

Employment Immigration 101 – Best Practices for 2023

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WHY FREDRIKSON?

Our group offers complete services in all areas of immigration law, with special emphasis on business, the arts and family immigration.

Members of the firm's Immigration and International Groups are fluent in written and spoken English, Spanish, Hmong, French, German, Russian, Hebrew, Chinese and Vietnamese.

We offer counsel in the following areas:

- Physicians and Healthcare Workers
- Employment/Temporary
- Employment/Permanent
- Artists, Entertainers and Athletes
- Expatriates
- Family Immigration
- Foreign Students
- I-9 Compliance/
Worksite Investigations
- Investors/Entrepreneurs
- Naturalization
- Refugees and Asylees

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Agenda

- Immigration Concepts and Terminologies
- The Lifecycle of a Foreign National's Immigration Journey
- Nonimmigrant Visa Options
- Immigrant Petition Options
- Keys for Success:
 - Sponsorship Considerations and Compliance
- Q&A

Immigration Concepts and Terminologies

Why Is Visa Sponsorship Required

- I-9 Employment Eligibility Verification – all new hires must complete Form I-9 to establish employment eligibility in the U.S. and his/her identity
- Unless United States citizen/national or lawful permanent resident, must possess employment authorization from USCIS and/or sponsoring entity

How to Determine Whether a Candidate Requires Visa Sponsorship

- Permissible questions:
 - Are you currently legally authorized to work for *any* U.S. employer?
 - Will you now or in the future require work visa/status sponsorship?
- Visa sponsorship question(s) must be posed consistently to ALL candidates – comply with all anti-discrimination laws
- Nonimmigrant fast facts
 - Various types of nonimmigrant status
 - Many require employer sponsorship

Immigration Terminology

- Immigrant vs. Nonimmigrant
- Visa vs. Nonimmigrant Status
- I-94 Electronic Record/Card
- Nonimmigrant Employment Status: H-1B, TN, H-3, F-1, J-1, O-1, L-1



Departure Number
1 2 3 4 5 6 7 8 9 0 1

[Stamped at Port of Entry]

ADMITTED
(Port of Entry)
(DATE)

