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## 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 21*** of the Multinational Green Card manager 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 countries. 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.