Working in the United States
&
Pathways to Become a Legal Permanent Resident

Presented by:

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Mission Statement

Dan McCarthy's mission is to assist his clients in establishing a foundation in the United States upon which they can build their lives and fulfill their dreams.

Four Categories of People in the United States

- Citizens (allowed to work anywhere)
- Immigrants (allowed to work anywhere)
- Non-immigrants (may work if visa type and situation allow)
- Undocumented Aliens (never allowed to work)

H-1B Visa

Temporary Work Permit

INA § 101(a) (15) (H)(i)(b)

What are the different types of "H" visa categories?

- H–1B Individuals who will perform services in a "specialty occupation"
- H–1B1 Beneficiaries of the Chile and Singapore Free Trade Agreements
- H–1B2 Workers on a Department of Defense research project
- H–1B3 Fashion models of distinguished merit and ability
- H–1C Registered nurses, under the Nursing Relief for Disadvantaged Areas Act
- H–2A Temporary and seasonal agricultural workers
- H–2B Nonagricultural workers coming to meet a seasonal, intermittent, or peak–load need or to participate in a one–time occurrence
- H–3 Participants in a training program
- H–4 Spouse and dependent children of principal H nonimmigrant

H-1B Visa Status

- *Specialty Occupation*: Requires at least a bachelor's degree in a specialty field, such as Electrical Engineering or Chemistry.

Requirements for H-1 Status

- A U.S. baccalaureate degree or higher;
- A foreign degree equivalent to a U.S. degree, as evaluated by a recognized credentials evaluation service; *or*
- A state license to practice the profession, or a combination of specialized training and/or experience which can be substituted for a U.S. degree

H-1B Visa Status

- An individual on H-1B status is in the US to work ONLY for the company or companies sponsoring him/her for H-1B status.

- The H-1B may only perform the work that is specified on the H-1B petition. An amended petition must be filed to change the job description substantially.

What is required from the Employer?

- An offer of employment from a U.S. employer is required;
- The job must qualify as a “specialty occupation”
- Submits completed Form ETA 9035 to DOL after complying and documenting compliance with LCA regulations
- Makes LCA and supporting documents available for inspection within one working day after filing LCA
- Submits a copy of certified LCA to USCIS with I–129 petition
- Employs H–1B worker pursuant to terms of LCA and I–129
- Employer is responsible for the cost of return transportation abroad if alien is dismissed before petition period expires

What is required of the Employee?

- Employee must have the minimum requirements necessary for the specialty occupation, which must be at least a bachelor's degree or equivalent, in a specific field of endeavor
- Must not be subject to any bar to obtaining H–1B status
- Must intend to work for the petitioning employer
- Is responsible for maintaining status by complying with the terms of employment

H-1 Time Length

An H-1 can be hired for up to three years initially, with a three-year extension.

However, additional years can be requested under certain cases where Permanent Residency has been filed and is still pending.

What documents do you need to have ready for your Employer to file the HIB?

- Copies of passport, visa, I-94 and documents for current and previous non-immigrant status
- Proof of highest degree (diploma and/or transcript) and evaluation, if from foreign university
- C.V.
- Copies of first pages of publications
- I-539 for dependents, and similar immigration/passport documents for each person; plus additional check

Labor Condition Application ETA 9035

(Not the Labor Certification Application, ETA 9089)

An H-1 petition requires the employer to establish that “Fair Market Conditions” have been met.

Working conditions: employer attests that the employment of the H-1B will not adversely affect the working conditions of similarly-employed individuals.

Alien Labor Conditions

- Prospective employee will be paid wages which are at least the higher of:
  - Actual wage paid to other similarly-employed workers, and
  - Prevailing wage, as established by an acceptable source, such as the SESA (Texas Workforce Commission)

- There is no strike, lock-out or work stoppage at the place of employment.

- Notice of the Labor Condition Application has been provided to workers employed in the named occupation, through a posting of the LCA for 10 working days in two conspicuous locations.

Prevailing Wage

The Employer will request a Prevailing Wage Determination from the National Prevailing Wage and Helpdesk Center (NPWHC).

Problematic Prevailing Wages

If the wage determination is too high, Employer will:

- Possibility of changing the title, job description or wages to meet the official standard.
- Request reconsideration from NPWHC.

