

The Basics of U.S. Immigration through Employment



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Introduction

- This presentation is ONLY a general overview of employment-based immigration
- It is NOT legal advice on your specific case
- Please DO consult a qualified attorney
- Thank you for attending – please keep Q&A for the end

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Employment-based Immigration

- Immigration Overview - Visa types
- Hiring an “alien”: CPT; OPT; H-1; O-1; TN; L
- Immigrant Visas
- Steps in the immigrant visa process
- Green Card processes
- The Green Card
- Naturalization

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What we will cover today

- Basics – regulations, laws, priority dates
- Maintaining status
- Families and dependents
- Non-immigrant to immigrant status
- H-1b, options, PERM process, EB 1,2 and 3
- Recent developments and changes

Other immigration topics to be aware of:

Typical routes to immigration: immediate relative; family, employment, asylum, investor, religious worker; U-visas; T-visas

Priority dates and what they mean

Visa expiry versus I-94 expiry

Remaining in status- what does that mean?

Non-Immigrant Visa Types:

- F-1 - J-1 – M-1
- CPT / OPT (employment-authorized status)
- H-1b; H-2A; H-2B; H-3 (trainee)
- O-1
- L-1 (a) or (b)
- “E” - treaty trader / investor
- Dependents in status – spouses and children

The Employment-Based Immigration Process

- Entry to USA as a non-immigrant: eg: F/J/H
- OPT or other work-authorized status
- Employer or self petition for I-140 approval
- File for Adjustment of Status or consular processing – stay in status at all times!
- Approval – “green card” or LPR status!

Hiring a foreign national

- What is OPT?
- Duration of OPT – 12 months or STEM extn.
- Timing of OPT is crucial
- Changing status to H-1b
- What is a H-1b?
- What if there are no H-1b's available?
- O-1 status / L-1 possible?

The H-1b visa

- Professional employment - up to 6 years
 - Minimum Bachelor's degree
 - Payment of Prevailing Wage (LCA)
- Premium Processing – sometimes put on hold by USCIS
- Extension of H-1b?
- H-1b “transfers”
- Cap and Non-cap H-1b's

Recent issues of concern:

- Policy of deferring to prior approval on the same case-same petitioner: **RESCINDED**
- BAHA Executive Order (April 2017) - specifically targeted at H-1b's and at all immigration in general.
- New requirement: USCIS now requires interviews and form I-245(J) for all employment-based adjustment applicants.

H-1b processing – the LCA

- What is the LCA? Labor Condition Application
- Process – registration with the DOL
- iCert portal – need employer FEIN
- Takes 7 working days minimum
- Must include approved LCA with H-1b
- “Material Change” needs new LCA, maybe new or amended petition
- STEM OPT extension needs E-verify

Immigrant visas – road to a “green card”

- What is an immigrant visa?
- So what were the visas that we just heard about?
- Why do we now need another visa?
- Immigrant v/s Non-immigrant categories
- Categories of immigrant visas
- Routes to immigrant visas

Employment based Immigrant visas – many routes, same destination

- EB-1: Outstanding Professor / Researcher
- EB-2: Advanced Degree - NIW - PERM
- EB-3: Professional / Skilled Worker / PERM
- EB-5: Investor Visa
- EB-2 – Sch A, Group 2: Exceptional Ability
- BEWARE THE BACKLOGS!!!

**Extraordinary, Exceptional, Plain Vanilla?
File PERM, Sch A-Grp 2, EB1, EB2 or EB3?**

- Alien's qualifications
- Job requirements
- Salary offered
- DOL requirements
- Processing times at USCIS
- Priority Dates – backlogs

A Simple Flowchart of the EB-IV process

1. Obtain work-authorized non-immigrant status
2. Decide: PERM or direct I-140?
3. File applications - PERM or I-140*
4. Application Approved
5. File application for Adjustment of Status*
6. *Concurrent filing – what is it, what are the benefits?

Priority Dates

- What are they?
- Who sets them?
- Why do we need them?
- How does it affect an immigrant visa?
- How to plan around visa backlogs
- Child Status Protection Act
- H-1b extensions due to priority date backlogs

Priority Dates – Family Based Immigration

Visa Bulletin (Nov 2018) Final Action Dates

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	22JUN11	22JUN11	22JUN11	01AUG97	01FEB07
F2A	15SEP16	15SEP16	15SEP16	01SEP16	15SEP16
F2B	01JAN12	01JAN12	01JAN12	08JUN97	01JUN07
F3	08JUL06	08JUL06	08JUL06	22DEC95	22JUN95
F4	22MAR05	22MAR05	01JUN04	08FEB98	15JUN95

Priority Dates – Employment Based

Visa bulletin (Nov 2018) – Final Action Dates

Employment-based	All Areas Except	CHINA-mainland born	EL SALV-GUATE-	INDIA	MEXICO	PHILIPPINES	VIETNAM
1st	01APR17	01JUN16	01APR17	01JUN16	01APR17	01APR17	01APR17
2nd	C	15MAY15	C	26MAR09	C	C	C
3rd	C	01JUN15	C	01JAN09	C	08JUN17	C
Other Workers	C	01MAY07	C	01JAN09	C	08JUN17	C
5th Regional Center (I5 and R5)	C	15AUG14	C	C	C	C	01FEB16

EB Immigrant Visas – Path I: PERM

- File PERM application with DOL
- Requires: advertisement; recruitment; good faith job opening to US workers; preparation of recruitment results to US DOL; e-file form ETA 9089; expect and prepare for audit
- Once PERM is approved – file I-140 Immigrant Worker Petition with USCIS, and
- If priority date is current, file for AOS as well

EB Immigrant Visas – Path II: EB-1(A)

- Alien of Extraordinary Ability
 - **IMPORTANT: CAN self-petition!**
 - Extraordinary Ability in the Sciences, Arts, Education, Business or Athletics
 - Will enter the USA to continue in such work
 - And the alien's entry to the USA will prospectively benefit the USA
 - Filed on form I-140

EB Immigrant Visas – Path II: EB-1(B)

- Outstanding Professor / Researcher
- Criteria: "Recognized internationally as outstanding" - at least TWO out of:
 - Major Prizes, International or National Awards
 - Memberships in professional assn's
 - Publications by the immigrant
 - Written about by others in professional publications
 - Judge of the work of others
 - Original contribution(s) to the field
 - **Must have tenure track or research position at university/facility**

EB Immigrant Visas – Path II: EB-1(C)

- Multinational Executive or Manager
- Entered as L-1A – manager or executive in multinational company, assigned to USA
 - