U.S. Immigration Law Handbook

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U.S. Immigration Law Basics

This booklet is designed to provide a basic outline of U.S. immigration laws and regulations. The focus of the booklet is business and professional immigration. Family immigration issues are discussed only as they relate to business and professional visas and green cards.

General Definitions:

- ***Citizenship & Immigration Services (CIS)*** – Formerly the Immigration and Naturalization Service (INS). The CIS is the government agency within the Department of Homeland Security which determines an individual's eligibility for visas, and is charged with enforcing immigration law and policy.
- ***Department of Labor*** – The government agency designated to protect U.S. workers (U.S. citizens and permanent residents), and encourage the employment of U.S. workers.
- ***Department of State*** – The government agency which operates U.S. embassies and consulates abroad, and is charged with issuing visas to foreign nationals wishing to travel to the United States. Department of Homeland Security may take over this function in the future.
- ***Immigrant*** – A foreign national who intends to reside permanently in the United States
- ***Nonimmigrant*** – A foreign national who intends to remain only temporarily in the United States, and to return to an unabandoned foreign residence abroad
- ***Green Card*** – Form I-551 stamp or card which evidences an individual's permanent residence in the United States.
- ***Visa*** – Form placed in a passport by a U.S. Consulate abroad which allows the visa holder to board passage to the United States and to present him or herself for inspection by a CIS officer at the port of entry into the U.S.
- ***Form I-94 – Arrival/Departure Card*** – Document issued by the immigration officer at the port of entry authorizing an individual to enter the United States, stating the visa category which the person is authorized to hold, and stating the date by which the individual must depart the United States
- ***Employment Authorization Card*** – Different from a green card, but provides an individual with authorization to work for any employer in the United States.

U.S. immigration law divides all individuals seeking to enter the United States generally into two categories: immigrants and nonimmigrants. "Immigrants" are individuals who are intending to remain permanently in the United States. "Nonimmigrants" are individuals coming for only a temporary stay. Those allowed to enter the United States as immigrants are permitted to have the intent to remain permanently and to abandon all foreign residence. Individuals admitted as nonimmigrants must demonstrate that they have a residence abroad which they have no intention of abandoning. There are certain nonimmigrant categories that are exempted from the foreign residence requirement which will be discussed in greater detail below.

Presumption of Immigrant Intent

All individuals coming to the United States are presumed by the CIS and Department of State to have the intent to remain permanently in the United States. Obviously, this is inconsistent with the intent allowed for a nonimmigrant visa. Accordingly, individuals coming temporarily to the United

States in a nonimmigrant visa category must overcome the presumption that they intend to remain permanently. If they cannot present evidence to overcome this presumption, their entry into the United States may be denied.

The following is a summary of the more common immigrant and nonimmigrant visas.

PART ONE

Temporary (Nonimmigrant) Visas

1. Visa Waiver

Citizens of certain countries may enter the U.S. as visitors ***without a visa*** under the ***Visa Waiver Program (VWP)***. Nationals of the following countries do not need visas to visit the U.S.A. for ninety (90) days or less for limited business or tourist purposes:

Andorra	France	Luxembourg	Singapore
Australia	Germany	Monaco	Slovenia
Austria	Iceland	Netherlands	Spain
Belgium	Ireland	New Zealand	Sweden
Brunei	Italy	Norway	Switzerland
Denmark	Japan	Portugal	United Kingdom
Finland	Liechtenstein	San Marino	

Each year several million travelers use this "no visa" program. The visitor simply shows his round trip ticket and fills out the Waiver Application on the airplane. Effective June 26, 2005, Visa Waiver Program travelers from all qualifying countries will require a machine-readable passport in order to enter on the visa waiver. Without one, travelers will need a visa to enter.

Limitations: No Visa Waiver visitor can perform local productive employment or receive a salary from a U.S. source. Visitors can perform certain work-related services similar to a B-1 visa holder, discussed below. Visitors who work must remain on the payroll of a foreign employer, although they can be advanced expenses by a U.S. affiliate.

Extend Stay/Change Status: as a general rule, no extensions or changes to another visa category are allowed in the U.S. and the visitor must return abroad (not to Canada or Mexico) before reentering the U.S. again for 90 days on the Visa Waiver or in another visa category.

2. B-1 Business Visitor Visa

The B-1 visa is designed for temporary business activities which promote international trade, commerce or investment. Examples: the B-1 visa holder can train, consult with business associates, take orders, participate in meetings, negotiate contracts, or look for sites for investments.

Duration: B-1 visas are generally issued for a year or more (sometimes up to ten years). Entries are generally limited to six months.

Extended Stay/Change Status: A B-1 visitor can apply to extend his/her stay beyond six months without limit. However, the visitor must continue to demonstrate nonimmigrant intent.

A B-1 visa holder may change to another status. However, if an application for change is made within 30 days of entry, CIS presumes that the B entry was fraudulent, and was made with the intent to stay.

Limitations: Business visitors on a B-1 visa cannot be paid a salary by a U.S. company and cannot engage in local skilled or unskilled labor (productive employment). (There is a limited exception to this rule for honoraria at academic institutions, discussed below).

Permissible B-1 Visa Activities

The regulations explicitly bar B-1 visa holders from performing skilled or unskilled labor. However, the CIS and State Department have approved use of the B-1 visa for some ***limited types of work*** where the activities are temporary in nature but are not covered by any other visa category. Engaging in unlawful work in the U.S. can result in serious consequences for both the employer and the individual employee (including fines, deportation of the employee and inability of the employee to re-enter the U.S.).

The following are activities which are permitted using a B visa:

- Attend a meeting of the board of directors or perform other functions resulting from membership on the board of directors of the U.S. corporation.
- Undertake training for a limited duration. To do so, the employee must continue to receive a salary from the foreign employer and receive no salary or other remuneration from a United States source other than an expense allowance or other reimbursement for expenses (including room and board). The consular officer must be satisfied that the intended stay in the U.S. is temporary and is indeed training and not productive employment. Foreign nationals, often students, who seek to gain practical experience, should consider more appropriate nonimmigrant classifications, such as an F, H, or J visa.
- Observe the conduct of business or other professional or vocational activity.
- Participate in scientific, educational, professional or business conventions, conferences, or seminars.
- Install or maintain equipment produced abroad, or train workers on the equipment, if installation, maintenance and training was part of the contract of sale with the B-1 visitor's foreign employer.

Honoraria for University Academic Activity

Generally, a B-1 visa holder cannot receive compensation from a U.S. source. However, a B-1 visitor for "usual academic activity" can be paid honoraria and associated expenses for a period of no more than nine days at any single institution of higher learning or affiliated non-profit research entity, and may not accept honoraria from more than five institutions within a six-month period.

> ***STRATEGY TIP****: You should consult with your immigration attorney to verify the adequacy of your documentation showing the purpose of B-1 transfers before sending your employees to the U.S. Consulate to apply for the visa. If the employee already has a B-1/B-2 visa in his passport, he still needs a letter to facilitate his entry into the United States.*

3. B-2 Tourist Visa

This is similar to a B-1, but allows entry strictly for tourist purposes. No business activities are allowed.

4. H-1B Visas

Using an H-1B visa, U.S. employers are permitted to hire foreign professional employees (for example, professors, researchers or technical personnel) who have ***at least a four (4) year college degree***, if they will work in a position requiring a college degree.

H-1B visas are available to persons with (1) a 4 year Baccalaureate Degree ***or the foreign equivalent;*** or (2) persons who can show by expert affidavits ***that their combination of education and qualifying experience*** is the equivalent of at least a U.S. four year B.A. or B.S. degree in the field.

Duration: An H-1B visa is valid initially for up to three (3) years and can be extended an additional three (3) years for a total of six years, regardless of the number of employers during that time. Extensions beyond six years are available in limited circumstances.

Limitations: There are many technical requirements, including ***payment of a prevailing wage*** and the ***filing of a Labor Condition Application***, for successful processing of an H-1B. Failure to comply with all of the H-1B regulations can result in the employer being disqualified for one year from hiring any additional H-1B specialty occupation workers, as well as other fines and penalties.

Special Issues for H-1B:

- ***Credentials Evaluation***: Foreign degrees must be evaluated to determine if they are the equivalent of the U.S. degree. There are credentials evaluation services throughout the United States who can provide these evaluations. In addition, under CIS regulations, three years of work experience can substitute for one year of bachelor's degree level college education. If the employer relies on a combination of education and work experience to show bachelor's degree equivalency, expert affidavits may be required to support the petition.

- ***Prevailing Wage***: The employer must pay the higher of the "prevailing wage" for the position as determined by United States Department of Labor ("DOL"), or the actual wage—that is, the wage paid to similarly employed U.S. workers. The DOL now has special rules for universities, recognizing the differing salary scales for universities versus private companies. A prevailing wage determination can be obtained from the State Employment Security Agency or from authoritative surveys.

- ***Labor Condition Application ("LCA"):*** This document attests to the DOL that the employer will pay the prevailing wage and that hiring the H-1B worker will not adversely affect the wages and working conditions of U.S. workers. The LCA must be certified by the DOL, and included in the H-1B package. The LCA process is now streamlined with the use of electronic filings. LCAs can be obtained in a matter of seconds. ***NOTE***: The LCA is not the same as Labor Certification for green card purposes. For an LCA in connection with an H-1B, there is no need to advertise the job or to test the labor market for U.S**.** workers**.**

- ***Posting***: A notice must be posted for ten days in two different places at the location of employment announcing that you are hiring an H-1B worker.

- ***Public Access File***: A Public Access File must be maintained for each H-1B employee, containing several documents, including the posting notice, proof of posting, the prevailing wage determination, the certified LCA, a receipt from the employee showing that s/he received a copy of the LCA, a statement of the actual wage rate, a short memorandum describing how the employer determined the salary and a summary of available benefits.

- ***Filing Fees:*** CIS' normal filing fee for private employers is $ 185, plus a $1,500 "training fee", plus a "fraud prevention" fee of $ 500. (NOTE: University employers, certain non-profit research entities, and primary/secondary schools do not pay the "training fee". Employers with 25 or fewer employees pay only at $750 "training fee"). Premium processing (15 day processing) carries an additional $1,000 filing fee to CIS.
- ***Transferring Employees to Other Locations***: If an H-1B employee is transferred for more than a very limited duration, the employer must have an LCA from DOL for the new location. If the employer transfers the employee before getting the LCA, the employer may need to file an amended H-1B petition with CIS.
- ***Change in Job Duties***: A material change in job duties may require a new H-1B filing. Any change in job duties should be reviewed by an attorney or immigration advisor.
- ***Family***: The spouse and children of H-1B employees receive H-4 visas and cannot work under that category.
- ***Dual Intent***: An H-1B visa holder may lawfully have the intent to remain permanently in the United States. This will be helpful for maintaining status while pursuing a permanent resident application.
- ***H-1B Quota***: CIS issues 65,000 new H-1B approvals each year (CIS year – October 1 through September 30). Exceptions to the cap: University jobs; H-1B extension with same employer; H-1B transfer to new employer. Graduates with U.S. advanced degrees have special allocation of 20,000 H-1Bs above the 65,000.

5. TN for Canadians and Mexicans:

A number of special procedures apply only to ***Canadians*** and ***Mexicans*** under NAFTA. This important treaty, which liberalized trade by creating a North American Common Market, also eliminated many barriers to the transfer of personnel in certain designated jobs

General Rules: NAFTA created a new visa category, the Treaty NAFTA (or "TN Visa") for Canadian and Mexican citizens seeking temporary entry for business or professional activities. The TN is valid for one year and requires that the TN holder work as an employee or under contract for a U.S. employer. Unlike the H-1B visa (6-year maximum), the TN can be renewed indefinitely. That is, a TN visa is valid for one year, with the potential for unlimited yearly extensions.

TN Procedure: There is ***no application form*** for TN status, unless the person is already in the United States. Canadians apply for entry under the TN category directly to a ***CIS officer at the border*** or at the preclearance stations at an international airport in Canada or Mexico. Depending on the port of entry, the approval process should take no more than a couple of hours. Mexicans must apply directly at a U.S. Consulate in Mexico to obtain a TN visa. Applicants are admitted upon proof of citizenship and of qualifications meeting the criteria of the TN visa. Typical documentation includes educational credentials, an offer of employment or contract from a U.S. employer and proof of Canadian or Mexican citizenship.

Special Rules for Canadians:

- Canadian citizens do not need to carry with them a valid Canadian passport when entering the U.S. Proof of Canadian citizenship is sufficient (i.e., birth certificate). However, a ***passport is advisable*** to help obtain a U.S. social security card and driver's license after arriving in the U.S.
- In addition, Canadian citizens do not need to obtain a visa from the U.S. Consulate to enter the U.S.

***Typical TN Occupations*:** Some of the more common occupations on NAFTA's list of TN occupations are: architect, computer systems analyst, librarian, dentist, physical therapist, medical technologist, scientific technician, statistician, registered nurse, veterinarian, horticulturist, teacher and social worker. The following are additional university-related positions eligible for TN:

College or University Teacher
Research Associate (University)
Librarian
Medical Laboratory Technologist
Veterinarian
Animal Scientist
Biochemist
Biologist
Chemist
Dairy Scientist
Entomologist
Epidemiologist
Geneticist
Geochemist
Geologist
Geophysicist
Meteorologist
Pharmacologist
Physicist
Plant Breeder
Poultry Scientist
Scientific Technician/Technologist
Soil Scientist
Zoologist

***STRATEGY TIP**: A very useful TN occupation is management consultant. This occupation does not require a college degree if the applicant can demonstrate equivalent professional experience, as shown by five years experience as a management consultant or five years experience in a field of specialty related to the consulting agreement. Other important categories are Computer Systems Analyst and Scientific Technician/Technologist.*

***MORE STRATEGY TIPS**: Circumstances where an applicant may wish to obtain a TN instead of an H-1B are:*

- *If the applicant is currently on an H-1B which is due to expire, since CIS regulations allow an H-1B visa holder to change to a TN without the one-year departure from the United States normally required with an expired H-1B.*
- *No more H-1B visas are available for a given fiscal year. (NOTE: Universities are exempt from the H-1B cap).*
- *Ease of entry, since TN can be obtained in one day.*

Special TN Rules for Canadians and Mexicans:

- For nearly all TN professional occupations (other than computer systems analyst and management consultant), ***experience cannot be substituted for education*** in meeting the TN educational requirements.
- Some occupations, such as architect, lawyer, and physician, may also ***include licensing requirements.***
- The ***spouse and children*** of the TN receive TD status and cannot work under that category in the U.S.
- ***Canadian Landed Immigrants*** are not eligible for the benefits of TN status.

6. L-1 Visas: Temporary (Nonimmigrant) International Corporate Transfers

Where a foreign company has a related U.S. company (branch, parent, subsidiary or affiliate), U.S. immigration law allows ***temporary*** transfers (no longer than 5 or 7 years) of (1) managers, (2) executives and (3) persons with specialized knowledge to the related U.S. company under the ***L-1 visa*** category.

Requirements:

- ***To qualify as an L-1A manager or executive***, the employee must show that the employee has day-to-day decision-making authority and supervises other personnel of the company or manages an important function of the business.
- ***To qualify as an L-1B employee with specialized knowledge***, the employee must show that s/he has specialized proprietary knowledge of the company's "product, service, research, equipment, techniques, management or other interests" as it applies to international sales and markets.
- ***New office L-1 visas*** can be issued for small companies lacking the capital to qualify under E-2 Visa Treaty Investor Regulations (see discussion below regarding E-2 visas).

Nationality of Employee: Unlike E-visas, the employee need not be of the same nationality as the foreign company. However, the employee must have worked for the overseas parent at least one full year within the 3 years preceding their first entry into the United States.

Duration: L-1 visas are issued for an initial period of 1-3 years. The maximum time limit of L-1A visas for managers and executives is seven (7) years. L-1B visas (for specialized knowledge employees) can be renewed in two-year increments for a maximum of five (5) years.

CIS regulations require that decisions on L-1 visas be made in thirty (30) days or less. Individual petitions are filed in the U.S. by the U.S. subsidiary or branch office. Approval is cabled to the U.S. Consulate in the employee's home country for your employees to pick up their visas.

"***Blanket Petitions***" can also be filed for large organizations or those having transferred at least ten (10) employees under the L-1 program during the previous year. Blanket Petitions further streamline the process by allowing the company to issue its own certificate of eligibility which the employee takes directly to the U.S. Consulate, ***allowing L-1A and L-1B visas to be issued in two weeks or less.***

Spouse Employment: Spouses of L-1 visa holders can obtain work authorization in the U.S.

***STRATEGY TIPS**: Foreign firms with new or existing U.S. operations have several basic options for transferring managerial and executive employees planning to work in the U.S.: L-1A visas, H-1B visas, E visas, and the Multinational Manager/Executive Green Card. You should consult an immigration attorney to see which of these basic choices best fits your international personnel needs.*

Joint ventures also allow use of L-1As, L-1Bs, E visas and Multinational Green Cards. To qualify, your foreign company must usually own 50% or more of the U.S. entity.

Dual Intent: Like the H-1B, L visa holders can permissibly have the intent to remain permanently in the U.S., which means that they can apply for a green card without jeopardizing the L-1 status.

7. E-1 Treaty Trader & E-2 Treaty Investor Visas

Citizens of certain countries may gain entry to the United States for trade or investment using E-2 Treaty Investor and E-1 Treaty Trader visas. Because these visas can be renewed in five-year increments for 10, 20 or even 30 years or longer, they remain excellent options for many foreign businessmen:

The **E-2 Treaty Investor Visa** allows you to: (1) move your entire business to the United States, or (2) start a new business in the U.S. if you are not now in business, or (3) establish or expand a U.S. branch, affiliate or subsidiary of your foreign company, or (4) if you are a foreign owned business, to transfer to the U.S. personnel of the same nationality as the company.

Same Nationality: An E-2 applicant must be of the same nationality as the foreign company or investor, and the nationality must be one of the treaty countries.

No Minimum Investment: There is no minimum required investment for an E-2 investor visa. In the case of small businesses, as a general guideline, an owner investor can usually obtain E-2 status if he will (1) actively manage the small business; (2) put at risk, including borrowed funds secured for personal assets, a substantial investment in capital and/or equipment;[1] and (3) plan to employ at least several U.S. workers. The amount of the investment varies depending upon the nature of each investment. U.S. State Department guidelines suggest that the smaller the business, the greater percentage of its value must be invested to qualify. ***The key is that the business cannot be "marginal,"*** that is, designed just to provide a living for the owner and his family.

Eligible Countries: The E-2 visa is available to citizens of the following countries under U.S. bilateral treaties or treaties of commerce and navigation:

[1] Some consulting or service businesses have qualified with even smaller investments, in the range of $25,000 to $50,000.

Albania
Argentina
Armenia
Australia
Austria
Azerbaiján
Bahrain
Bangladesh
Belgium
Bolivia
Bosnia & Herzegovina
Bulgaria
Cameroon
Canada
Chile
Colombia
Congo (Brazzaville and Kinshaha)
Costa Rica
Croatia
Czech Republic
Ecuador
Egypt
Estonia
Ethiopia
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
Slovak Republic
Slovenia
Spain
Sri Lanka
Suriname
Sweden
Switzerland
Taiwan
Thailand
Togo
Trinidad & Tobago
Tunisia
Turkey
Ukraine
United Kingdom
Yugoslavia

Other Requirements: To qualify for an E-2 visa, the applicant must be entering the U.S. to perform either (a) managerial or executive functions, or (b) functions requiring essential skills. Examples of essential skills functions may include:

- A French technician for a French company coming to the U.S. to maintain specialized equipment for a U.S. subsidiary.
- A German accounting specialist coming to a U.S. branch of a German company to ensure that the books and records are maintained according to German accounting standards.
- A technical translator for a Japanese company coming to the U.S. to translate technical documents regularly sent from the Japanese parent company.

Duration: The E-2 visa is usually issued for an initial period of 2-5 years. There is no limit to the number of renewals.

Family: The spouse and children of an E-2 investor or employee also receive E-2 visas. They can also obtain work authorization in the United States under that category.

***STRATEGY TIPS**: The E-2 visa is not limited to businesses involved in international trade. Purely local businesses such as retail sales, construction, service industries, or manufacturing can qualify.*

For larger companies, the E-2 should be a first choice for quickly transferring key managers, executives and persons with essential skills to your U.S. operations. Note: the employee and company must have the same nationality and must be from one of the qualifying treaty investor countries. Nationality of the foreign firm is usually determined by the citizenship of at least fifty- percent (50%) of its stockholders.

No college degree is required to obtain an E-2 visa.

E-1 Treaty Trader Visas. There is a companion visa to the E-2, ***the E-1 Treaty Trader***. To qualify, the following requirements must be met:

(1) The trader's U.S. office must engage in ***substantial trade*** with the foreign country of its shareholders. "Substantial trade" is not measured just in dollars. Frequent and continuous trade in goods or services of small dollar value may also qualify for E-1 visa treatment.

(2) At least 50% of the trade must be between the U.S. business applying for the E-1 visa and the foreign country of which the employee is a citizen.

(3) The U.S. business must be at least 50% owned by persons holding the same nationality as the visa applicant.

Eligible Countries: Only citizens of the following countries with bilateral treaties with the United States qualify for E-1 visas:

Argentina	Costa Rica	Ireland	Netherlands	Switzerland
Australia	Croatia	Israel	Norway	Taiwan
Austria	Denmark	Italy	Oman	Thailand
Belgium	Estonia	Japan	Pakistan	Togo
Bolivia	Ethiopia	Jordan	Paraguay	Turkey
Bosnia & Herzegovina	Finland	Korea (South)	Philippines	United Kingdom
Brunei	France	Latvia	Singapore	Yugoslavia
Canada	Germany	Liberia	Slovenia	
Chile	Greece	Luxembourg	Spain	
Columbia	Honduras	Macedonia	Suriname	
	Iran	Mexico	Sweden	

Types of Trade:

- Export and import firms can qualify, as do manufacturing companies purchasing most of their equipment and parts from their parent firms.
- ***The trade does not need to be in goods***. Technical know-how, blueprints, accounting advice or software engineering services, just to name a few, can qualify as trade in services for E-1 visa purposes.

E-1 Examples:

- A Virginia lumber firm which is owned by Israelis and exports at least 51% of its timber products from the U.S.A. to Israel can obtain E-1 visas for its key traders and managers who are Israeli nationals.
- A French employee of the Israeli lumber firm cannot qualify for an E-1 visa because he must have the same nationality as its owners. (Note: Other visas may be available to the French employee).
- A Virginia electronics firm owned by Germans which buys most of its parts from Holland for sale in the U.S.A. cannot qualify for an E-1 because the majority of its trade is not with the country of its shareholders (Germany). (Note: Again, other visa options may be available.)

Duration: The E-1 can usually be obtained in less than thirty (30) days from most U.S. Consulates, will be ***valid for two to five years and can be renewed indefinitely***.

Family: The immediate family members of the holder of an E-1 visa can come to the U.S. Once here, they can apply for work authorization in the United States.

> ***STRATEGY TIPS****: Proper use of E visas requires mastery of a number of technical rules and usually requires expert assistance. Documentation requirements for E-1 and E-2 visas can vary from U.S. consulate to U.S. consulate and can change without notice.*
>
> *Joint ventures with established U.S. companies can be used to qualify foreign firms and their employees for E visas as long as the foreign venture partner can exercise veto control over key business decisions.*
>
> *A small, family-owned business engaging in frequent trade with the country of its foreign owners may qualify for an E-1 even if no U.S. workers are employed.*

8. O Visas

O visas are temporary visas available for aliens of extraordinary ability in the fields of science, education, business or athletics. O visas require employer sponsorship. An O visa is an excellent alternative to the H-1B for university professors and researchers. This summary focuses on aliens of extraordinary ability in the fields of science, education and business.

Requirements: Extraordinary ability must be demonstrated through sustained national and international acclaim and recognition for achievements in the field through evidence of the following:

- Receipt of a major internationally-recognized award, such as the Nobel Prize; or
- At least ***three*** of the following forms of documentation:
  - Documentation of receipt of nationally or internationally recognized prizes or awards for excellence in the field;
  - Documentation of membership in associations in the field which require outstanding achievements of their members, as judged by recognized national and international experts and their disciplines;

- Published material in professional and major trade publications or major media about the alien, relating to his/her work in the field. Must include the title, date, and author of such published material;
- Evidence of participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification sought;
- Evidence of original scientific, scholarly or business-related contributions of major significance in the field;
- Evidence of authorship of scholarly articles in the field, in professional journals or other major media;
- Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have distinguished reputation; and
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

- If the above evidence does not readily apply to the occupation, then the employer can submit other comparable evidence to submit.

O visas also require a letter evidencing consultation with an appropriate "peer group" (such as a prominent association in the field of endeavor) stating that the peer group has no objection to issuance of the O visa. Some professions and specialties have no such peer group, in which case the employer can submit a letter attesting that no such peer group exists.

Length of Stay: An O visa is valid for three years with available extensions.

Spouse and Children: Can accompany the principal beneficiary as O-3 visa holders, but cannot work in that status.

Dual Intent: Filing of an immigrant visa will not in itself prevent entry or re-entry on an O or extension of O visa. However, this is not technically dual intent because the employee still must have an intent to return to the home country.

9. Hiring Foreign Students and Foreign Graduates of U.S. Universities

F-1 Students – Foreign students are permitted to attend U.S. colleges or universities as long as they show (1) they have the resources to support themselves and cover all tuition and expenses; and (2) they have an intent to return to their home country. Foreign students will need a completed Form I-20 (issued by a university) to obtain valid F-1 status. F-1 students may be eligible for several different types of employment opportunities and very specific rules apply to each.

On-Campus Employment: If the F-1 student is maintaining a valid F-1 status, the student may work on campus no more than 20 hours per week while school is in session, but may be full time when school is not in session.

Off-Campus Employment: An F-1 student may request off-campus employment work authorization based upon severe economic hardship caused by unforeseen circumstances beyond the student's control.

***Curricular Practical Training*:** Another work option for hiring F-1 students is Curricular Practical Training. CPT is work authorized by the foreign student advisors and shown to be an integral part of an established curriculum. A student is not eligible for CPT unless the student is legally enrolled

on a full-time basis for at least nine months, although this can be waived in certain instances for graduate students. If a student accumulates more than twelve months of CPT, the student is ineligible for Optional Practical Training.

Optional Practical Training: The last and most common method of employment authorization for F-1 students is optional practical training. Students who have graduated can be hired for a period of up to ***one year***. All that is required is authorization from the university's Foreign Student Advisor, and receipt of a work authorization card from CIS. This process should be started at least 90 days prior to graduation and CANNOT be obtained if filed after graduation. The student cannot commence work until the EAD is received. An application or receipt notice is not sufficient.

> ***STRATEGY TIP****: F-1 Optional Practical Training is an excellent way to recruit top foreign graduates of U.S. colleges and universities with a minimum of delays and paperwork.*

Family: The F-2 spouse of an F-1 cannot work under any circumstance.

J Visas

The visa is based on cultural exchanges between the United States and a foreign country and is a comprehensive visa covering several different categories: (1) students; (2) trainees; (3) teachers; (4) professors; (5) international visitors; (6) alien physicians; (7) government visitors; (8) researchers; (9) short term scholars; (10) specialist; (11) camp counselors; and (12) au pairs. Most of these categories permit full-time work authorization for varying time units. Selected categories are discussed below:

- ***Students***: Like F-1 students, J-1 students are permitted to work on campus or off campus if there is an urgent, unforeseen need. The employment is limited to 20 hours per week while school is in session or full time when school is not in session. For ***Academic Training***, J-1s are eligible for up to 18 months of academic training (36 months if post-doctoral research). Unlike F-1s, they do not require CIS employment authorization. Rather, they only need a letter of authorization from the foreign student advisor that the employment is related to the degree
- ***Professors and Research Scholars***: These positions cannot be tenure-track and the J-1 cannot have been in the U.S. on a J visa for all or part of 12 months immediately preceding date of program commencement, with a few minor exceptions. The time limit is three years, with a possibility for a six-month extension for good cause.
- ***Short-Term Scholars***: Coming to the U.S. for a period of six months to lecture, observe, consult and participate in seminars, workshops, conferences, study tours, professional meetings or other educational activities.

Family: J-2 family members of J-1s may obtain work authorization if they can show that income is not needed to support J-1 alien.

***STRATEGY TIP**: Some J-1 visa holders may be required to return to their country of last residence for two years after expiration of their J-1 visa. You should consult your university, foreign student office or immigration law advisor to see if you are subject to this important restriction or if there are other visa options available to avoid the restriction.*

H-1B Visas

Once a student obtains a bachelors degree (or higher), the student is eligible for an H-1B visa. This option is discussed earlier in this handbook.

10. Trainee Visa Options For Up To 24 Months

U.S. and foreign companies often wish to provide training on new or existing technologies to foreign workers. Several visas exist which allow for ***the training of foreign employees who do not have college degrees or specialized knowledge*** or cannot otherwise enter under H-1B, L-1B or E visas:

- A J-1 trainee visa can be obtained through an international exchange program authorized by the Department of State. This category allows the trainee to work for a U.S. firm and engage in productive employment as part of her training for up to 18 months. Unlike many of the other visa options, the ***spouse of the J-1 trainee can be granted work authorization.***
- ***An H-3 training visa*** requires a detailed training curriculum set up by the employer. This visa allows the trainee to engage in productive employment only if it is incidental to the training. ***The H-3 is valid with extensions for up to two years***. Specialized immigration law advice is usually needed to establish and obtain approval for an H-3 training program. Spouse and children (under 21) can enter with an H-4 but cannot work.
- ***A B-1 visa*** can be used for short term training of less than one year. The trainee must be an employee of a foreign company. The employee must be compensated (except for expenses) by the foreign firm. ***Spouses and children*** of B-1 trainees can accompany the trainee but cannot work in the United States.
- ***F-1 student visa*** allows for Curriculor Practical Training (CPT) if the training part of the student's degree program. Optional Practical Training (OPT) is available for up to 12 months during an academic program or 12 months post-graduation. Use of CPT for 12 months or more will void eligibility for OPT.

PART TWO

Permanent Resident Green Cards

General Guidelines

Many foreigners coming to the U.S. desire to obtain permanent resident "Green Cards." A green card allows the holder to work for any employer and to travel freely in and out of the U.S. Possessing a Green Card eliminates the need to request extensions of visas, and allows the spouse and children of the Green Card holder to work or to attend college under the lowest U.S. tuition rates. Essentially, a green card gives the holder many of the rights of a U.S. citizen, except the right to vote and sit on juries. A green card can be revoked upon conviction of certain crimes or upon absence from the U.S. for prolonged periods (more than six months).

As a general rule, Green Cards can be obtained on the basis of (1) ***family relationship*** to a U.S. citizen or permanent resident, (2) ***employment or business*** activities; (3) ***unique skills or abilities*** or (4) D.V. lottery. This Outline focuses on employment and unique ability Green Cards.

Typical Green Card Process: The green card application (I-140 and supporting materials) must be approved by CIS. (In some cases, an employer will need to obtain approval from the Department of Labor before filing the I-140 with the CIS. This is called "Labor Certification" and is discussed below.) The beneficiary must then apply for adjustment of status (if in the U.S.) or apply for consular processing (if abroad) in order to obtain the green card. Adjustment of status or consular processing involves obtaining a criminal background check, a medical exam, and verification that there are no grounds for excluding the individual from permanent residence.

1. First Preference (EB-1): Managers and Executives; Persons of Extraordinary Ability; and Outstanding Researcher/Professor.

First Preference green cards are available to (a) ***Multinational Managers/Executives***; (b) ***Persons of Extraordinary Ability in the arts, science or business*** or (c) ***outstanding researchers and professors.***

Advantages:

- Persons who qualify for this preference category can obtain a Green Card without the lengthy delays involved in the normal Labor Certification process.

Multi-National Manager/Executive Green Cards

Multinational Manager and Multinational Executive Green Cards can be very valuable to existing or new companies doing business in the U.S.A. As many as 40,000 manager/executive visas or "Green Cards" can be issued annually. This category has never been oversubscribed.