H-4 Dependents

Cannot work in this dependent visa status, but may be eligible for their own primary visa status.

Payment of Fees

- DOL regulations consider “employer business expenses”...attorney fees and other costs connected to the performance of H–1B program functions which are required to be performed by the employer.

  - $320.00 filing fee
  - $500.00 fraud fee
  - $750.00 training fund fee for companies with 25 employees or less and $1,500.00 for companies with more than 25 employees
  - $2,500.00 (depends on the attorney) in Attorney’s fees

  - $1,000.00 Premium Processing paid by either Employer or Employee

Time to File for H1-B

The United States government's fiscal year begins October 1st.

New H1-B visas become available on that date.

The earliest you can file for an H1-B visa is 6 months before the start date of employment, so file on April 1st

Too many filed - Lottery

The H–1B Cap

Annual H–1B cap of 65,000

From this supply of 65,000, 6,800 are set aside for the H–1B program under the U.S.–Chile and U.S.–Singapore Free Trade Agreement

Exceptions to the H–1B Cap

- Employment at a cap–exempt employer: institutions of higher education, nonprofit entities related to or affiliated with an institution of higher education, nonprofit research organizations, and governmental research organizations
- Employees who were counted against the cap during the past 6 years
- Employees already in H–1B status that where already counted against the cap: extension of stay, amendment to the H–1B petition, or change of employer
- J–1 physicians granted Conrad waivers of the 212(e) requirement
- Citizens of Singapore and Chile applying for special H–1B status are counted from a set–aside of 6,800 numbers
- The first 20,000 employees who have earned a U.S. master's degree or higher are not counted towards the cap (but are counted after the first 20,000 slots have been taken)

H-1B Cap-Gap

- D/S and OPT will be extended for the beneficiary of a timely filed H-1B petition, requesting a change of status, and an employment start date of October 1st of the following fiscal year.

- The extension terminates upon rejection, denial or revocation of the H-1B petition.

How does the Employ American Workers Act ("EAWA") effect the H-1B Employer?

- EAWA prevents a company from displacing U.S. workers when hiring H-1B workers if the company received funds through ("TARP"), or under section 13 of the Federal Reserve Act (collectively referred to in this document as "covered funding").

- Under EAWA, any company that has received these funds and seeks to hire H-1B workers is considered to be an "H-1B dependent employer."

What is a "H-1B" dependent employer?

An "H-1B dependent employer" must make the following additional attestations to the U.S. Department of Labor (DOL) when filing a Labor Condition Application (LCA):

- It has taken good faith steps to recruit U.S. workers (defined as U.S. citizens or nationals, lawful permanent resident aliens, refugees, asylees, or other immigrants authorized to be employed in the United States (i.e., workers other than nonimmigrant aliens) using industry-wide standards and offering compensation that is at least as great as those offered to the H-1B nonimmigrant;
- It has offered the job to any U.S. worker who applies and is equally or better qualified for the job that is intended for the H-1B nonimmigrant;
- It has not "displaced" any U.S. worker employed within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing. A U.S. worker is displaced if the worker is laid off from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought; and
- It will not place an H-1B worker to work for another employer unless it has inquired whether the other employer has displaced or will displace a U.S. worker within 90 days before or after the placement of the H-1B worker.
- (USCIS Questions and Answers, March 20, 2009)

To which H-1B hires does EAWA apply?

- EAWA applies to any "hire" taking place on or after February 17, 2009, and before February 17, 2011. EAWA defines "hire" as an employer permitting a new employee to commence a period of employment; that is, the introduction of a new employee to the employer's U.S. workforce.
- EAWA applies to:
- Any LCA or petition filed on or after February 17, 2009 involving any employment by a new employer, including concurrent employment and regardless of whether the beneficiary is already in H-1B status.
- New employment (i.e., hires) based on a petition approved before February 17, 2009, if the H-1B employee had not actually commenced employment before that date.
- EAWA does not apply to:
- A petition to extend the H-1B status of a current employee with the same employer.
- A petition seeking to change the status of a current U.S. work-authorized employee to H-1B status with the same employer.
- (USCIS Questions and Answers, March 20, 2009)

Are the EAWA requirements permanent?