Class F-1
Until D/S

14. Family Name

15. First (Given) Name

16. Birth Date (Day/Mo/Yr)

17. Country of Citizenship

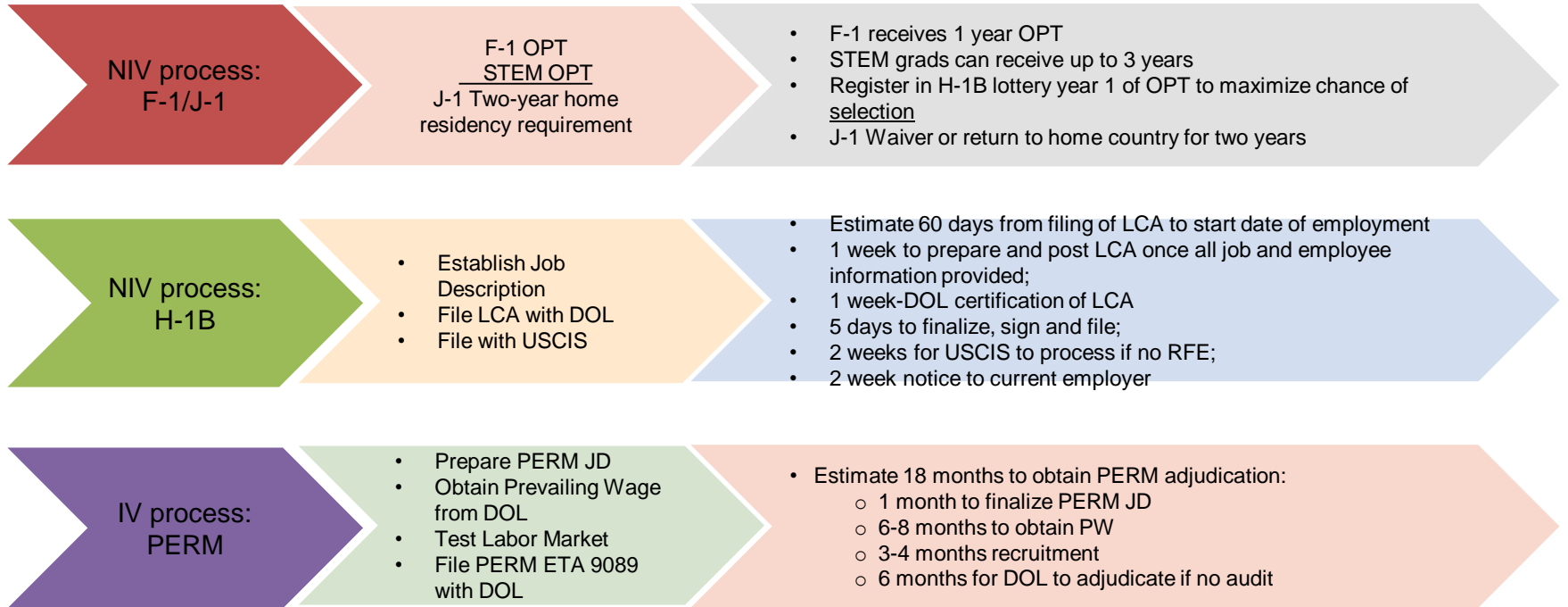
Government Agencies Involved

- **Department of Homeland Security**
- **US Citizenship & Immigration Services (USCIS)** – Services and benefits (family and employment); naturalization; special status programs.
- **US Immigration & Customs Enforcement (ICE)** – Interior investigations and enforcement, including SEVIS enforcement; smuggling; document fraud; raids
- **US Customs & Border Protection (CBP)** – Inspections at ports of entry; Customs functions; border patrol
- **Department of State** – Issues visas to enter the US
- **Department of Labor** – PERM Labor Certification and Labor Condition Application (LCA)

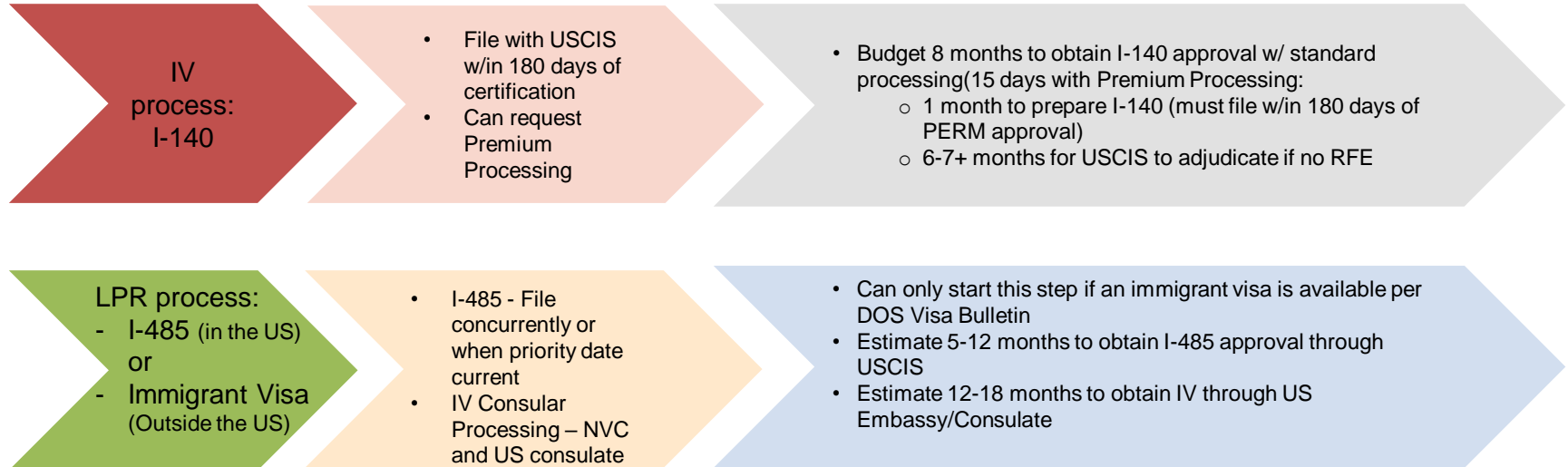


The Lifecycle of a Foreign National's Immigration Journey

The Lifecycle of an Immigration Case: NIV to Lawful Permanent Resident Status



NIV to Lawful Permanent Resident Status Continues...



Crafting an Immigration Strategy

Elements to an Immigration Strategy

Organizational Goals

- Organizational policies & structure
- Position: requirements and duties
- Timing: start date and long-term retention

Employee Goals

- Prior immigration history & nationality
- Long term immigration goals
- Familial considerations

Organizational Goals:

Organizational Policies & Structure

Policies

- Existing sponsorship policies
- Case-by-case basis
- Past practices
- Future needs
- Cost considerations
- Compliance obligation

Organizational Structure

- Entities
- International presence
- H-1B cap exemption
- Investment potential
- Worksites & remote work
- Contracted workers vs employees

Organizational Goals: Position

Requirements:

- Education
- Experience & licensure
- Travel

Duties

- Tasks and duties
- Other similarly situated employees
- Specialized nature of the role
- Managerial components

