

OVERVIEW OF EMPLOYMENT-BASED LAWFUL PERMANENT RESIDENCE

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Presentation Outline

- Overview of permanent residence
- Overview of employment-based permanent residence
- Outstanding professors and researchers
- Labor certification
 - Labor certification for teaching faculty
 - Labor certification for other professional occupations
- Adjustment of status

Lawful Permanent Residence

■ What is it?

- Authorization to live and work permanently in U.S.
- Authorization to enter U.S. with “green card” and passport (no visa necessary)
- A “green card”

■ What is it NOT?

- Citizenship
 - Can apply for citizenship (naturalization) after being an LPR for a certain period
 - There are some additional rights/benefits for citizens

■ Who can become a permanent resident?

– Not just anyone

- The law provides certain narrow grounds for LPR
 - Family-based: relationship to U.S. person
 - Employment-based: benefit to a U.S. employer
 - Public policy-based: (“asylum”/“lottery”) to “avoid chaos” and to balance the sources of immigration to the U.S.
- Total number of LPR “visas” is limited
 - Queues may develop, so depending on home country and category, it could be a long process
 - Petition approval places people in queue for the visa until their category/country allotment is available again
- Certain people are ineligible: people who committed serious crimes or immigration violations, entered U.S. illegally, etc.

■ Common Routes to LPR

– Asylum

■ Self-petition

- Must prove likelihood of persecution if you return home

– Diversity Visa Lottery

■ No petition -- apply on Dept. of State web site

- Must be from country with low immigration to U.S
- DOS chooses 50,000 per year (notifies 100,000)

– Family relationship to U.S. Citizen/L.P.R.

■ U.S. citizen/LPR relative files petition

- Preferences and queues

– Employment

■ Usually employer offering full-time permanent job files petition, but ***some exceptions allow self-petition***

- Preferences and queues

Employment-Based LPR

■ EB LPR Categories

- 140,000 “visas” allocated among five categories “preferences” annually
 - **First Preference (EB-1)**
 - Aliens with extraordinary ability
 - **Outstanding professors and researchers**
 - Certain multinational executives and managers
 - **Second Preference (EB-2)**
 - **Members of the professions holding advanced degrees**
 - Aliens of exceptional ability
 - **Third Preference (EB-3)**
 - Professionals and skilled workers
 - Other workers
 - **Fourth Preference (EB-4):** Certain special immigrants
 - **Fifth Preference (EB-5):** Investors in commercial enterprises

■ Overview – Three Common Routes in Higher Education

– Outstanding Professors and Researchers

- Tenure-track or permanent research position required
 - Employer files I-140 immigrant petition
 - Employee files I-485 adjustment of status application

– Advanced-Degree Professionals, Professionals, etc.

- Full-time, permanent job required
 - Employer files labor certification application with U.S. Dept. of Labor
 - For “professional occupations,” after extensive advertising and showing no qualified U.S. applicants
 - For “college and university teachers” (“special handling”) after one ad and showing that most qualified applicant was hired
 - Employer files I-140 immigrant petition
 - Employee files I-485 adjustment of status application

– Those working in national interest or with extraordinary ability

- No need to have permanent, full-time job
 - Employee may self-file I-140 immigrant petition
 - Attractive for post-docs and others the institution might not sponsor

Outstanding Professor/Researcher

- EB-1 “Outstanding Professor or Researcher”
 - Available for
 - Professors in a tenure-track or tenured position
 - Researchers with a “permanent” position
 - Requirements
 - At least three years of experience in the field
 - Recognized internationally as outstanding in a specific academic area, as established by evidence in at least two of the following categories
 - original scientific or scholarly contributions to the field (letters)
 - authorship of scholarly books or articles
 - published material about applicant’s work
 - participation, individually or on a panel, judging the work of others
 - receipt of major prizes or awards for outstanding achievement
 - membership in an organization that requires outstanding achievement
 - other comparable evidence
 - Careful and specific definition of the field of endeavor is crucial
 - Expert opinion letters powerful evidence (must be carefully focused)
 - Main advantages
 - Labor certification is not required
 - EB-1 least likely to retrogress or backlog

■ Advantages/Disadvantages

– Advantages

- Bypass labor certification process
 - Recent DOL rule requires employer to pay all costs associated with labor certification
 - Especially “professional occupation” process for researchers
 - For highly focused and engaged scholar, can be quickly prepared/filed in case of emergency to protect work authorization (file petition and AOS application concurrently, file 365+ days before H-1B expires)
 - Can be good option for faculty if “special handling” criteria not met
- EB-1 rarely backlogs
 - Especially scholars from India and China may have reason to prefer EB-1, depending on Visa Bulletin (balancing institutional/employee interests, want vs. need for fast green card)