- No. EAWA took effect on February 17, 2009 and will sunset two years from the date of enactment.

- (USCIS Questions and Answers, March 20, 2009)

MAINTAINING A VISA STATUS

Whatever visa status you are in while in the United States, you must maintain your status by complying with that visa's requirements.

After employment ends: No grace period for H-1B Employees.

H-4 turns 21 years old, they are no longer "children" and must change status to another type of visa category or leave the U.S.

B-1/B-2 Visa

- A person in the U.S. as a Visitor, for either Business (B-1) or Pleasure (B-2)

- B-1/B-2 visa holders can receive an academic honorarium and reimbursement for travel and subsistence, but no salary
- You cannot work and receive wages but you can look to see what business you would like to conduct
- Short time period (6 months or less)

B-1/B-2 (WT/WB) Restrictions

- Cannot receive a Social Security card and cannot be “employed”
- Limited to 5 payments in a 6-month period
- No stay longer than 9 days at any college or university

TN VISA

(For Mexicans and Canadians)

An alien may be admitted to the United States in TN status for the period of time required by the employer, up to a maximum initial period of stay of three years.

A good feature of this visa is that TN professionals can receive extensions of stay in three-year increments, with no outside limit on the total period of stay.

Canadian and Mexican professionals who have already completed six years in the H-1B or L visa category can qualify for the TN visa without fulfilling the requirement of one-year abroad imposed on H-1B and L aliens.

How do you get the TN visa?

- Canadian professionals can enter the United States by providing documentation at the port of entry that they are engaged in one of the designated professions, and that they possess the requisite educational credentials to qualify in the listed profession.

- Mexican nationals seeking TN status must apply for the at a U.S. consulate.

What are the limitations of the TN Visa?

- TN classification may be conferred only to persons seeking temporary entry without the intent to establish permanent residence.
- The alien must identify the time-limited purpose of his or her entry, e.g., to perform services under a contract with a U.S. entity for a specified period of time.
- A TN professional cannot establish a business or practice in the United States in which he or she will be self-employed. This bar, however, does not prevent a self-employed professional who otherwise qualifies for TN classification from entering the United States to engage in substantial, prearranged activity for a U.S.-based enterprise owned by a person or entity other than the TN alien

What are the advantages to the TN visa over the H-1B visa?

- The USCIS does not have to approve an initial petition
- The six-year limit on stay for H-1 aliens does not apply to the TN category
- There is no annual ceiling on the admission of Canadian and Mexican TN professionals

Remember the key requirements:

To qualify for TN status, the intended U.S. activity must be in a profession listed in Appendix 1603.D.1 of NAFTA, and the alien must possess the necessary credentials to be considered a professional in one of the Appendix 1603.D.1 fields. A bachelor's or higher degree is usually required. Cannot use a combination of experience and education. You need the degree.

THE L-1 VISA

- The L visa category is one of the most useful tools available to international companies needing to bring foreign employees to the United States.
- It is a useful visa because a employee in L visa status can apply to become a Legal Permanent Resident.
- An alien may be admitted to the United States in L-1 status for the period of time required by the employer, up to a maximum initial period of stay of 3 years.
- An L-1 extension of stay may be authorized in increments of up to two years.
- The total period of stay may reach 7 years for L-1A managers and executives
- A total of 5 years for L-1B specialized knowledge personnel.

WHAT ARE THE BASIC REQUIREMENTS FOR OBTAINING L-1 STATUS?

The employee must have worked abroad for the overseas company for a continuous period of one year in the preceding three years

- An alien who spent two months in the United States during the preceding year must have worked for the overseas company for at least 14 months, at least 12 of which were outside of the United States. **Each day in the United States during the preceding year adds one day to the total time that the alien must have been employed by the overseas company.**

- **Part-time employment abroad.** A year or more of part-time employment cannot be added up to meet the one-year abroad requirement.

WHAT ARE THE BASIC REQUIREMENTS OF THE COMPANY FOR OBTAINING L-1 VISA FOR AN EMPLOYEE?

The overseas company must be related to the U.S. company in a specific manner

The law states that the company abroad for which the employee has worked for a year abroad must be “the same employer or a subsidiary or affiliate” of the U.S. company.

