent, the petitioner must provide a certified copy of the child's birth certificate showing the names of both the mother and father, and the marriage certificate of the parents;
3. Brother(s) and sister(s), the petitioner must provide certified copies of his or her birth certificate and the birth certificate of his or her sibling showing the names of both parents, and the marriage certificate of their parents to each other;
4. Parent, the petitioner must submit a certified copy of his or her birth certificate showing the parent's names, and the marriage certificate of the parents if filing on behalf of the father.
5. Stepparent, the petitioner must submit certified copies of his or her birth certificate showing the names of his or her natural parents, and the marriage certificate of his or her .natural parent to the stepparent;

6. An adoptive parent or adoptive child, the petitioner must submit a certified copy of the adoption decree.

The petitioner must be filed with the current filing fee (see Appendix A) at the USCIS Service Center having jurisdiction over the place of residence of the petitioner. After the petition is approved, the foreign national relative may have to wait for a period of years until an immigrant visa is available to him or her. The Chapter that follows discusses the reason for this wait, and the next step in the process of obtaining permanent resident status.

## **CHAPTER 22 – VISA PROCESSING / ADJUSTMENT OF STATUS**

### **VISA PROCESSING AND ADJUSTMENT OF STATUS**

Once an approved I-140 employment-based petition or I-130 relative petition is obtained from the Citizenship and Immigration Service (USCIS), the foreign national is ready to make final application in obtaining permanent residency. If the foreign national is physically present in the United States, and remained in valid legal status since his or her entry, he or she can obtain his or her “green card” without leaving the U.S. through a process called “Adjustment of Status”. If he or she is not eligible for “Adjustment of Status” because he or she is not physically present in the United States, or because he or she is out of legal visa status, the process is to be completed at a U.S. Consulate and is called “Visa Processing.” Visa processing is done only at the U.S. Consulates. This chapter will explain Priority Dates, Visa Processing, and Adjustment of Status. This chapter also contains the conclusion of the sample case study of the Labor Certification permanent resident “Visa Processing” and “Adjustment of Status.”

#### **A. WHAT ARE PRIORITY DATES?**

The United States uses a quota system under which immigrant visas for both employment-based and family-based petitions are issued. Visas are issued based on the first date the employer or foreign national submitted the application to the U.S. government. This date is called a “priority date.” Usually there are more applicants for visas than there are visas available, so backlogs form in the various visa categories, and people end up waiting for a visa to be available to them. Every month, the U.S. Department of State publishes a list of the dates for which our Consulates throughout the world can issue visas in the various immigrant categories. They publish a list of the dates for which our Consulates throughout the world can issue visas in the various immigrant categories. The dates they publish are called “Current Priority Dates.” To view the Department of State’s Visa Bulletin, go to [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html) and click on “Current Bulletin.”

#### **B. VISA PROCESSING**

When the USCIS approves an I-130 Relative Petition or I-140 Immigrant Petition for Alien Worker, a copy of the approval notice and the visa petition is sent to the National Visa Center (NVC). The NVC reviews the case to determine which Consulate has jurisdiction, and whether or not an immigrant visa is immediately available to the foreign national based on his or her priority date. If a visa is not immediately available, the NVC will notify the foreign national that the approval notice has been received, and that visa processing will begin when a visa is available. If a visa is immediately available based on the foreign national’s priority date, the NVC will send the foreign national a package of forms and instructions known as “Packet III”.

## PACKET III

The main purposes of “Packet III” are to obtain update information about the foreign national and to have the foreign national begin assembling all the documents needed to complete the visa processing application. Documents are needed from the applicant and any eligible family members accompanying the foreign national. These documents include passports, certified copies of marriage certificates, birth or adoption certificates, divorce or death certificates of former spouses, court and prison records, police certificates, military records, photographs, and English translations of all foreign language documents. The instructions in Packet III must be followed completely and carefully. Once all the necessary documents have been assembled, the foreign national should return Part III of Optional Form 169, OF-230 Biographic Information - Part I, and I-864 and I-864A, Affidavit of Support, so that the consulate can proceed with the visa processing. The completed forms should be returned to the address as instructed by the NVC. The assembled documents should not be forwarded to the Consulate, as the applicant will bring the assembled documents with him or her to the Consulate interview. Fingerprints may also be requested by the NVC at this time.