– Disadvantages

- Extensive documentation required
- Subjective and “un-scientific” process
 - Sometimes hard for scientific brain to process
 - Difficult to predict chances of success accurately (*hard to know minimum evidence unless you have many denials*)
- Although scholar gathers evidence, requires extensive advising, coaching, etc. by advisor

■ Advising considerations

- The decision to/not to pursue the “outstanding” route
 - May not be best for those eligible for “special handling” labor cert.
 - For professors (“teachers”), labor certification is relatively quick and simple
 - Collection of evidence for “outstanding” petition can take longer than labor certification
 - Missed 18 month window, failed to run print ad, institution or professor refuses re-recruitment?
 - “Outstanding” route requires much more advising than “special handling”
 - For researchers, labor certification more difficult, but often successful
 - EB-2 backlogs and actual vs. perceived need to rush
 - Scholars with “aging-out” children may find EB-1 attractive as filing AOS may gain protections provided by Child Status Protection Act
 - In emergencies, may be possible to file concurrently I-140 and I-485, with applications for EAD and advance parole, to protect work authorization
 - Often H-4 spouses/children want EAD quickly, so encourage EB-1
 - Often, though, unfounded general anxiety is the driving factor
 - “My friend” has advised extensively about nonexistent advantages of EB-1, problems with a service center, etc., so misinformation abounds

Labor Certification (EB-2 and EB-3)

■ What is it?

- Determination by USDOL that there is no qualified U. S. worker available to fill the position . . .
- The first step in the “green card” process for most EB petitioners (after LC approved. Employer can file immigrant petition)

■ How is it obtained?

- Generally, employer must demonstrate proper recruitment efforts and that no qualified U.S. worker applied (*different for “college and university teachers”*)

■ Problems

- Complicated and arcane requirements, not “real world”
- Unforgiving computer system now “reads” applications
- Generally U. S. worker need only meet the ***minimum qualifications*** for the position
 - So you’re not proving that you found the most qualified applicant (that would be easy)
 - ***Different and much preferable standard for “college and university teachers”***

■ DOL regulations create three recruitment processes for:

- Non-professional occupations (jobs not generally requiring bachelor’s degree)
- Professional occupations (jobs generally requiring a bachelor’s degree or higher)
- “Special handling” (more precisely, “Optional special recruitment and documentation procedures for college and university teachers”)

■ LC PROCESS: Professional Occupations

– OVERVIEW OF PROCESS

- Obtain prevailing wage determination
- Conduct proper recruitment and prepare “recruitment report”
- Post notice for 10 business days and publish in usual in-house media
- Wait 30 days (but not more than 180 days) and file ETA-9089 online
- DOL may approve, audit, or deny
- If approval, employer may file I-140 for employee

– RECRUITMENT

- Employer must conduct proper recruitment (30 to 180 days before filing), including:

– MANDATORY RECRUITMENT

▪ ***Job Order:***

- Place ad with State Workforce Agency (SWA) to go into job bank and remain active for 30 days

▪ ***Advertisements in newspaper or professional journal***

- Two Sundays in most appropriate newspaper of general circulation in area of employment
- If job requires experience and advanced degree, and professional journal ad would be normal, employer may place advertise in professional journal in lieu of one Sunday newspaper ad

■ **LC PROCESS: Professional Occupations, ctd.**

– RECRUITMENT, ctd.

- Employer must conduct proper recruitment (30 to 180 days before filing), including:

– **ADDITIONAL RECRUITMENT, *three*** of the following

- recruitment at job fairs
- recruitment through the employer's web site
- recruitment through a job search web site (other than the employer's site)
- on-campus recruiting
- recruitment through trade or professional organizations
- use of private employment firms or placement agencies
- use of an employee referral program
- use of a campus placement office
- recruitment through a "local" or "ethnic" newspaper
- radio and television advertisements.

■ LC PROCESS: “College and University Teachers”

- “Optional special recruitment and documentation procedures for college and university teachers,” but commonly referred to as “special handling” as it was known before PERM
- “College and university teachers” are those who engage in “some classroom teaching”
 - No specific course load requirement
- RECRUITMENT
 - One advertisement in a national **PRINT** (not online-only) professional journal
 - Employer must have chosen **best qualified applicant**
 - *No need to prove that no minimally qualified U.S. applicants applied*
 - Documentation includes statement by employer’s official with hiring authority setting forth the total number of applicants and job-related reasons why the foreign national is best qualified
- FILING DEADLINE
 - Must file the labor certification application in DOL’s PERM system within 18 months of “selection of the alien” (usually job offer letter)

■ **Special Handling, ctd.**

– Advantages

- If recruitment proper (in-house processes established and followed) re-recruitment not required, so new faculty arrive on-campus “special handling”-ready
- Little or no agency discretion involved
 - If proper procedures followed, very little chance of denial by DOL or USCIS
- Filing LC timely provides certainty to employee concerning “green card” and continuing H-1B work authorization

– Disadvantages

- EB-2 or EB-3 for some employees will involve a long wait before adjustment of status can be filed
 - Leads to problems for some employees, like staying in same job for many years
- If your in-house policies and procedures are such that you have to re-recruit, you will have many unhappy employees, department chairs, etc. and may encounter disasters from time to time

– Institutional policies

– Current issues

Keys to Successful LC Process

- Make sure job requirements are “normal” (per DOL) or justifiable due to “business necessity”
- Don’t require more qualifications than employee had at start of employment
 - Employer cannot require more education or experience for the job than the employee had when she/he started
- Careful recruitment and filing
 - Carefully establish job requirements
 - Gather documents (diplomas, experience letters) establishing that employee met requirements before hired
 - Create advertisements and conduct recruitment carefully
 - For “professional occupation” route
 - Choose additional recruitment vehicles strategically
 - Carefully calculate time periods (30 - 180 day window)
 - Carefully review applications to see if requirements met and reject in writing if not (interview if seem to qualify)
 - For “special handling” route
 - Ensure print (*paper*) ad
 - Carefully calculate 18-month window from selection (offer letter)
 - Carefully review applications and justify your selection of “best qualified”
 - Post notice of filing for 10 consecutive business days (or provide to union), and record dates and place of posting
 - If employer posts such notices in in-house media (intranet, newsletter), post there
 - Prepare thorough “recruitment report” and audit file
 - Meticulous attention to detail in filing ETA-9089
 - If audited, respond timely and with thorough required evidence

Which Route is Best?



Benefits of Each Step

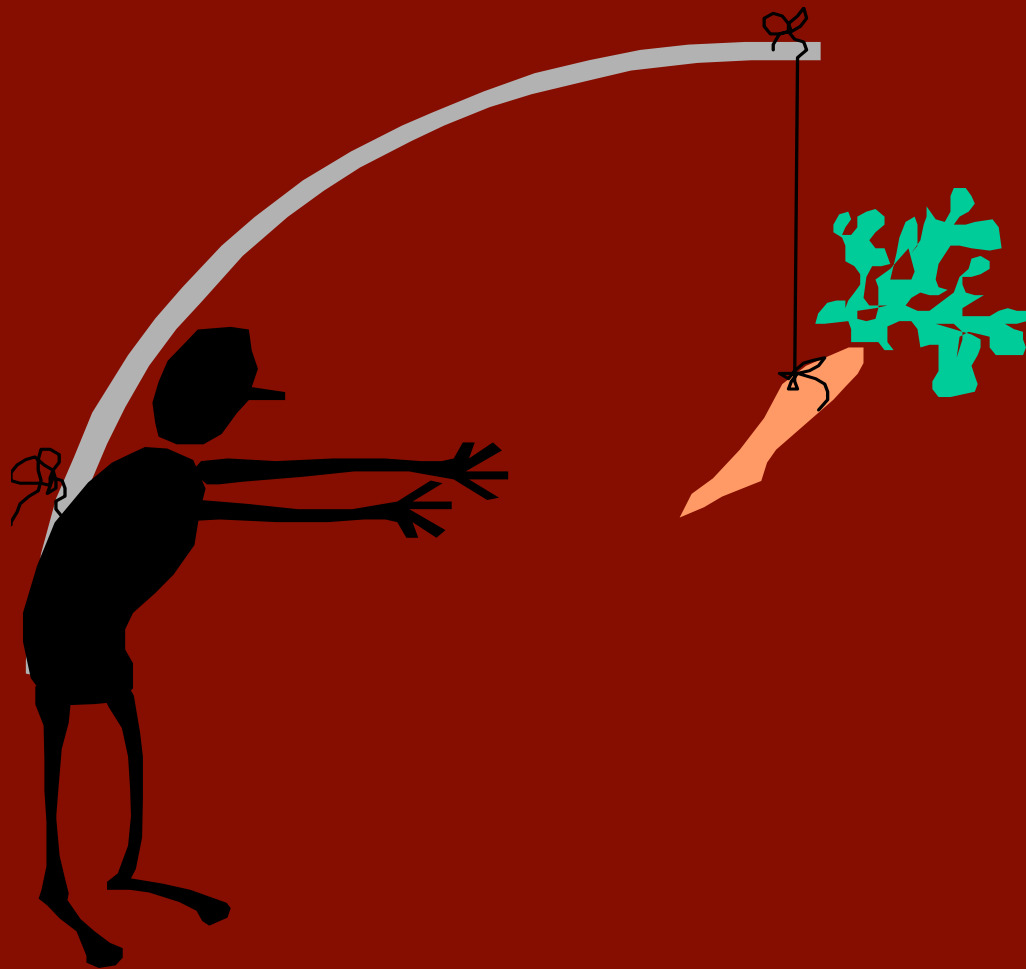
- **Approval of labor certification application**
 - Allows employer to file I-140 immigrant petition
 - Provides no work authorization or right to remain in U.S.
 - Establishes beneficiary's place in immigrant visa queue
 - If LC filed before 5th year of H-1B ends, indefinite extensions of H-1B
- **Approval of I-140 immigrant petition**
 - Establishes beneficiary's right to apply for AOS or immigrant visa, eventually (per Visa Bulletin)
 - Provides no work authorization or right to remain in U.S.
 - If first step, establishes beneficiary's place in immigrant visa queue
 - If approved, but beneficiary can't file AOS because of immigrant visa backlog, indefinite extensions of H-1B
- **Filing I-485 adjustment of status application**
 - Basically provides right to remain in U.S. until adjudication
 - *Until I-485 filed, LPR process provides no right to remain/work in U.S.*
 - Provides right to obtain work card and travel document