Requirements to qualify for this "fast track" Green Card:

- The U.S. company must be related to the foreign company as a branch office, affiliate, parent or subsidiary. Franchisees will not qualify as related entities.
- The applicant/employee must have full-time managerial or executive experience with the foreign company for one (1) year during the three (3) years prior to entry into the U.S.A.

Family: The ***spouse and children under age 2***1 of the Multinational Green Card manger or executive also receive Green Cards and can work and reside permanently in the United States.

> ***STRATEGY TIP****: The advantage of this visa category is that it should reduce the waiting time for Green Cards by many months. Also, the manager does not need a college degree. Finally, no Labor Certification is required (Labor Certification requires advertising the position in the U.S. and a showing that no U.S. applicants meet the minimum requirements of the position. The Labor Certification process can take many months to complete.)*
>
> ***STRATEGY TIP****: The foreign company can be a joint venture with a U.S. company so long as your foreign company exercises "negative veto control" over its operations, which usually means at least 50% ownership. This strategy works well for new companies that need an established business partner in the U.S.A.*

Extraordinary Ability

Certain persons may qualify for permanent residence as Aliens of Extraordinary Ability, which must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.

Requirements: Evidence to support an extraordinary ability petition shall include ***either*** evidence of a major one-time achievement (that is, a major, international recognized award such as a Nobel Prize), ***or at least three of the following***:

- Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor (need letters confirming awards and that they are nationally recognized);
- 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;
- 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 (in the past, we have included an author's footnote for the alien's technical assistance to satisfy this requirement);
- 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 (this would include peer review of articles, grant review, etc.);
- Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media (would need letters discussing importance of journals);
- Evidence of the display of the alien's work in the field at artistic exhibitions or showcases (this may include abstracts or ***speaking*** presentations at conferences);

- Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation (letter from head of your university research team that you are critical and a letter from someone else saying that your university is the best in this area);
- Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- Other comparable evidence, if the other standards do not readily apply to your occupation.

Sponsor: The alien can sponsor him/herself, or can be sponsored by an employer.

Outstanding Researcher/Professor

This petition requires employer sponsorship. It is available for universities and for private employers who wish to sponsor outstanding researchers.

Requirements:

- The first requirement is that the position with a private employer or university must be "permanent" which, in reference to a research position, means either tenured, tenure-track, or for a term of indefinite duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.
- Second, a petition for an outstanding professor or researcher must be accompanied by evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence shall consist of at least two of the following:
  - Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
  - Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
  - Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;
  - Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
  - Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
  - Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.
- In addition, there must be evidence that researcher/professor has ***at least three years of experience in teaching and/or research in the academic field***. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien acquired the degree, and if the teaching duties were such that the alien had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. ***Evidence of teaching and/or research experience must be in the form of letter(s) from current or former employer(s)***

and must include the name, address, and title of the writer, and a specific description of the duties the alien performed.

- The employer must submit evidence that the organization has the ability to pay the wage. That is, if the employment is contingent on the receipt of a grant not yet received, or the renewal of a grant soon to expire, the petition will have difficulty. The University generally submits a statement regarding the ability to pay the wage and the source of the wage.
- If the position is with a private, non-academic employer, the employer must have at least three persons full-time in research positions, and must have achieved documented accomplishments in the field.

Unlike individuals of extraordinary ability, an "outstanding professor or researcher" applicant ***must have a job offer***, but there is no requirement for the prolonged Labor Certification process. Accordingly, permanent residence for an outstanding researcher or ***professor can be obtained reasonably quickly.***

2. Second Preference (EB-2): Exceptional Ability and Advanced Degree Professionals. (National Interest Waivers)

This category is reserved for persons holding advanced degrees (M.S., Ph.D., J.D., M.B.A., M.A.) or who can demonstrate exceptional ability in the sciences or business.

Examples:

- A chemist with a Ph.D.;
- An engineer with a B.S. in Mechanical Engineering and five (5) years of progressive experience equal to an M.S. in Engineering;
- A highly compensated business executive with ten (10) years experience, who has been recognized for significant contributions to his industry.

Green Cards in this preference category can be issued to employees of U.S. operations who have ***no prior experience*** with the parent company abroad.

STRATEGY TIPS:

Before filing the Second Preference Petition, the employer must obtain Labor Certification, which requires advertising the position and showing that there are insufficient U.S. workers meet the position's minimum qualifications. This step can delay issuance of the Green Card by 6-18 months or more, depending on the state of employment.

There is an important exception to Labor Certification, which can eliminate much of the wait for the Green Card: the National Interest Waiver ("NIW"). The NIW is granted to business or research personnel of "exceptional ability" or with an advanced degree who can show that their activities will substantially benefit the U.S. national economy, health or welfare. The issuance of an NIW is a complex area but one of importance to a wide range of businesses, particularly high technology and scientific firms.

National Interest Waiver

Certain individuals may be eligible for a National Interest Waiver ("NIW"). An NIW means that the U.S. government will issue a green card without the requirement of a job offer and without the lengthy labor certification process.

To qualify, the foreign national must (1) possess the equivalent of a U.S. Master's degree or higher ***or*** (2) prove that he/she is an individual of "exceptional ability." To show "exceptional ability," CIS requires documented evidence of ***at least three*** of the following:

- A degree from a college or other institution of learning related to the area of expertise;
- Evidence of ten years of full-time experience in the occupation;
- A license or certification to practice the occupation;
- Evidence of remuneration for services which demonstrates exceptional ability;
- Evidence of membership in professional associations;
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional and business organizations.

In addition to these items, the applicant will need to present evidence to CIS of ***the*** "***national interest" importance*** of his/her work or research. That is, the applicant will need to show how his/her work or research advances the interests of the U.S., such as improving the health of U.S. citizens, improving working conditions, advancing the education of U.S. children, etc.

As the result of a 1998 court decision, the CIS also now requires evidence of the following in order to support a national interest waiver:

- Evidence that the benefits of the alien's work (A) are national in scope, (B) benefit more than a particular region of the country, and (c) will involve no adverse impact to other regions of the country, but in fact will benefit other regions of the country.
- Evidence that the alien's work is in an area of substantial intrinsic merit.
- Evidence that the alien has achieved a degree of expertise significantly above that ordinarily encountered in his field.
- Evidence that the national interest of the United States would be adversely affected if a labor certification were required.
- Evidence that the alien is not seeking a national interest waiver for the purpose of ameliorating a local labor shortage.
- Evidence that the alien is responsible for innovative work which serves the national interest.
- Evidence that the alien's past record of prior achievement justifies projections of future benefit.

National Interest can be shown in many ways:

- In ***business cases*** it is important to show the key role that the alien will hold in a company that plays a significant role in the national economy.

- In ***scientific or medical research fields***, it is useful to explain how the alien's research will provide an economic or social welfare benefit, such as development of new telecommunications technologies, increasing the health of pre-mature infants, or advancements in the efficiency of drug-delivery systems.
- Waivers can also be granted for ***unique contributions*** which can be expected to improve wages and working conditions, provide affordable housing, improve the U.S. environment or otherwise benefit the U.S.
- Persons holding Ph.D.s or Master's Degrees may also be able to use their substantial contributions to scientific advancement to qualify for a national interest waiver.

STRATEGY TIP: National Interest Waivers may be subject to increased scrutiny by the CIS due to the increased popularity of this exception to normal green card procedures. Your exceptional ability or advanced degree employee should consult with an immigration expert to decide whether grant of the NIW is likely, based upon the specific facts and circumstances of the particular case.

Labor Certification

If an NIW is not possible, the alien must rely on ***labor certification***, discussed below (under Third Preference EB-3). This requires advertising to see if there are qualified U.S. workers available for the job.

Special Handling Labor Certification for College/University Professors

Unlike regular labor certification, there is a special rule for universities which allows universities to apply for a green card for a tenured or tenure-track teaching professor even if other qualified U.S. workers apply. The case can proceed as long as, in the judgment of the university, the foreign professor is more qualified than other qualified U.S. applicants. ***This is an excellent option for tenure-track teaching professors who may not qualify for National Interest waiver***.

In order to take advantage of special handling, the following factors must be met:

- The university must have engaged in national, competitive recruitment.
- The labor certification must be filed within 18 months of the decision to hire.

The university must still apply to the DOL for Labor Certification, submitting all ads, list of resumés received and reasons for rejection of U.S. applicants.

3. Third Preference (EB-3) for (a) Professionals holding B.S. or B.A. Degrees, (b) skilled workers (requiring 2 or more years of experience), and (c) other workers.

Labor Certification

Labor Certification is required for the EB-3 category, and for EB-2 where an NIW is not available.

In order to sponsor an employee for a green card through labor certification, the employer must show that adequate recruitment has been conducted by the employer and that there are not enough qualified U.S. workers available to fill the positions available for the job offered.

On December 27, 2004, the U.S. Department of Labor (DOL) published a new regulation that will govern all applications for Alien Labor Certification filed on or after March 28, 2005. Employers file applications for Alien Labor Certification with the DOL in order to sponsor an alien for Lawful Permanent Resident status by demonstrating that there are insufficient U.S. workers available who meet the minimum qualifications for a given position. The DOL's new regulation, known as Program Electronic Review Management (PERM), will ***not*** apply to applications for Alien Labor Certification that are currently pending. Neither will PERM apply to applications for Alien Labor Certification that are filed before March 28, 2005. This summary will describe the procedure for filing basic cases using the PERM procedure, followed by a discussion of the special rules for filing cases for university teaching faculty.

PERM provides for an electronic automated attestation system to replace the old paper-based system, which required both the local state employment agency staff and DOL federal staff to review all applications filed. Under PERM, employers will complete an electronic application form called an ETA-9089 in which they answer a series of questions relating to the sponsoring employer and the job offer the employer wishes to have certified. The employer must maintain certain documentation in support of the application but need not submit it to the DOL unless the employer is audited. The DOL will audit some applications at random and others for cause prior to certification.

In cases where no audit is initiated, the DOL estimates that it will approve PERM cases within 45-60 days. In the event of an audit, the DOL Certifying Officer will send the employer an audit letter requesting additional documentation. The employer will have 30 days to respond to this letter with a possible 30 day extension at the request of the employer. Upon receiving the employer's response, the DOL Certifying Officer may (1) approve the labor certification application; (2) request more documentation; or (3) require that the employer conduct additional recruitment for the position under the direct supervision of the DOL.

Additional key provisions and ramifications of the PERM regulation include the following:

> ***Recruitment Evidence***: Before filing Form ETA-9089, employers will have to undertake certain recruitment efforts and document the results. The nature of this recruitment is specifically mandated by the regulation. At a minimum the employer must:
>
> 1. Post a notice of the job opportunity in conspicuous places at the work site for at least 10 consecutive business days.
>
> 2. Post a notice of the job opportunity through all in-house media within the employer's organization. This includes both electronic (e.g., websites) and printed in-house media and is separate from the posting requirement listed above. The duration and manner of these in-house media postings must accord with normal procedures used by the employer to recruit for similar positions.
>
> 3. Place a Job Order with the State Workforce Agency (SWA) for at least 30 days. The SWA is the local state office of the DOL having jurisdiction over the place of employment.
>
> 4. Place two advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment. The ads need not

include the salary or a detailed listing of the job requirements but they must be specific enough to apprise U.S. workers of the job opportunity. The employer's name must be mentioned in the advertisement. If the job requires experience and an advanced degree, the employer may opt to use a professional journal advertisement instead of one of the two Sunday ads.

5. For professional positions, take three additional recruitment steps. In addition to the measures set forth above, for professional positions (i.e., those that require that attainment of a Bachelor's degree or higher), the employer must undertake at least three of the following ten recruitment efforts within 180 days before filing the application: (1) job fairs; (2) employer's web site; (3) job search web site other than the employer's; (4) on-campus recruiting; (5) trade or professional organizations; (6) private employment firms; (7) an employee referral program, if it includes identifiable incentives; (8) a notice of the job opening at a campus placement office; (9) local and ethnic newspapers if appropriate for the job opportunity; and (10) radio and television advertisements.

6. Prepare a detailed recruitment report. The employer must prepare and sign a recruitment report upon completion of advertising. The report must include the number of hires and the number of U.S. workers rejected categorized by the lawful job-related reasons for the rejection. The Certifying Officer may request copies of the resumes of those U.S. workers who applied for the position and require the employer to sort the resumes according to the basis for rejection.

7. Consider qualified laid-off workers: If applicable, the employer must notify and consider for the position any workers it laid off within the six months prior to filing Form ETA-9089 who had worked for the employer in the occupation for which certification is sought or in a related occupation. The employer must document that it offered the position to those laid-off workers who were able, willing and qualified to do the job.

Prevailing Wage: Under PERM, the employer will be required to pay 100% of what DOL determines to be the prevailing wage for the certified position. Previously, employers were permitted to pay within 95% of the prevailing wage for the position. Employers must submit a prevailing wage request form to the SWA and receive a response before filing Form ETA-9089. If an employer disagrees with a prevailing wage determination, it may file supplemental information, submit a new prevailing wage request or appeal the SWA's determination.

***Special Rules for University Teaching Faculty*:** Labor Certification Applications filed on behalf of college and university teachers were previously processed through a "Special Handling" procedure at the DOL. Under PERM, the procedure remains in place but is called "Optional Special Recruitment" for college or university teachers. This procedure is very beneficial, since standard for evaluating US candidates is more favorable to the university teaching faculty. Under normal PERM processing, the standard is: if any US worker meets even the minimum qualifications for the position, the employer cannot proceed with the application for the foreign worker, even if the foreign worker is better qualified. Under Optional Special Recruitment, the standard is: if the foreign faculty

member is the best qualified, then the employer can proceed with the application even if other minimally qualified US workers applied.

In order to take advantage of this standard, cases for university teaching faculty filed on or after March 28, 2005 must include the following information:

- Form ETA 9089: This is the new attestation-based Labor Certification Application under PERM. Applications must be filed within 18 months after the date that the alien is selected for the position pursuant to a competitive recruitment process.

- Prevailing Wage: The employer must agree to pay 100% of the determined prevailing wage for the position once the alien becomes a permanent resident. Previously, employers were permitted to pay within 95% of the prevailing wage for the position. If an employer disagrees with a prevailing wage determination, it may file supplemental information, submit a new prevailing wage request or appeal the SWA's determination.

Recruitment Documentation: The employer must recruit in accordance with the normal procedures set forth in PERM **or** document that the alien was selected through a competitive recruitment process during which the alien was found to be more qualified than any of the U.S. workers who applied. The employer must prepare a signed, detailed statement explaining its recruitment efforts that lists the total number of applicants and the specific, job-related reasons why the alien was found to be more qualified than each of the other U.S. worker applicants. The employer must also prepare the following documentation:

- A final report of the body recommending that the alien teacher be hired following the competitive selection process;

- A copy of an advertisement placed in at least one national professional journal, including the job title, duties and requirements;

- Evidence of all other recruitment sources used by the school to fill the position; and

- A written statement attesting to the alien's educational or professional qualifications and achievements.

Processing after the Labor Certification is approved

- After the DOL issues a labor certification, the employer files a green card petition (form I-140) with CIS. CIS reviews the application to see that the foreign applicant in fact qualifies for a green card by meeting all of the requirements demanded of U.S. workers.
- Assuming the I-140 is approved, the employee is now eligible for a green card, and can apply to "adjust status" to permanent resident if a visa number is available. This involves fingerprinting, a medical exam and numerous forms.

Third Preference (EB-3 Unskilled Workers)

Under current law, full-time employees in jobs not requiring two years experience or training can still qualify for Green Cards provided that a testing of the job market under ***Labor Certification*** procedures shows that there are no U.S. citizens or permanent residents meeting minimum qualifications for the job.

4. Green Cards For Investors

A controversial Green Card option is the Job Creation or "Million Dollar" Investment Visa.

Requirements*:** To be eligible for this important ***Permanent Resident Visa, you must:

- Invest in and actively manage or establish policies for a "qualifying commercial enterprise" which will employ at least ten (10) U.S. workers; ***and***
- Be in the process of investing or have invested a minimum of $1,000,000. ***Exception***: Certain "targeted areas" (rural or high unemployment) require an investment of ***only $500,000***. Your State or local economic development agency can provide you with a list of rural and urban areas qualifying for the lower $500,000 investment rules.

A "qualifying commercial enterprise" can be any of the following:

- the creation of a brand new or original business; or
- the purchase of an existing business and "simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results;" or
- an investment in an existing business which increases its net worth and number of employees by 40%, resulting in at least ten new jobs and a new net worth which is 140% of the pre-expansion net worth; or
- an investment in a troubled business which has been in existence for at least two (2) years and has incurred a net loss equal to at least twenty percent (20%) of its prior net worth, and the investment saves at least 10 jobs.

Type of Investment: The *capital investment* can be a combination of cash, inventory, equipment or loans, so long as borrowed funds are not secured by the assets of the new or existing enterprise. Qualified corporate/immigration counsel can assist you in properly structuring your investment and in reducing the amount of cash required. The investment capital can be from a U.S. source, such as a commercial bank, or from overseas.

Employment of Ten U.S. Workers: The investor can take up to two years to create the required ten (10) full-time employment positions if he submits a comprehensive business plan. A new *Pilot*

Program liberalizes the job creation rules for investments in export related industries in "***Regional Centers***" approved by the Immigration and Naturalization Service ("CIS").

Family: A qualifying Investor and his spouse and children under 21 will receive Conditional Permanent Residence for two (2) years and then Permanent Residence (Green Card) based upon the continued viability of the investment.

> ***STRATEGY TIP****: The actual amount of cash required to qualify can be reduced by resorting to a number of corporate financing options. Immigrant Investor Visas will be of greatest benefit to residents of Hong Kong, China, Indonesia, Israel, South Africa, Saudi Arabia, Brazil, and other Asian, African, Middle Eastern and South American counties. Many nations from these areas do not have commercial treaties with the U.S.A. which qualify their nationals for other investment visas, such as the E-2.*

5. Adjustment of Status/Consular Processing

The final step in obtaining permanent residence is either adjusting status in the U.S. or consular processing abroad. Both processes are designed to determine if there are any grounds for excluding the beneficiary from permanent resident status. Grounds for exclusion can include certain types of diseases, criminal background, affiliation with the Nazi or Communist parties, sale or trafficking in illegal drugs, terrorist activities, etc.

Adjustment of status applications can be filed concurrently on I-140 petition or anytime thereafter by presenting a copy of the I-140 receipt notice. Consular processing, on the other hand, cannot be filed until the I-140 petition is approved. There are pros and cons for each type of processing, so you should consult your immigration attorney to see which one is right for you.

Work Authorization/Travel Abroad

During the adjustment process, individuals on L and H visas can continue to work using those visas, and to travel in and out of the United States using the L or H visa. Other visa holders cannot travel outside the United States during the pendency of the adjustment application without an advance parole document (application Form I-131). In addition, adjustment applicants in visa categories other than H and L should apply for work authorization (application Form I-765) in order to work during the pendency of the adjustment process. Depending on where the application is filed, advance parole can usually be obtained within several weeks; work authorization must be issued within 90 days of filing.

6. Citizenship

A foreign national is eligible for citizenship five years after obtaining a green card based on employment, or three years after obtaining a green card based on marriage. The citizenship application can be submitted up to 90 days prior to the five-year (or three-year) anniversary. The applicant must have "resided" in the U.S. for at least five years (three years in the case of marriage to a U.S. citizen), and must have been physically present in the United States for at least half of that period of time. Absence from the United States for more than six months creates a presumption of lapse of continuous residence; absence for one year or more creates an absolute bar, and the five-year (or three-year) clock must begin again. There are mechanisms for preserving continuous residence which are beyond the scope of this handbook.

PART THREE

I-9 compliance Guidelines

I-9 Guidelines

The I-9 process is designed to require employers to verify the identity and work eligibility of individuals who present themselves for employment. At the same time, the form is designed to prevent unnecessary or discriminatory inquiry into the employee's nationality. As with many employment issues, it is critical for employers to be familiar with the rules and requirements of the I-9 process in order to avoid expensive litigation and possible fines.

There are generally three instances where I-9 and immigration issues arise in a hiring of foreign professionals:

- ***Recruitment***: What questions can you ask regarding nationality and visa status; what questions can you absolutely ***not*** ask.
- ***Job Offer***: What visa must you obtain. This issue was discussed in the Part 1 of this Handbook.
- ***Hiring Stage***: I-9 process.

Each of these phases has its own rules.

Recruiting Inquiries:

Can:

Ask if an applicant is "currently authorized to work in the United States on a full-time basis for any employer."

- If the applicant answers "yes," you may then ask "will you require now or in the near future employment visa sponsorship (i.e., H-1B visa).
- You ***may not*** ask what their employment eligibility is based on.
- If the applicant answers "no" to your original question whether they are currently authorized to work in the United States on a full-time basis, you may ask what their current immigration status is.
- These questions, if asked, should be asked of everyone, not just "foreign-looking" or "foreign-sounding" candidates.

Cannot:

- Ask if the person is a U.S. citizen.
- Ask how the person obtained citizenship.
- Ask if the person is a permanent resident alien (i.e., green card holder).
- Ask what kind of work authorization the person has.
- Ask to see the green card.
- Ask what the person's visa status is.
- Ask what the person's home country is.
- Ask when their work authorization expires.

- Ask if the applicant has "unlimited work authorization" or work authorization for an "indefinite period of time."

  Under IRCA employers cannot reject "protected individuals" because of time limited employment eligibility, even if the remaining eligibility is short. For example, asylees, refugees, and temporary resident aliens or applicants for temporary residents may have work authorization that is only valid for six to eighteen months from the time that it is obtained. However, all of these people are able to obtain automatic extensions of work authorization and are, protected under IRCA as "intending citizens" of the United States. Thus, the better practice is never even to inquire as to the remaining time left on work authorization, since it is not relevant at the recruiting or interview stage.

- Ask what the person's native language is.
- Ask how the person acquired the ability to read, write or speak in that language.
- Ask if the person intends to become a citizen of the United States.
- Ask if the person intends to remain permanently in the United States.

  Note: Persons who would need an employer to petition to obtain an H-1B visa or a green card are not "protected individuals" under IRCA. Therefore, the employer is free to provide this service or not provide this service. ***However***, the employer should not have a policy that has a disproportionate impact on employees of certain national origins. In other words, you may not apply for green cards only for nationals of certain countries and not nationals of other countries.

I-9 Verification

The following is a list of "dos and don'ts" to be relied upon in the I-9 verification process.

Do:

- Perform I-9 processing at time of hire, not at time of interview. (Note: Some employers have employees fill out the I-9 at the time of interview. This is not, in and of itself, improper as long as all interviewees are required to fill out the I-9. ***However, this practice is not advisable since a rejected applicant could bring a claim alleging that information on the I-9 was used for unlawful purposes).***
- Accept all documents listed on the I-9 form that "reasonably appear to be genuine," and "relate to the individual."
- Set up a tickler system to track cases that must be reverified.
- Reverify the employee's I-9 documents if given a temporary stamp of permanent residence, rather than the actual green card.
- Keep I-9 forms separate from personnel files so that they may be easily reviewed and produced. It also makes it easier to destroy after three years from date of hire or one year from date of termination, whichever is later.
- Keep terminated employees' I-9 forms separate from current employees.

Do Not:

- Specify which documents an employee may present in connection with the I-9 verification.

  Note: Employers may request social security numbers at the time of application as long as ***all*** applicants are required to provide a social security number and that any applicant who cannot provide one be given a reasonable time to do so.

- Refuse to accept specific documents.
- Ask to see a document with an expiration date if the document the applicant presents does not have an expiration date on it.
- Ask for actual I-9 documents rather than receipts for such documents. If an employee presents receipts for the replacement of any of the documents listed on an I-9, that person has 90 days from the date of hire to submit the original documents, and may work in the interim.

  Note: A notice that an application for work authorization has been ***filed*** with CIS, but has not yet been adjudicated, is not a "receipt" for this purpose. Rather, it applies to the replacement of an existing document that has been lost, stolen or damaged.