Organizational Goals:

Timing

Organizational need

- Start date
- Consular processing timing

Long term retention

- Pathway to lawful permanent residence
- Visa bulletin backlog

Employee Goals: Immigration History

Prior history

- Prior status
 - Max out issues
 - Two-year home residency
 - Intent
- Immigration bars
 - Criminal issues
 - Unlawful presence

Nationality

- Visa bulletin backlog
- Treaty options

Employee Goals:

Long Term Immigration Goals

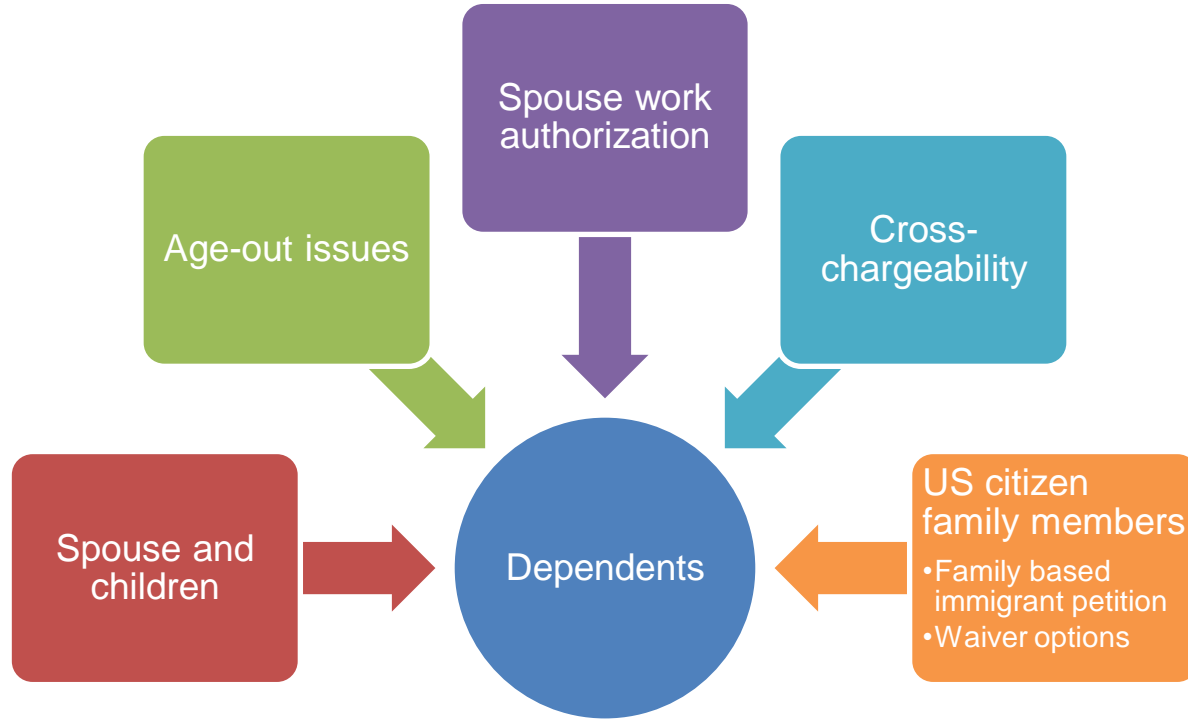
Immediate visa needs

- Qualifications

Future visa needs

- Immigrant intent
- Travel needs
- Employer sponsorship options
- Career advancement

Employee Goals: Familial Considerations



One size does not fit all!

Tailored immigration strategy is circumstance dependent

Multiple options may be available

Employer and employee must understand options, process, risks, and timing

Nonimmigrant Visa Options

Information Required for Case Strategy

Professional v. Non-Professional

Nationality of Candidate

Candidate's Education and Experience (resume)

Prior/Current Immigration Status of Candidate

Targeted Employment Start Date

Common Nonimmigrant Employment Options

| Visa Type | Employer Sponsorship |
|--|--|
| F-1 Student on CPT, OPT, and STEM OPT | CPT and OPT – No, but requires permission from USCIS or University STEM OPT – require employer sponsored training plan. |
| H-1B, H-1B1, E-3 Specialty Occupation | Yes – Employer Specific |
| L-1 Intra Company Transferee (Manager, Executive, Specialized Knowledge) | Yes – Employer Specific |
| H-2 Temporary agricultural and non-agricultural workers | Yes – Employer Specific |
| O-1 Scientists, researchers, and business executives of extraordinary ability | Yes – Employer Specific |
| H-3 or J-1 Trainee | H-3 – requires employer sponsorship J-1 – requires J program sponsor |
| TN Status for Citizens of Mexico & Canada | Yes – Employer Specific |
| E-1/E-2 Treaty Visa | Yes – Employer Specific |

H-1B Visas

Most popular temporary nonimmigrant employment option

Definition: A visa for a foreign national in a specialty occupation (professional position) that requires at least a Bachelor's degree or equivalent.

- The foreign national must qualify for the position
- The visa is limited to 6 years, but there are exceptions

Examples of H-1B occupations:

- Market Research Analysts
- Business Intelligence Analysts
- Financial Analysts
- IT Project Managers
- Computer and Information Systems Managers

H-1B Filing Process – Two Steps



1) File Labor Condition Application with the DOL (one week processing time)



2) File Form I-129,
Petition for Nonimmigrant
Worker with USCIS

* H-1B Portability – can start employment once USCIS receives H-1B petition if candidate is currently in H-1B status

* Premium Processing – \$2,500 to obtain a decision within 15 days from filing

H-1B Keys for Success



Determine DOL O*NET Classification to establish specialty occupation and determine required wage rate



Require detailed job duties



Minimum requirement (degree/fields of study) – why it matters



Must pay required wage – higher of prevailing wage (DOL vs. alternative salary survey) or actual wage rate

The H-1B Cap

Annual cap on the H-1B category is 65,000 (plus 20,000 for U.S. Master's)

Establish hiring goals early

H-1B Cap registration for FY2023: March 1 – 18, 2022.

First round filing period starts April 1, 2022, for 90 days.

Employment start date in next fiscal year – October 1st

H-1B Cap Exempt: H-1B foreign nationals already counted against the cap, employed by cap exempt employers (i.e. universities, government research institutions...), or J-1 waiver physicians fulfilling a 3 year commitment

E-3 Visas – Alternative to H-1B for Australians

- 10,500 annual visa limit (usually remains available throughout the year)
- Definition: Specialty Occupation (Professional position) – Bachelor’s degree required
 - The visa is issued indefinitely in 2 year increments
- Filing Process:
 - A Labor Condition Application required, and employee may only work for sponsoring company
 - Foreign Nationals can apply directly with U.S. consulate or through USCIS
- Keys to Success:
 - Non-immigrant intent required
 - E Spouse (regardless of nationality) eligible for work permit



H-1B1: Alternative to H-1B for Singaporeans & Chileans

- 6,800 annual visa limit (Chile: 1,400; Singapore: 5,400) – usually remains available throughout year
- Definition: Specialty Occupation (Professional position) – Bachelor's degree required
 - The visa is issued indefinitely in 18 month increments
- Filing Process:
 - A Labor Condition Application required, and employee may only work for sponsoring company
 - Foreign Nationals can apply directly with U.S. consulate or through USCIS
- Keys to Success:
 - Non-immigrant intent required
 - Spouse not eligible for work permit



L-1 Visas: Intracompany Transferees

- A good option for multinational companies moving employees to the US
- Definition: a full-time executive, manager, or employee with specialized knowledge employed with a related foreign entity for 1 full year within the past 3 years
 - Visa Duration: up to 7 years for executives and managers; up to 5 years for specialized knowledge workers
- Examples:
 - CFO of foreign entity in Japan moves to the US to manage the financial side of a growing US branch (executive)
 - Software Engineer in Poland with over 5 years of experience developing software for the company moves to the US to become expert for US employees (Specialized Knowledge)
- Process:
 - Individual: File I-129 with USCIS; Consular Process
 - Blanket L: Once Blanket L is approved with USCIS, can Consular process directly



L-1 Keys for Success



Determine best classification: Executive, Manager, Specialized Knowledge (can change)



Require detailed job duties



Consider filing a Blanket L to save time and money



Permanent residence for Executives and Managers is straightforward through the EB-2 category

O-1 Visas: Extraordinary Ability

Reserved for those who are at the top of their field

Definition: Person who has extraordinary ability in the sciences, arts, education, business, or athletics with sustained national/international acclaim, or extraordinary achievement in the motion picture/television industry.

- Visa Duration: Initial visa is for 3 years, can extend in 1 year increments indefinitely

Examples:

- Physician who is performing extremely specialized surgeries
- Researcher who has published several peer-reviewed articles in her field
- Company executive who has unique and successful career path

Process:

- File I-129 with USCIS; Consular Process if outside the country

O-1 Keys for Success



Ensure that the field of expertise is very specialized and narrow



Sustained national or international acclaim can be demonstrated through 3 of 8 factors



Opinions or letters of support from highly-visible institutions are essential



Consider foreign national's credentials when determining best fit for permanent residence path

H-2A and H-2B Temporary Visas



H-2A
AGRICULTURAL



H-2B
NONAGRICULTURAL

H-2A Temporary Agricultural Visas

Definition: A visa for a foreign national to work temporarily in an agricultural position

- The position must be temporary
- The position must be in an agricultural, on a farm.