The company must be a qualifying organization

A company that is doing business in the United States and the company in the other country doing business during the whole period of the transfer and the transferring company must continue to do business abroad during the entire period of the alien’s stay in the United States as an L-1 transferee.

WHAT ARE THE BASIC REQUIREMENTS OF THE EMPLOYEE FOR OBTAINING L-1 VISA?

- The employee must be coming to the U.S. company to work in an executive, managerial, or specialized knowledge capacity.

- The employee must be qualified for the position by virtue of his or her prior education and experience.

WHAT ABOUT FAMILY MEMBERS OF L VISA HOLDERS?

Family members of the L-1 visa holders are entitled to admission in the L-2 visa status.

L-2 spouses can apply for an Employment Authorization Document (EAD card).

THE E VISA

The E category is especially useful for business owners, managers, and employees who need to remain in the United States for extended periods of time in order to oversee or work in an enterprise engaged in trade (E-1) between the United States and a foreign state or that represents a major investment (E-2) in the United States. § 101(a)(15)(E) of the Immigration and Nationality Act.

Important visa if the Employee does not qualify for an H-1B or L visa.

NICE FEATURES OF THE E VISA

- The E visa category can be used by **many different types of companies**, from one owned by a single investor to a large multinational corporation
- The E visa category can be used by the company's principals or by its **employees,** as long as they are performing functions approved by the applicable rules.
- An initial period of stay of two years is granted to persons coming to the United States in the E category, this period can be extended almost indefinitely.
- Work authorization (EAD) for spouses of E-1 and E-2. However, other family members cannot obtain work authorization.

REQUIREMENTS FOR OBTAINING AN E VISA

Three elements must be present for the E visa category to be available:

1. a **treaty** must exist between the United States and Country X;

2. **majority ownership or control** of the investing or trading company must be held by nationals of Country X;

3. Country X **citizenship** must be held by each employee or principal of the company who seeks E status under the treaty.

1. TREATY COUNTRIES FOR THE E VISA

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

- Treaties conferring **only E-1 treaty-trader status** exist with the following countries:
- Brunei
- Denmark
- Greece
- Israel

- Treaties conferring **only E-2 treaty-investor status** exist with the following countries:
- Albania
- Armenia
- Azerbaijan
- Bahrain
- Bangladesh
- Bulgaria
- Cameroon
- Congo (Brazzaville)
- Congo (Kinshasa)
- Czech Republic
- Ecuador
- Egypt
- Georgia
- Grenada
- Jamaica
- Kazakhstan
- Kyrgyzstan
- Lithuania
- Moldova
- Mongolia
- Morocco
- Panama
- Poland
- Romania
- Senegal
- Slovak Republic
- Sri Lanka
- Trinidad & Tobago
- Tunisia
- Ukraine

- **United Kingdom:** Only for British nationals “normally resident” in the UK; no “landed immigrants” (permanent residents) of Canada, Hong Kong, or other countries.
- **China:** Taiwan only.
- **Australia and Sweden:** The 1990 Act required that nationals of these countries be treated as though a treaty exists for E-1 and E-2 purposes. Therefore, although there is not an actual treaty with these countries, they are listed above with other countries for which a treat exists.

NATIONALITY OF THE PRINCIPAL INVESTOR OR TRADER, THE TREATY ENTERPRISE AND THE TREATY COUNTRY

- The company and trader or investor engaging in trade or investment in the U.S. must have the same nationality as the treaty country.

- The "nationality" of the company engaging in trade or investment is the nationality of those persons who own **at least 50%** of the stock of the corporation. This rule encompasses 50-50 joint-venture companies. For large, publicly held companies that may have a difficult time establishing their nationality through stock ownership records, the firm can be presumed to have the nationality of the country where its stock is initially listed and traded on a public stock exchange.

- The "nationality" of the persons owning the corporate stock is their country of citizenship

REQUIREMENTS FOR TRADERS (E-1 VISA)

Trade: The trading company must be engaged in "trade."

Substantial: The trade must be "substantial."

Principally with U.S.: The trade must be "principally" between the U.S. and the treaty country.

Duties: The employee or principal must serve the company in a specified capacity either managerial or involving "essential skills."