After the Consulate receives OF-169, OF-230-I, and I-864/I-864A forms, the next packet, Packet IV, will be sent to the foreign national. This packet notifies him/her of the date and time his/her visa interview appointment, and contains OF-230, Part II, which must be completed. The foreign national and all accompanying family members will be required to have a medical examination from a government-designated physician prior to the visa interview.

## THE MEDICAL EXAMINATION

Packet IV contains the names, addresses, and telephone numbers of the physicians, information about the medical appointment, and medical history forms. In most cases, the foreign national must contact the physician to set an appointment for the medical examination prior to the visa interview. The medical examination consists of a chest X-ray, blood (HIV) test, and a tuberculin test. The results of the tests will be given to the foreign national in a sealed envelope, which he or she must present (unopened) to the Consular Officer at the visa appointment.

## THE VISA APPOINTMENT

At the visa interview, the foreign national will be questioned regarding the information that was submitted by him/her to the Consulate, and the documents of the foreign national and his or her family members will be examined. If everything is in order, the Consular Officer will issue the visa, usually on the same day

## **C. ADJUSTMENT OF STATUS**

If the foreign national is already in the United States and can meet certain requirements of the U.S. immigration law, he or she can become a permanent



resident without ever leaving the country through a process called “Adjustment of Status.” There are three main advantages to utilizing the Adjustment of Status procedure instead of Visa Processing. The first advantage is that the foreign national saves the cost and inconvenience of the long trip back to their home country for him/her and his or her family members. Secondly, the foreign national may quickly obtain employment authorization to allow him/her to begin employment while his or her visa petition is being processed. The third advantage is that he or she will have the right to appeal a denial of the petition Immigration and the U.S. court system, a right that is not available to him/her through Visa Processing. To qualify for Adjustment of Status, the foreign national must meet certain requirements including:

1. The foreign national must not have entered the country illegally. He or she must have been “admitted” to the United States
2. The foreign national must not have been admitted as a “crewman,” in transit through the U.S. from another country, or as an Exchange Visitor who is subject to the two-year foreign resident requirement if he or she has not fulfilled the requirement or received a waiver to the foreign resident requirement;
3. The foreign national must not have engaged in unauthorized employment for more than 6 months. An exception to this rule can be made in the case of the spouse or children of an American citizen;
4. The foreign national must be eligible for immigration, e.g. he or she must be the immediate relative of a U.S. citizen, a qualifying relative of a lawful permanent resident of the U.S., or eligible under one of the categories for employment-based immigration;
5. An immigrant visa must be immediately available to the foreign national, i.e. his or her priority date must be current; and
6. The foreign national must be admissible to the U.S. as a permanent resident. There are several major categories under which foreign nationals can be found excludable. These include:
  - a. Health-related grounds;
  - b. Criminal and related grounds;
  - c. Security and related grounds;
  - d. Public Charge;
  - e. Illegal Entrants and Immigration Violators; and
  - g. Documentation Requirements.

However, there are waivers available for certain to the above listed grounds of exclusion. If a foreign national believes that one of the grounds of exclusion applies to him or her, he or she should consult an attorney before applying for Adjustment of Status.

To apply for Adjustment of Status, the foreign national must complete an application for himself of herself and for each member of his or her immediate

family who is seeking to adjust status to that of permanent resident. At least two forms are required for each application, and they must be filed with the USCIS office that has jurisdiction over the place where the foreign national or nationals will live. The required forms are:

1. Form I-485, “Application for Permanent Residence”; and
2. Form G-325A, Biographical Information form.

A non-refundable filing fee (see Appendix A) must be paid at the time of filing for each application.