Examples of H-2A occupations:

- Farm worker
- Livestock worker
- Agricultural Equipment Operator

H-2B Temporary Nonagricultural Visas



Definition: The employment must be of a temporary nature for a limited period of time such as a one-time occurrence, seasonal need, peak load need or intermittent need.

Limited to Numerical cap: 66,000 per year divided into two. Half first half of fiscal year, half second half of fiscal year. (Oct. 1 and April 1).

There is a limited number of H-2B Eligible countries, and employee must be on the list of countries, or qualify for an exception.

B-1 Business Visitor

Definition: Limited short-term business visit up to 6 months, excluding performing skilled or unskilled labor.

- Remuneration must be from employer/source outside the U.S.
- Principal place of business and the actual place of accrual of profits is in the foreign country

Examples: business meetings, board meetings, short term training, contract negotiation, business associate consultation, and litigation

- Investors seeking investment in the U.S.
- B-1 in lieu of H1 or H3

Process:

- ESTA Visa Waiver Program
- Canadians are visa exempted
- B-1/B-2 visa consular processing - processing time varies based on consulate – significant delay due to COVID

F-1 Students - OPT/CPT

Definition: Full-time students enrolled in an academic educational program, a language-training program, or a vocational program. F-1 students may only work with proper authorization:

- CPT is training that is an integral part of the student's curriculum
 - Require DSO authorization – Form I-20, No EAD required
- OPT allows postsecondary students up to 12 months of practical training in their field of study
 - Require DSO authorization and USCIS issued EAD
- STEM OPT provides STEM students a one-time, 24-Month Extension of post-completion optional practical training (OPT), if employed with an E-verified employer
 - Require an I-983 training plan
 - Require DSO authorization and USCIS issued EAD

Process:

- DSO authorization and SEVIS update – within days.
- If an EAD is required, file I-765 Application for Employment Authorization with USCIS – 2 months processing time

J-1 Interns, Trainees, Exchange Visitors

Definition: authorized for individuals approved to participate in work- and study-based exchange visitor programs with a cultural exchange element

- Sponsored by an exchange program that is designated by DOS
- Private sector U.S. employers may act as a Host Organization to J-1 visitors
- Develop a detailed training plan with defined objectives, activities, cultural exchange component, and continuous supervision and periodic evaluation
- 12-18 months on the job training
- May trigger a two-year home residence requirement

Examples:

- Bringing an engineering student currently enrolled in a degreed program overseas for a one-year internship
- Other positions such as Professors or scholars, Research assistants, Teachers, Specialists, Au Pairs, Camp counselors

Process for Private Sector Employer:

- Identify and apply for sponsorship with an exchange program sponsor – varies based on sponsor, several weeks
- Apply for a J-1 visa at a U.S. Consulate overseas – varies based on consulate

H-3 Trainees

Definition: trainees invited by an individual or organization for the purpose of receiving training

- Requires detailed training plan with defined structure, fixed schedule, objectives, and means of evaluation
- Training cannot be gained abroad and will benefit the trainees in pursuing a career abroad
- Trainee will not be placed in the normal operation of the business
- Prohibit productive employment, except for employment that is incidental and necessary to the training
- Available to degreed and non-degreed trainees
- Can include multiple trainees in one petition
- Maximum 2-year period

Example:

- US employer bringing a team of engineers and technicians to receiving training on a specific manufacturing process in preparation of product line transfer

Process:

- U.S. employer or organization files a Form I-129, Petition for Nonimmigrant Worker with USCIS – 2 weeks if Premium Processing
- Once approved, trainees apply for an H-3 visa at a US consulate abroad -- varies based on consulate

TN NAFTA Professionals

Definition: TN visa permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level.

- Occupations are specifically listed in NAFTA treaty – most require a Bachelor's degree.
- Employer Specific – full time or part time employment with a U.S. employer, no self-employment allowed.
- Non-immigrant intent required
- Status approved in three-year increments and renewable indefinitely.
- No regulatory visa limit

Examples: Accountants; Engineers; Scientists; Medical/Allied Professionals such as Physician (teaching or research only), RNs, OT, PT, RT, Med Lab Scientist; college, university, or seminary teachers; etc.

Process:

- Canadian citizen – no visa required; same day processing at border POE; or file petition with USCIS and be processed as quickly as two weeks with Premium Processing.
- Mexican citizens – apply at U.S. consulate – processing time varies. Visa issued for one-year or four-year validity. Can also file with USCIS but require visa to travel internationally.