REQUIREMENTS FOR INVESTORS (E-2 VISA)

- A treaty between the United States and the country of which the treaty enterprise is a "national".
- At least 50% ownership of the investing enterprise by nationals of the treaty country.
- Citizenship in the treaty country by principal investors and enterprise employees seeking admission through the treaty enterprise
- **Active investment**—The investor must make an irrevocable commitment of funds that represents an actual, active investment.
- **Substantial investment**—The investment must be substantial, taking into account only those financial transactions in which the investor's own resources are at risk
- **Creation of jobs—**The investment cannot be marginal in nature, that, one which will only support the investor and his or her family; in most cases it should create job opportunities for U.S. workers
- **Essential role in enterprise**—The person for whom treaty-investor status is sought must fill a key role with the company, either as the investor who will develop and direct the investment, or as a qualified manager or specially trained and highly qualified employee necessary for the development of the investment.

THE O VISA

The O visa is set aside for aliens of “extraordinary” ability in the sciences, arts, education, business, or athletics, certain aliens accompanying or assisting those aliens, and their family members.

The O visa employee must intend to work in their area of extraordinary ability or achievement.

“Extraordinary ability” means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

WHY IS THE O VISA A GOOD ONE TO HAVE?

Because an alien may legitimately come to the United States for a temporary period as an O-1 visa holder, and at the same time, lawfully seek to become a permanent resident.

HOW LONG CAN YOU STAY IN THE O VISA?

The initial period of stay can be approved for the time necessary to complete the event or activity or group of events or activities for which the O visa employee is admitted, up to a period of 3 years.

Extensions in one year increments with no cap on the number of years.

The term “event” means an activity such as a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement.

Extensions of stay for an O visa employees and support personnel can be granted in increments of up to one year to continue or complete the same event or activity for which they were admitted.

THE DEPT. OF LABOR IS NOT INVOLVED IN THE PROCESS, BUT ...

A petition can be approved only after the employer consults with a peer group, labor organization, or management organization regarding the nature of the work to be done and the alien's qualifications. The employer obtains a written advisory opinion obtained from a peer group, labor organization or management organization with expertise in the specific field involved.

WHAT MUST THE EMPLOYER PROVE TO OBTAIN AN O VISA FOR AN EMPLOYEE IN THE SCIENCES, EDUCAITON, BUSINESS AND ATHLETICS?

- Receipt of a major, internationally-recognized award, such as the Nobel Prize, or

- At least three of the following forms of documentation:
  - receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor
  - membership in associations in the field which require outstanding achievements of their members (as judged by recognized national or international experts in the discipline or fields)
  - published material in professional or major trade media about the alien concerning the alien's work in the field (include the title, date, and author of such published material, and any necessary translation)
  - participation on a panel, or individually, as a judge of the work of others in the field
  - scientific, scholarly, or business-related contributions of major significance in the field
  - authorship of scholarly articles in the field in professional journals or other major media
  - employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation
  - high salary or other remuneration commanded by the alien for services (as evidenced by contracts or other reliable evidence)
  - other comparable evidence

WHAT MUST THE EMPLOYER PROVE TO OBTAIN AN O VISA FOR AN EMPLOYEE IN THE ARTS?

(Arts includes fine arts, visual arts, culinary arts, performing arts, and any field of creative endeavor.)

- Evidence that the alien has been nominated for or has been the recipient of significant national or international awards or prizes in the particular field, such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award, or

- At least three of the following forms of documentation that the alien:
  - has or will perform a lead or starring role in productions or events which have a distinguished reputation (as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements)
  - has achieved national or international recognition for achievements (evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications)
  - has performed a lead, starring or critical role for organizations and establishments that have a distinguished reputation (evidenced by articles in newspapers, trade journals, publications, or testimonials)
  - has a record of major commercial or critically acclaimed successes (as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications)
  - has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged (such testimonials must clearly indicate the author's authority, expertise, and knowledge of the alien's achievements)
  - has commanded or now commands a high salary or other substantial remuneration for services in relation to others in the field (as evidenced by contracts or other reliable evidence)

CAN THE EMPLOYER APPLY FOR THE SKILLED SUPPORT PERSONNEL OF THE O VISA EMPLOYEE?

- The O-2 visa is set aside for Employees who will accompany and assist in the artistic or athletic performance of an O-1 visa holder and Employees who will accompany and assist an O-1 visa holder on a specific motion picture or television production.