At the time of filing the application, an USCIS Contact Representative will review the application for completeness, provide information regarding the medical examination, and set an appointment date for the foreign national and his or her family members to appear at the USCIS office for an interview with an USCIS Officer. It may take three to nine months before the visa interview is held depending on the city. If Form I-765 was filed, the USCIS Officer will set an additional appointment for the foreign national to receive employment authorization to enable him/her to work until the interview is held.

The medical examination and tests must be completed prior to the interview. The foreign national must contact one of the physicians on the approved list of designated physicians to set an appointment the medical examination for himself or herself and each family member prior to the visa interview. The medical examination consists of a chest X-ray, blood (AIDS) test, and a tuberculin test. The results of the tests will be given to the foreign national in a sealed envelope, which he or she must present (unopened) to the Immigration Officer at the time of interview.

On the day of the interview, the applicant should appear at the USCIS office with the following:

1. His or her family members who are also seeking to adjust status (if any);
2. His or her passport;
3. His or her I-94 Departure Record;
4. All original documents of those that were submitted with Form I-485 “Application for Permanent Residence”;
5. Results of the medical examination(s);
6. An up-dated job offer letter if the permanent resident application is based upon an employment-based petition; and
7. The Appointment Notice.

At the Adjustment Interview, the USCIS Officer will place the applicant(s) under oath, and review the Form I-485 and Form G-325A for accuracy. The Officer may ask the applicant(s) questions pertaining to the basis for permanent residency, and/or any possible reasons for exclusion. Assuming that everything is in order at the conclusion of the interview, the Officer will approve the application for permanent residence.

## I-765, EMPLOYMENT AUTHORIZATION

If a foreign national wishes to be granted employment authorization prior to his or her visa interview, he or she must also prepare and file Form I-765, "Request for Employment Authorization." In addition to the forms, the foreign national must also provide the USCIS with the following documents:

1. Certified copies of the Birth Certificate of the foreign national and each family member that is seeking to adjust status;
2. If employed, a letter from the present employer showing that he or she has employment of a permanent nature, or if not employed, an Affidavit of Support (Form I-864) from a responsible person in the U.S. to show that the foreign national is not likely to become a public charge;
3. If the spouse is filing an application for permanent residence with the foreign national, the foreign national must give the USCIS their marriage certificate and proof that all prior marriage that either had have been legally ended;
4. Two color photographs of each applicant taken within thirty days must be submitted. The photos must have white background, and be glossy, unretouched, and unmounted. The dimension of the facial image must be about 1 inch from the chin to the top of the hair, and the face should be facing directly forward; and
5. Each applicant between the ages of 14 and 79 years old must submit a completed fingerprint card (Form FD-258).

If the foreign national files a Form I-765 requesting that employment authorization be granted, an additional filing fee must be submitted with the application (see Appendix A).

## I-131, APPLICATION FOR TRAVEL DOCUMENT

If a foreign national wishes to be granted Advance Parole (permission to reenter the U.S.) prior to his or her visa interview, he or she must also prepare and file Form I-131, "Application for Travel Document." In addition to the forms, the foreign national must also provide the USCIS with the following documents:

1. Certified copies of the Birth Certificate of the foreign national and each family member that is seeking to adjust status;
2. If employed, a letter from the present employer showing that he or she has employment of a permanent nature, or if not employed, an Affidavit of Support (Form I-864) from a responsible person in the U.S. to show that the foreign national is not likely to become a public charge;
3. If the spouse is filing an application for permanent residence with the foreign national, the foreign national must give the USCIS their marriage certificate and proof that all prior marriage that either had have been legally ended;
4. The foreign national must also show proof that he or she is not subject to a 3- or 10-year ban, as discussed previously;

5. Two color photographs of each applicant taken within thirty days must be submitted. The photos must have white background, and be glossy, unretouched, and unmounted. The dimension of the facial image must be about 1 inch from the chin to the top of the hair, and the face should be facing directly forward; and
6. Each form should include an explanation or other evidence showing the circumstances that warrant issuance of an advance parole document.

If the foreign national files a Form I-131 requesting that employment authorization be granted, an additional filing fee must be submitted with the application (see Appendix A).

#### **D. PORTABILITY OF LABOR CERTIFICATIONS AND EMPLOYMENT BASED PETITIONS**

Section 106(c) of AC21 provides that Adjustment of Status applicants whose cases have been pending 180 days or longer may change jobs or employers without invalidating their underlying immigrant petition or labor certification. They must, however, engage in a new job in the same or a similar occupational classification as the one for which the original petitioned was filed. This relief applies regardless of nationality and nonimmigrant classification at the time of filing. It represents a major change in terms of who controls or “owns” the labor certification or employment based petition and could change the dynamics of filing.

## **CHAPTER 23 – THREE- AND TEN-YEAR BARS / UNLAWFUL PRESENCE**

### **A. THREE- AND TEN-YEAR BARS**

Individuals who have been unlawfully present in the United States for more than 180 days but less than one year beginning on April 1, 1997, and who left the U.S. voluntarily, are inadmissible to the U.S. for three years from the date of their departure. Those who are unlawfully present in the United States for one year or more from April 1, 1997 **and leave the U.S.** will be inadmissible for ten years from the date of their departure. Unlawful presence is defined as being present in the U.S. after the expiration of the period authorized by the Attorney General.

In most cases, unlawful presence begins after the expiration of a date certain Form I-94. There are cases when there is not a particular date on the I-94 such as the case of an F-1 student or a J-1 nonimmigrant. These individuals do not begin accruing unlawful presence until there has been a finding that they are in violation of status. Similarly, Canadian nationals who come to the U.S. as visitors and who do not receive I-94s do not begin accruing unlawful presence until there is a finding of violation of status.

There are some special circumstances in which a person will not be deemed to be unlawfully present. Some examples are:

1. Periods during which the individual is under the age of 18;
2. Period of time during which a person is under an order of Voluntary Departure from an Immigration judge;
3. Individuals who have filed timely applications to extend, change or adjust status;
4. Individuals who have filed bona fide asylum applications; or
5. Battered women and children in certain cases.

### **B. UNLAWFUL PRESENCE FOR CONDITIONAL RESIDENTS**

Generally, a conditional resident who does not make a timely filing of an application to remove the condition automatically falls into unlawful presence status.

### **C. HOME CONSUL VISA REQUIREMENTS**

Individuals who have gone out of status will not be allowed to re-enter the United States unless they have a visa issued by the U.S. Consulate in their own home country.

## **CHAPTER 24 – SIGNIFICANT DEVELOPMENTS IN IMMIGRATION LAW**

### **A. LEGAL IMMIGRATION AND FAMILY EQUITY ACT (LIFE)**

The new LIFE (Legal Immigration and Family Equity) Act which was signed into law by former President Clinton on December 21, 2000 introduced the following measures into existing US Immigration law:

1. The LIFE Act addressed issues of family reunification by providing a new temporary nonimmigrant status for certain foreign national spouses and minor children of U.S citizens and legal permanent residents during the pendency of their green card processing. Five new visa categories, V1, V2, V3, K3 and K4, were established pursuant to the LIFE Act. The new categories permit U.S. consular officers to issue nonimmigrant visas to the spouse, child, and, in some instances, the child of the child of a lawful permanent resident (LPR) and to the spouse of a U.S citizen and the child(ren) of the spouse. Issuance of nonimmigrant visas will permit these foreign nationals to apply for admission into the U.S. as nonimmigrants while waiting for completion of the immigration process with their U.S. citizen or LPR family member.

### **B. PREMIUM PROCESSING SERVICE**

This service allows U.S. businesses to pay a \$1,000 fee in exchange for 15-calendar day processing of certain petitions and applications. The Citizenship and Immigration Service (USCIS) guarantees that within 15 days it will issue either an approval notice, a notice of intent to deny, a request for evidence or a notice of investigation for fraud or misrepresentation. If the USCIS fails to process the petition within 15 days, it will refund the \$1,000 to the company and continue to process the petition as part of the Premium Processing Service. Either the company or the employee may pay the \$1,000 filing fee. In addition to expedited processing, companies who participate in the program may use a dedicated phone number and e-mail address to check on the status of their petition or ask any other questions they may have concerning their petition.

Currently, the Citizenship and Immigration Service (USCIS) has designated only the Form I-129 (Petition for Nonimmigrant Worker) for Premium Processing. The USCIS will continue to review the program and assess its ability to incorporate other employment-based petitions and applications into the program. The following are the classifications within the Form I-129, which are eligible for Premium Processing:

- H-1B Temporary Workers in Specialty Occupations;
- H-2B Non Cap Temporary Worker performing nonagricultural;
- H-3 Trainees;
- L-1 Blankets;
- L-1A and L-1B Intra-company Transferees; Executive or Manager capacity and Specialized Knowledge Employees, respectively;

- O-1 and O-2 Foreign nationals of Extraordinary Ability or Achievement and essential support services;
- P-1, P-2 and P-3 Athletes and Entertainers;
- Q-1 International Cultural Exchange Foreign nationals;
- E-1 Treaty Traders, where the petition is filed with the USCIS and not directly at a U.S. Consulate;
- E-2 Treaty Investors, where the petition is filed with the USCIS and not directly at a U.S. Consulate; and
- TN 1 and TN 2 NAFTA; Canadian and Mexican Professionals, respectively.

The USCIS will also continue to accept requests for expedited processing under existing rules for non-profit organizations on all applications and petitions and for petitions and applications that are not designated for Premium Processing based on the following five criteria:

- Severe financial loss to a company or individual;
- Extreme emergent situation;
- Humanitarian situation;
- Department of Defense or national interest situation; or
- USCIS Error.

### **C. THE CHILD CITIZENSHIP ACT OF 2000**

This law amends the Immigration and Nationality Act (INA) to permit foreign-born children, including adopted children, to acquire citizenship automatically if they meet certain requirements.

On February 27, 2001, a law became effective which allows certain foreign-born children, including adopted children currently residing permanently in the United States to acquire citizenship automatically. The term “child” is defined differently under immigration law for purposes of naturalization than for other immigration purposes, including adoption. Acquiring citizenship automatically means citizenship is acquired by law, without the need to apply for citizenship. A child who was currently under the age 18 and has already met all of the requirements outlined below will acquire citizenship automatically on February 27, 2001. Otherwise, a child will acquire citizenship automatically on the date the child meets all of the requirements listed below.

#### **ELIGIBILITY**

To be eligible, a child must meet the definition of “child” for naturalization purposes under the immigration law and must also meet the following requirements:

- The child has at least one United States Citizen parent (by birth or naturalization);
- The child is under 18 year of age;

- The child is currently residing permanently in the United States in the legal and physical custody of the United States citizen parent;
- The child is a lawful permanent resident; and
- An adopted child meets the requirements applicable to adopted children under immigration law.

The new law is not retroactive. Individuals who were 18 years of age or older on February 27, 2001, do not qualify for citizenship, even if they meet all of the other criteria. If they choose to become U.S. citizens, they must apply for naturalization and meet eligibility requirements that currently exist for adult lawful permanent residents.

#### PROOF OF CITIZENSHIP

Proof of citizenship will not be automatically issued to eligible children. However, if proof of citizenship is desired, parents of children who meet the conditions of the new law may apply for a certificate of citizenship for their child with the USCIS and/or for a passport for their child with the Department of State.

#### CHILDREN (INCLUDING ADOPTED CHILDREN) BORN AND RESIDING OUTSIDE THE UNITED STATES

The law does not apply to children born and residing outside the United States. In order for a child born and residing outside the United States to acquire citizenship, the United States citizen parent must apply for naturalization on behalf of the child. The naturalization process for such a child cannot take place overseas. The child will need to be in the United States temporarily to complete the naturalization process and take the oath of allegiance.

To be eligible, a child must meet the definition of “child” for naturalization purposes under immigration law, and must also meet the following requirements:

- The child has at least one U.S. citizen parent (by birth or naturalization);
- The U.S. citizen parent has been physically present in the United States for at least five years, at least two of which were after the age of 14, or the United States citizen parent has a citizen parent who has been physically present in the United States for at least five years, at least two of which were after the age of 14;
- The child is under 18 years of age;
- The child is residing outside the United States in the legal and physical custody of the United States citizen parent;
- The child is temporarily present in the United States – having entered the United States lawfully and maintaining lawful status in the United States;



- An adopted child meets the requirements applicable to adopted children under immigration law; and
- If the naturalization application is approved, the child must take the same oath of allegiance administered to adult naturalization applications. If the child is too young to understand the oath, the USCIS may waive the oath requirement.

#### **D. SPECIAL VISA PROCESSING PROCEDURES PURSUANT TO SECTION 306 OF THE ENHANCED BORDER SECURITY AND VISA REFORM ACT OF 2002**

Seven countries are now designated as state sponsors of terrorism in accordance to Section 306 of the Enhanced Border Security and Visa Reform Act of 2002 (EBSVRA). They are **North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya**.

All applicants from state sponsors of terrorism age 16 and over, irrespective of gender, must without exception complete form DS-157, in addition to form DS-156, and must appear for an interview with a consular officer. An exception to the requirement for an interview may be made at the discretion of the consular officer in cases of A and G visa applicants (except for A-3 and G-5 applicants, who must be interviewed).

#### **E. US-VISIT**

As of January 2004, the U.S. Department of Homeland Security launched US-VISIT, a new program to enhance the nation's security while facilitating legitimate travel and trade through our borders. The system utilizes biometrics, which are physical characteristics unique to each individual, to verify identity by requiring most foreign visitors traveling to the U.S. on a visa have their two index fingers scanned and a digital photograph at the port of entry. The US-VISIT program hopes to facilitate legitimate travel and trade by leveraging technology and the evolving use of biometrics to expedite processing at our borders.

#### **F. CHILD STATUS PROTECTION ACT (CSPA)**

The Child Status Protection Act (CSPA) was enacted to provide relief to children who "age-out" as a result of delays by the U.S. Citizenship and Immigration Services (USCIS) in processing visa petitions and asylum and refugee applications. The Immigration and Nationality Act (INA) defines a "child" as an unmarried individual under 21 years of age. The CSPA locks in the age of the child at an earlier date in the process of applying for permanent residency, and preserves the status of "child" for many individuals who otherwise would age out. The new method of calculating a person's age varies depending on the type of immigration benefit that is sought.

The CSPA applies to:

- Derivative beneficiaries of asylum and refugee applications;
- Children of U.S. citizens;
- Children of Lawful Permanent Residents (LPR); and

- Derivative beneficiaries of family-based, employment-based and diversity visas.

According to the CIS, the CSPA does not apply to applicants for or derivatives of Nicaraguan Adjustment and Central American Relief Act; Haitian Refugee Immigration Fairness Act; Family Unity; Special Immigrant Juvenile status; or non-immigrant visas (including K and V visas).

For employment-based applications, the CSPA will allow beneficiaries to subtract from their age, the period of time that the I-140 petition was pending. Before the era of visa backlogs, this meant that if the child was not 21 by the time that an I-140 was filed jointly with an I-485, then the child's ability to adjust status was preserved. However, it is clear that Congress did not contemplate immigrant visa backlogs such as we are seeing at the present time because the CSPA will not prevent children of employment-based beneficiaries from "aging out" and thus losing the chance to obtain green cards based on a parent's application.