E-2 Treaty Investor Visa

Definition: Allows a national of a treaty country to enter the U.S. to work at companies financed by their own investments or as employees to a treaty investor company

- Require majority ownership by a national or citizen (individual or foreign entity) of the treaty country
- Visa applicant must possess citizenship in the treaty country
- Investment must be substantial; U.S. business must be real and operating, and more than marginal
- Investors – develop and direct the U.S. enterprise
- Employees – executives, managers, or essential employees
- Non-immigrant intent required
- Status approved in two-year increments, renewable indefinitely, if the investment and majority ownership by treaty country national(s) is sustained.

Examples:

- Foreign investor makes a substantial invests in a new business and seeks to work as the CEO of the new business
- Treaty country company acquires a U.S. business through a substantial investment and seeks to transfer a manager who is the citizen of the same Treaty country to manage the U.S. business.

Process:

- Visa applicant applies for an E-2 visa directly at a U.S. consulate overseas
- Status is renewed in two-year increments by CBP each time the visa holder enters the U.S.
- Status can also be renewed by filing an I-129 petition with USCIS.

Other NIV Options

Other employer-sponsored NIV options:

- P visa for Artists, Athletes and Entertainers
- Q visa for Cultural Exchange Visitors
- R visa for religious workers

Dependent spouse eligible for work authorization

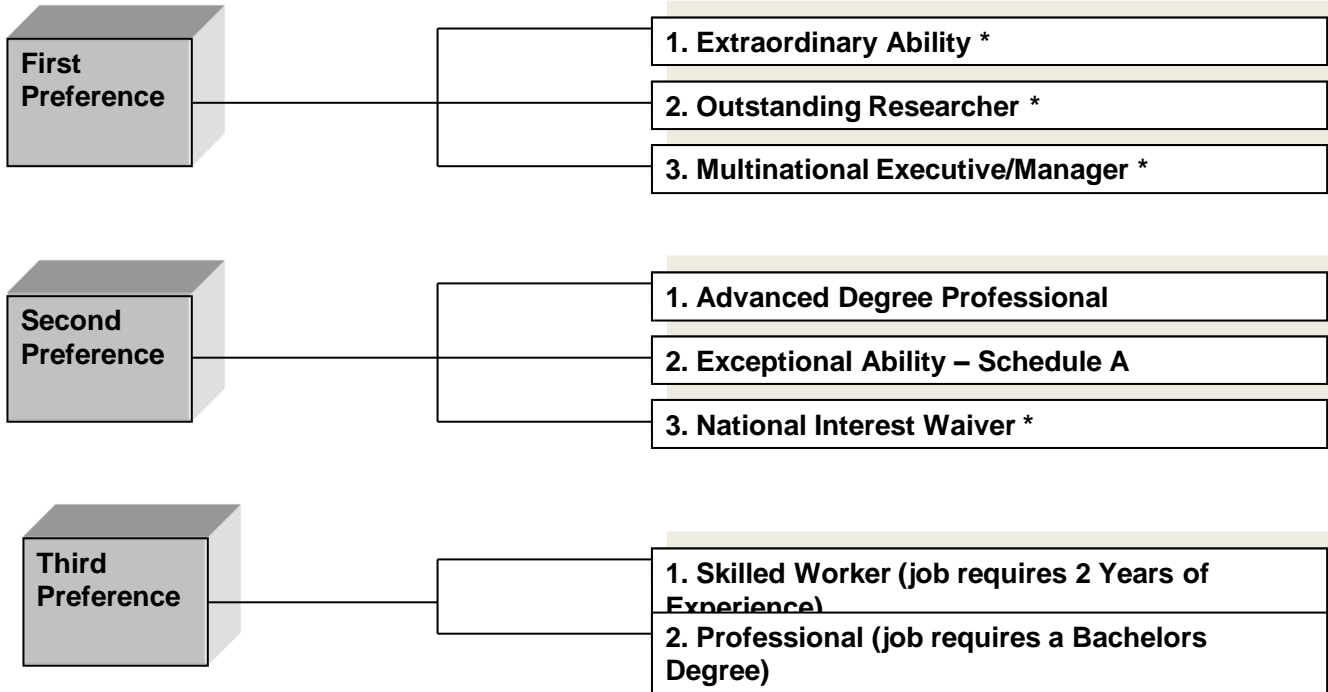
- E-2
- L-2
- H-4 with EAD
- J-2 with EAD

Remember to extend or change dependent status!