- They must be an “integral part” of the actual performance and have “critical skills and experience” with the principal alien which are not o a general nature and which cannot be performed by U.S. workers.

THE P VISA

The P-1 category is set aside for certain athletes and entertainers:

- an athlete who compete individually or as part of a team at an internationally recognized level;
- a professional athlete;
- a person who performs as an athlete, coach, or part of a team or franchise that is located in the United States and is a member of certain amateur foreign leagues or associations from which a significant number of individuals are drafted by major sports leagues or their minor league affiliates; or
- a professional or amateur athlete who performs individually or as part of a group in a theatrical ice skating production coming to the United States in a specific ice skating production or tour.
- With regard to entertainers, the P-1 category covers aliens who perform with or are an integral and essential part of the performance of, an entertainment group that has received international recognition as “outstanding” for a “sustained and substantial period of time.”

WHAT ARE THE DIFFERENCES BETWEEN THE O VISA AND THE P VISA?

- P-1 visa covers Employees who perform with or are an integral and essential part of the performance of, an entertainment group that has received international recognition as "outstanding" for a "sustained and substantial period of time."

- The distinction between athletes and entertainers in this subcategory is important to keep in mind: individual athletes may be admitted to the United States as P-1 aliens, but not individual entertainers. The only basis for approval of a P-1 petition for a single entertainer is when the entertainer will be coming to the United States to join a foreign-based entertainment group. All other single performers coming to the United States must qualify on an individual basis as an O-1 entertainer of extraordinary ability or must qualify in the H-2B category for temporary workers coming to fill temporary positions in the United States.

WHAT ARE THE REQUIREMENTS OF THE ENTERTAINMENT GROUP?

- The group must have been internationally recognized as outstanding in the discipline for a sustained and substantial period of time

- 75% of the members of the group must have had a sustained and substantial relationship with the group for at least one year and must provide functions integral to the group's performance

THE P-3 VISA

- The P-3 category covers artists and entertainers, including groups, who will perform “under a program that is culturally unique.”
- The P-3 Employee or group must be coming to the United States to perform, teach, or coach in culturally unique events.
- The group does not have to have performed together for a specific period of time.
- Petitioners merely have to submit evidence addressing the cultural uniqueness of the performance and evidence that all performances are culturally unique.

Pathways to Become a Legal Permanent Resident

Legal Permanent Residency (The GREEN CARD)

- Confers on the bearer the right to remain in the U.S. more or less permanently
- Can be obtained in one of these ways:
  - Family a Qualifying familial relationships include: Immediate **Relatives of U.S. Citizens,** are the spouses, children, and parents of U.S. citizens.
  - In order for parents to petition for a child, the child must be unmarried and under the age of 21 to qualify.
  - Children may petition for their parents if the petitioning son or daughter is at least 21 years of age. Visa numbers are immediately available for these individuals to apply for lawful permanent residence. This category may also include widows of U.S. citizens under certain conditions.
  - The Diversity Visa lottery provides a way for a international person to obtain LPR status without relying on family or employers to file petitions.
  - Applicants access the electronic diversity visa entry form at www.dvlottery.state.gov.
  - Asylum is available to anyone in the United States, regardless of status, who has been persecuted or has a well–founded fear of persecution in his or her home country "on account of race, religion, nationality, membership in a particular social group, or political opinion."
  - Employment
  - Public or humanitarian policy (Will not be addressed in this presentation)

Permanent Residents

- Can work at any job
- Green card is sufficient to prove work eligibility (or I-551 stamp in passport before green card is received)
- May be eligible for in-state tuition if he/she can prove domicile in Texas
- Cannot become President of the U.S. or vote

Employment-Based Petitions

(EB-1, EB-2, EB-3, EB-4, EB-5)

EMPLOYMENT BASE VISA (EB-1)

The EB-1 (about 40,000 annual visas) for “priority workers”:

- managers and executives subject to international transfer to the United States (no labor certification required) (remember the L visa);
- outstanding professors and researchers with universities or private employers that have established research departments (no labor certification required) (remember the O visa);
- aliens of “extraordinary ability” in the sciences, arts, education, business, and athletics (no labor certification required) (no offer of employment required).