- Ask F-1 students who are still performing practical training while in school to verify that they are enrolled full time. This would be considered document abuse under IRCA.
- Fire an employee at the time of reverification if their work authorization had expired without first giving that person a chance to show that he or she is still eligible to continue working. Generally, an employee will have three days to present I-9 documents. This policy must be consistently applied to all employees to prevent the possibility of national origin discrimination.

In summary, recruiters should obtain as little information as possible about citizenship status, employment authorization or national origin before actually hiring the applicant. Once the applicant has been hired, the person responsible for performing I-9 verification should strictly follow the instructions on the I-9 form and allow the employee to select whatever documents within each column s/he chooses to present and not inquire any further about documents which "reasonably appear to be genuine on their face."

I-9 Compliance

Changes in I-9 Procedures

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA-IRA), passed October 1, 1996, made several changes in the areas of I-9 compliance:

- Reduced the list of acceptable documents for I-9 purposes to evidence identity and work eligibility.
- Reduced penalties for employers who commit "technical" I-9 paperwork violations.
- Required that employers must have discriminatory intent to be liable for "document abuse" violations.
- Created new civil and criminal penalties to deter document fraud.
- Increased number of investigators to enforce I-9 compliance.

- Created a new pilot program to telephonically verify, based on government data bases, the work authorization of employees prior to hiring.
- Barred government contracts to employers who knowingly hire or continue to employ illegal aliens.

CIS has only issued interim regulations implementing these changes. No final regulations have been released. This section will review each of these changes in detail.

Acceptable I-9 Documents

First, the list of acceptable documents an employee can present for I-9 purposes to evidence identity and/or work eligibility has been reduced by the 1996 legislation in hopes of simplifying an employer's compliance with these requirements. However, this change applies only with respect to hirings occurring on or after September 30, 1997. ***Although these revisions are currently in effect, enforcement has been postponed pending issuance of final regulations and the release of a new I-9 form, with the reduced list of documents. No action will be taken against employers for relying on documents listed in the current version of the form.***

With regard to List A Documents, which evidence both employment eligibility ***and*** identity, the new law ***removes***:

- The Certificate of US Citizenship (CIS form N-560 or N-561);
- The Certificate of Naturalization (CIS form N-550 or N-570);
- Reentry Permit; and
- Refugee Travel Document.

As a result of all of these changes, the revised List A documents are:

- US Passport, expired or unexpired;
- Alien registration receipt card (green card) - CIS form I-551;
- Employment Authorization Cards; and
- Unexpired foreign passport with I-551 stamp or attached I-94 Arrival-Departure Record.

List B Documents (documents which establish identity only), are now limited to drivers license or state issued ID card. School ID cards, voter registration cards, U.S. military cards, draft records, military dependent ID cards, U.S. coast guard merchant marine cards and U.S. citizen ID cards (CIS form I-197 or I-179) are no longer acceptable.

Lastly, the 1996 law ***removes*** the following List C Documents, which evidence employment eligibility only:

- Certificates of birth issued by local government authorities in the United States
- Unexpired employment authorization document issued by CIS.

As revised, List C Documents establishing employment eligibility are limited to:

- Social security number card with no employment restriction; and
- Form I-94 Arrival/Departure Record.

Recognizing that some people may have difficulty presenting something from this reduced list, CIS reiterated its "receipt rule," identifying three instances when receipts are acceptable in lieu of a required document. The employee must present:

- ***Application for replacement of lost or stolen documents***. Please note that an application for initial work authorization or extension of existing but expired work authorization is not an application for "replacement" document.
- ***I-94 Card that CIS has marked with a "Temporary I-551" stamp*** is a receipt for Form I-551 until the expiration of the stamp or if no expiration, within one year from date of admission. Then it would need to be reverified.
- ***I-94 Card indicating refugee status***. If individual presents a I-94 card with a refugee or asylee admission stamp, then they have 90 days to present either a Form I-688 or I-766 EAD (List A) or a social security card containing no employment restrictions (List C) and some other List B document. However, both asylees and refugees are authorized to work "incident to status" and are NOT required to present a work authorization card to be eligible to work.

"Good Faith" Compliance Attempts

Second, the 1996 legislation adds a "good faith" defense for employers who have committed merely technical or procedural errors in completing the I-9 form. Under the change in the law, an employer cannot be fined for merely technical or procedural errors in completing the form, unless the CIS or the Department of Labor has first explained the error to the employer and given the employer 10 business days to correct the error. Only if the error has not been corrected will CIS or DOL be eligible to fine the employer. Please note that this revision to the law only applies to persons hired and I-9 forms completed after September 30, 1996. Technical and procedural violations on I-9 forms completed prior to September 30, 1996, but still required to be retained under the law, would not receive the benefit of the 10-day cure rule.

It is critical for employers to distinguish between "technical or procedural errors" versus "substantive" errors. Examples of "technical or procedural" errors that could be corrected within a 10-day cure period are:

- The employee failing to date Section 1 of the application;
- The employee failing to complete maiden name, address or birth date in Section 1;
- The employer failing to date Section 2; and
- The employer failing to complete the date of hire in the middle attestation of Section 2.

Substantive violations that are not curable are:

- Failure of employee to complete Section 1 attesting to citizenship or immigration status.
- Failure of employee to sign Section 1.
- Failure of employer to review and document either a List A or a List B and List C document in Section 2.
- Failure of employer to sign Section 2.

Requirement of "Discriminatory Intent"

A third revision made by the 1996 law amends the anti-discrimination statute. Now, for an employer to be liable for "document abuse" (asking for more or different documents than required for work authorization), the employee must show that the employer ***intended*** to discriminate based on national origin or citizenship status. This "intent" requirement only applies to employer requests for documents on or after September 30, 1996. The goal of this revision is to ensure that employers not be fined for document abuse violations if the employer's actions were motivated by a good faith effort to comply with IRCA's verification requirements.

Document Fraud

Fourth, despite the seemingly pro-employer revisions, you can now be found civilly liable for document fraud if you prepare, file or assist another person in preparing or filing an application for benefits with knowledge or in reckless disregard of the fact that such application or document was falsely made. This law would cover signing an I-9 form when you know that the documents presented are false or insufficient, or you know that the person is not authorized to work in the U.S. In fact, the law created a criminal penalty of up to 5 years in jail, on top of the civil penalty, if you fail to disclose your role as preparer of a false document. For example, if you as an employer, complete an I-9 for someone who does not speak English (or not very well), but fail to disclose your role as preparer by signing the certification, then you could be criminally liable if the I-9 is considered "falsely made."

Increased Enforcement

Fifth, the law also made it a priority to focus on work site enforcement initiatives and justified increasing the number of agents and support staff who investigated I-9 compliance exclusively from 317 to 701. Although most of the increased enforcement will focus on industries traditionally associated with illegal employment, including food processing, construction and agricultural production, this is still a substantial increase in the pressure by CIS on employers to establish proper I-9 procedures.

Government Contractors

Finally, the last major change in this area is that President Clinton issued an executive order which places additional penalties on government contractors who violate IRCA's prohibitions against the knowing employment or continued employment of unauthorized aliens. Such employers will be barred from procuring government contracts for one year. Note that this bar does not apply to paperwork violations, only to hiring violations. Under the order, the knowing employment of even one unauthorized alien in a pool of several thousand employees would still be sufficient to trigger the bar.

CONCLUSION

This Handbook is published by the Immigration Practice Group ("IPG") of McCandlish Holton PC. The IPG of McCandlish Holton PC regularly advises U.S. and foreign companies and U.S. universities on all aspects of hiring and transferring international personnel. Immigration Specialists in the IPG are Mark B. Rhoads, Helen L. Konrad, and Jennifer Minear.

All of the technical details, regulations and procedures regarding immigration cannot be explained in this brief Handbook. The highlights discussed above outline strategies and identify issues regarding the employment of foreign personnel. Current U.S. visa rules, labor and immigration laws, and bilateral trade and investment treaties offer many opportunities to transfer essential foreign personnel to U.S. operations.

This handbook should not be considered legal advice. Immigration is a complex area of law, and particular issues should be addressed with experienced immigration counsel.

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