“Green Card” Options

Employment-Based Preference Categories

*No Labor Certification Required



Visa Bulletin/Priority Date

- DOS owns visa bulletin
 - Visa bulletin changes monthly
 - USCIS determines if using Dates of Filing of Final Actions Date
- Establishes place in line for Permanent Residence
 - 3 step process: Date Labor Certification is FILED
 - 2 step process: Date I-140 is FILED
- Priority Date must be CURRENT to file I-485 AOS
 - Can “recapture” Priority Date from earlier employment-based I-140

A. FINAL ACTION DATES FOR EMPLOYMENT-BASED PREFERENCE CASES

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

| <u>Employment-Based</u> | All Charge-ability Areas Except Those Listed | | | | | |
|---|--|--------------------------------|---------|---------|-------------|---------|
| | CHINA-mainland born | EL SALVADOR GUATEMALA HONDURAS | INDIA | MEXICO | PHILIPPINES | |
| 1st | C | C | C | C | C | C |
| 2nd | 01NOV22 | 08JUN19 | 01NOV22 | 08OCT11 | 01NOV22 | 01NOV22 |
| 3rd | C | 01AUG18 | C | 15JUN12 | C | C |
| Other Workers | 01JUN20 | 22JUN13 | 01JUN20 | 15JUN12 | 01JUN20 | 01JUN20 |
| 4th | 22JUN22 | 22JUN22 | 15MAR18 | 22JUN22 | 15SEP20 | 22JUN22 |
| Certain Religious Workers | 22JUN22 | 22JUN22 | 15MAR18 | 22JUN22 | 15SEP20 | 22JUN22 |
| 5th Unreserved (including C5, T5, I5, R5) | C | 22MAR15 | C | 08NOV19 | C | C |

Crafting Permanent Residence Strategy – Factors to Consider

When to start the sponsorship process?

- Employer's immigration policy
- NIV max out
- Processing time and visa backlog
- Children age out

Choosing the optimal employment-based pathway to permanent residence

- Is there a permanent job offer?
- Nature of employer's business
- Employee's credentials and background
- Timing

Other pathway to permanent residence

- Family-based immigration options
- Investment-based immigration

EB-1A: Extraordinary Ability

Does not require an employer to petition; the foreign national can petition on her own

Definition: The foreign national has extraordinary ability in the arts, education, business, or athletics and has achieved international acclaim for her accomplishments

Required documentation:

- major awards, original research, peer reviewed publications, judging, membership in associations requiring outstanding ability, published material written by others about the scientist; expert opinions

Can premium process – receive an I-140 approval in only 15 days

EB-1B: Outstanding Researcher or Professor

Definition: Recognized internationally as outstanding in a specific academic area:

- Tenure track teaching position at a University or Institution of Higher Education
- A comparable position at a University or Institution of Higher Education
- Comparable position to conduct research with private employer with at least 3 full time researchers

Required documentation:

- major awards, original research, peer reviewed publications, judging, membership in associations requiring outstanding ability, published material written by others about the scientist; expert opinions
- Evidence that the institution is of higher education or conducts research

Can premium process – receive an I-140 approval in only 15 days

EB-1C: Multinational Executives and Managers

Definition: Executives or managers who previously worked as an executive or manager for a qualifying company outside the U.S. for over one year prior to transferring to the U.S. in a managerial or executive role

Required Documentation:

- Evidence of the continued relationship between foreign and US entities
- Both entities are still “doing business” in their respective countries
- Evidence of executive/managerial nature of position abroad and in the US

EB-2: National Interest Waiver

Normally, PERM process is needed for EB-2, unless the work is in the national interest:

National Interest Waiver Definition:

- The PERM process is waived for EB-2 who demonstrates “substantial merit or national importance”, and foreign national is “well positioned” to advance endeavor

Required Documentation:

- Evidence of Advanced Degree or Exceptional Ability
- Evidence of substantial merit/national importance of endeavor
- Evidence of foreign national’s accomplishments in field & future goals

NIW can be filed by employer or foreign national

EB-2: Physician National Interest Waiver

Requirements:

- Physician must have certificate from the Educational Commission on Foreign Medical Graduates (ECFMG), and be fully-licensed in the state
- Must be full time position in a healthcare professional shortage area (HPSA), medically underserved area (MUA) or for the VA
- Must have 5 year contract and demonstrate 5 years of service (prospective or retrospective)
- State Public Health Department issues letter that employment is in the national interest
- Can file AOS concurrent with I-140

5 years cannot include years in J-1 status (usually in H-1B or O-1 status)

PNIW can be filed by employer or foreign national

PERM Based Processes (EB-2 or EB-3)

PERM

- Labor certification application through DOL
- Recruitment by Employer

I-140

- Filed with USCIS
- If employee terminated, may retain priority date

I-485

- Filed with USCIS
- If employee terminated, may retain if pending more than 180 days

PERM Labor Certification (EB-2 or EB-3)

Definition:

- A permanent labor certification issued by the Department of Labor (DOL) allows an employer to hire a foreign worker to work permanently in the United States. The filing of applications is the responsibility of the employer, not the employee.
- EB-2: members of the professions holding an advanced degree or its equivalent
- EB-3: professionals, skilled workers, or unskilled workers.