WHAT IS EXTRAORDINARY ABILITY?

Evidence of a one-time achievement that is a major, internationally recognized aware or evidence in at least **three** of the following categories:

- Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence the field of endeavor;
- Documentation of the alien's membership in associations in the field which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- 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 as a 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.
- Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- Evidence that the alien has commanded a high salary in relation to others in the field; or
- Evidence of commercial success in the performing arts, as shown by box office receipts or record, CD or video sales.

Catch All: If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Who is a Outstanding Professor or Researcher?

- Recognition internationally as outstanding in a specific academic field;
- At least three years of teaching or research in the field; and
- (a) the offer of a tenured or tenure-track teaching position or the offer a comparable research position, or (b) the offer of a research position having no fixed term and in which the employee will ordinarily have an expectation or permanent employment.

WHAT EVIDENCE DO YOU NEED TO PROVE YOU ARE AN OUTSTANDING PROFESSOR OR RESEARCHER?

Evidence in at least **two** of the following categories:

- Documentation of the alien's receipt of major prize or awards for outstanding achievement in the academic field;
- Documentation of the alien's membership in associations in the field which require outstanding achievements in the academic field;
- 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 as a 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.

MANAGERIAL OR EXECUTIVE TRANSFEREE (EB-1)

- the U.S.-based Employer offering the Employee employment must provide full-time, permanent employment;
- Department of Labor (DOL) Labor Certification Application is not required;
- the Employee must meet the minimum requirements for the job;
- the Employer must be able to pay the alien's salary;
- the Employee and Employer must both intend for the alien to undertake the position; and
- an immigrant visa number must be available to finalize process for permanent residence

EMPLOYMENT BASED (EB-2)

The second employment-based preference (about 40,000 annual visas plus visas not used in the first preference):

- aliens of “exceptional ability” in the sciences, arts, or business; if it can be established that he or she has “a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.” and
- advanced-degree professionals (Masters and above).
- Labor Certification Application is required, and
- A job offer is required, unless it is waived in the national interest; (National Interest Waiver)

WHY IS IT IMPORTANT IF A LABOR CERTIFICATION APPLICATION IS REQUIRED TO BE FILED BY THE EMPLOYER?

Because it is costly and complicated. The Employer must do the following:

1. Formulate the job offer, duties, minimum requirements and wage,

2. Request a prevailing wage

3. Conduct a recruitment campaign that complies with the Department of Labor's regulations,

4. Retain documentation of compliance, and prepare Form ETA 9089

WHY IS A NATIONAL INTEREST WAIVER IMPORTANT?

- The Alien does not need a job offer.
- The Alien does not need a Labor Certification Application file by an Employer, however, the Alien will need to file a duplicate original Labor Certification Form ETA 750-B when filing his/her petition.
- The Alien can petition for himself or herself.

WHAT DO YOU HAVE TO PROVE TO ESTABLISH A NATIONAL INTEREST WAIVER?

Prove substantial intrinsic merit. The Alien must prove that the Alien's proposed employment is in an area of substantial intrinsic merit.

Prove proposed benefit is national in scope. It must also be shown that the proposed benefit will be national in scope. The emphasis of this factor is on the existence of a national goal that the alien's proposed undertaking will promote.

Balancing of interests. The national interest would be adversely affected if a labor certification were required. The Alien must prove the benefit derived from the particular alien's participation in the "national interest" field of endeavor must "considerably" outweigh the "inherent" national interest in protecting U.S. workers through the labor certification process.

In Re New York State Dept. of Transportation (NYSDOT), 22 I&N Dec. 215 (BIA 1998) [Int. Dec. 3363] (August 7, 1998), AMDOC# 200212013

What kind of expertise qualifies?

- The I.N.A. permits National Interest Waivers to aliens who will provide services in the following general fields:
- the sciences
- arts
- professions
- business
- physicians who will work in areas designated as health care provider shortage areas and at VA hospitals

- ***Mississippi Phosphate*** **Guidelines:** provides a nonexclusive list of things that might be taken into account when determining whether someone's services were in the national interest; ask yourself how the services might improve the U.S. economy, improve the wages and working conditions of U.S. workers, improve education and training programs for U.S. children and under qualified U.S. workers, improve U.S. healthcare, provide more affordable housing for young and/or older, poorer U.S. residents, improving the environment of the U.S. and making more productive use of natural resources or be of interest to a U.S. government agency

WHAT TYPES EB-2 EMPLOYMENT DO NOT NEED A LABOR CERTIFICATION APPLICATION TO BE FILED BY THEIR EMPLOYER?