Adjustment of Status (AOS)

■ Last step in LPR process

- A request that USCIS “adjust” applicant’s status to LPR (alternative to “consular processing” an immigrant visa)
 - Must have current “priority date” on Visa Bulletin to file AOS
 - Priority date established by filing of first step in LPR process
 - May file after immigrant petition approved or—if priority date is current—“concurrently” with petition
 - Depending on country, category, and demand for “green cards,” the wait for priority date to become current can be a long one
- Dependents (spouse, unmarried children under 21), called “derivatives,” may apply for AOS with “principal”
- Adjustment applicants can get travel document and work card
- Filing adjustment application (not petition or labor cert.) gives person the right to remain in the U.S. to wait for “green card”

Approval of petition gives right to LPR, but you can't file AOS application and get LPR until your priority date is "current"



Introduction to Backlogs

- The question “when may I file my AOS application?” is answered, in part by Dept. of State Visa Bulletin
 - Law says an “immigrant visa must be immediately available” in order for you to apply for AOS in the U.S. or to consular process immigrant visa abroad
 - Visa Bulletin tells you when an immigrant visa is available for you?
 - http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html
- Remember, 140,000 employment-based LPR visas each year
 - Allocated among preferences, EB-1 - 28.6% EB-2 - 28.6%, etc.
 - Per country limit in each category 7%, so--for example--persons from China can only have 7% of EB-1 visas
 - So sometimes more demand than supply and queues develop
- Place in the queue is determined by “priority date,” the date first step (labor certification application or petition) is filed
- Movement in availability depends on the demand for “immigrant visas,” so dates on Visa Bulletin can move forward, backward, etc.

November 2010 Visa Bulletin

http://www.travel.state.gov/visa/frvi/bulletin/bulletin_4747.html#

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01JUN06	08MAY06	C	C
3rd	22JAN05	22NOV03	22JAN02	01MAY01	22JAN05
Other Workers	01APR03	01APR03	22JAN02	01MAY01	01APR03
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C
5th Pilot Programs	C	C	C	C	C

How Long Will It Take?



■ Depends . . .

- How long to gather documentation?
- Agency processing times

- Dept. of Labor processing

- Professional occupation applications:??
- "Special handling" applications:??
- If application is audited:??

- USCIS processing times

- I-140: ??
- I-485: ??

- This is JUST processing time, but there may be Visa Bulletin delays – many employees confused about this

- Visa Bulletin changes each month, backlogs difficult to predict



What Happens During the Wait

- Remember, there are two kinds of waiting (don't confuse them)
 - DOL and USCIS processing time
 - Waiting for priority date to become current so you can file AOS
- While waiting to file AOS application, should maintain H-1B status
- If labor cert. application or immigrant petition is filed more than 365 days before 6th year of H-1B expires, H-1B and H-4s can be extended beyond 6 years (start LPR process early!)
- If I-140 is approved but backlog prevents filing AOS, H-1B/H-4 status can be extended beyond 6 years
- Once AOS application is filed, applicant can get work card and travel document and/or continue to maintain H-1B status
 - *Usually a good idea to maintain H-1B status until green card arrives*
- After I-485 pending 180 days, employee can move to new employer or position ("same or similar"), and not "cancel" process, but risks
 - Changes in job—such as promotion—prior to this point can be big problem
- Employee may interviewed at DHS office, but rare in EB cases

Wrap-Up

- Questions?
- For more information
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