Requirements:

- Test of the labor market
- Offered wage must meet or exceed prevailing wage
- Employee must meet the minimum requirements of the offered position prior to filing PERM Labor Certification Application
- Employer's ability to pay

Process:

- Prevailing Wage Determination issued by DOL – 6 to 8 months
- Recruitment – 60 days to 180 days
- PERM Certification issued by DOL – 6 to 8 months
- I-140 Immigrant Petition – two weeks if Premium Processing, or several months
- I-485 when priority date is current

Lawful Permanent Residence

Adjustment of Status

- If inside the US
- Filing eligibility based on priority date & IV category
 - Visa bulletin retrogression
- Travel considerations
- Work & travel permits
- Independent basis to remain in US

Consular Processing

- If outside of the US
- National Visa Center
- US Embassy/Consulate abroad
- Consular backlogs/delays

Lawful Permanent Residence & Naturalization

LPR – “Green Card”

- LPR card valid for 10 years
- Benefits:
 - No other status needed
 - Employment flexibility
 - Travel without visa
- Must maintain US residence
- Cannot vote

Naturalization to USC

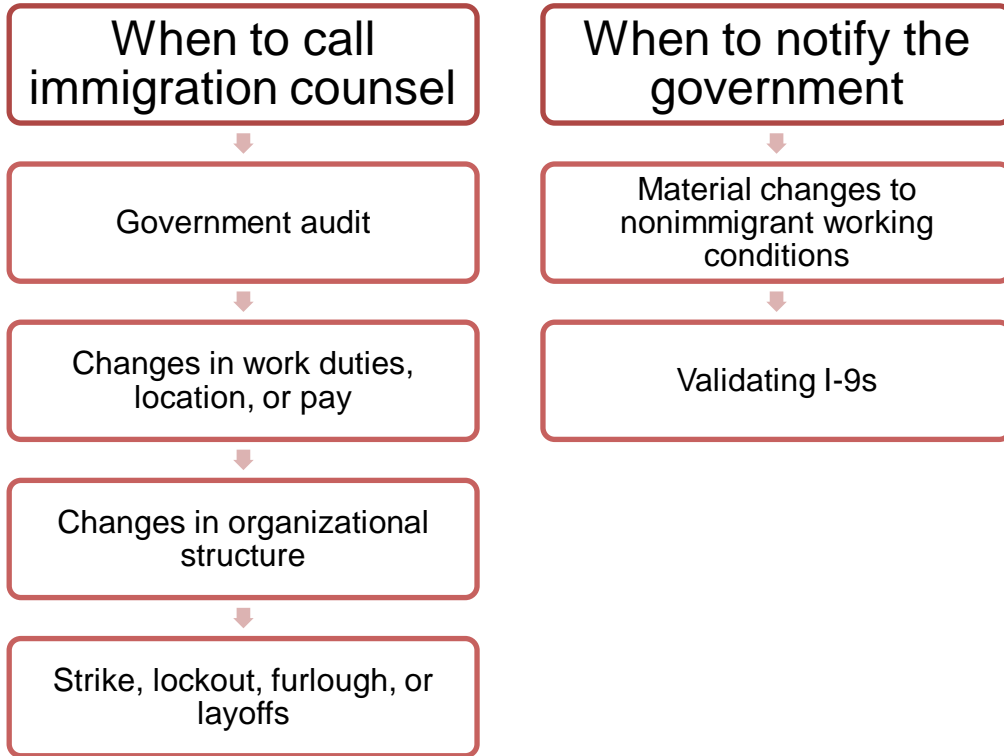
- Eligibility:
 - LPR for 5 years
 - 3 years if married to a USC
 - Meet other factors including:
 - Good moral character
 - Continuous residence in US
 - Language & knowledge test

Keys for Success

- Key factors to consider
 - When to establish & update immigration policy
 - Designation of an immigration point
 - Maintain open lines of communication between management, employee, & outside partners



Keys for Success



Keys for Success

Compliance considerations

I-9 compliance & proactive audits

H-1B public access file

PERM audit file

H2 compliance

J-1 waiver compliance reporting

Dependent status extensions



... And more in our upcoming compliance webinar coming this Spring!

Questions?

Presenters



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