- The Department of Labor listed in Schedule A at 20 C.F.R. § 656.10 listed the following groups of occupations that will not adversely impact the U. S. workforce because of a lack of U. S. workers:

- Group I, covering licensed physical therapists and professional nurses;

- Group II, covering aliens with exceptional ability in the sciences and arts (including aliens in the performing arts).

This is important because the Employer does not have to go through a recruitment process.

WHAT ARE THE EMPLOYER'S REQUIREMENTS FOR SCHEDULE A?

- Employer must compete the Department of Labor's Form 9089
- Employer must obtain the prevailing wage
- Employer must comply with the notice requirements associated with standard labor certification
- Evidence the Employee qualifies for the Schedule A Group I or II

WHAT ARE THE EMPLOYEE'S REQUIREMENTS FOR SCHEDULE A?

Widespread Acclaim and international recognition accorded to the alien by recognized experts in the field.

The Alien's work in the last year required exceptional ability.

The Alien's intended work in the U.S. will require exceptional ability; and ...

WHAT ARE THE EMPLOYEE'S REQUIREMENTS FOR SCHEDULE A?

Evidence in at least **two** of the following categories:

- Documentation of the alien's receipt of internationally recognized prize or awards for excellence in the field;
- Documentation of the alien's membership in associations in the field which require outstanding achievements of their members, as judged by recognized international experts in their discipline or field;
- Evidence of the alien's participation as a judge of the work of others, either individually or on a panel;
- Evidence of the alien's original scientific or scholarly research contributions of major significance in the field;
- Evidence of the alien's authorship of published scientific or scholarly articles in the field, in international professional journals or professional publications with an international circulation.
- Evidence of display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

EMPLOYMENT BASE
EB-3

The third employment-based preference (about 40,000 annual visas plus visas not used in the first and second preferences):

- professionals with bachelor's degrees not qualifying in the second preference;
- skilled workers (filling positions requiring at least two years of training and experience);
- unskilled workers. (Only 10,000 visas of the annual allotment may be assigned to unskilled workers.)
- Labor certification and an offer of employment are required.

EMPLOYMENT BASE
EB-3 PROFESSIONALS

The EB-3 Professional consists of aliens:

- who hold bachelor's degrees or a foreign equivalent degree,
- are members of the professions (occupations that require at least a bachelor's degree in a specific field), and
- the job offered requires the minimum of a bachelor's degree for entry into the occupation.

WHAT IS THE COSTLY PART OF THE LABOR CERTIFICATION APPLICATION PROCESS?

Standard Recruitment Procedures:

The Job Order with the State's Workforce Agency,

Two print advertisement requirement

Three additional recruitment steps for professional positions,

Interviewing applicants and rejecting U.S. workers that do not meet the *minimum* qualifications for the job,

Writing a recruitment report, and

Maintaining the recruitment documentation.

What is my Priority Date?

- There is frequently more demand for employment–based immigrant visa slots than there is availability. A preference category(EB-1, 2, or 3) can become oversubscribed in two ways: either the total category availability has been reached or the per–country limit for that category has been reached.
- When a category becomes over–subscribed a waiting list develops. A person's place on the waiting list is determined by his or her "priority date."
- A "priority date" is the date that a labor certification application was first filed with the Department of Labor or, for those categories exempt from the labor certification requirement, the date on which a preference petition (the I-140) was filed.

Can I change Employers? *Portability* of I–140 Petitions and Labor Certification Applications

- Individuals who have filed an adjustment of status application on the basis of a petition outstanding professors or researchers], multinational executives or managers; advanced degree professionals and aliens with exceptional ability and skilled workers, professionals, and other workers, may change jobs or employers without affecting the validity of the underlying I–140 or approved labor certification or the original priority date, but only if:

- Their adjustment of status application has been filed and remained unadjudicated for 180 days or more and

- The new job is in "the same or similar occupational classification as the job for which the petition or certification was filed."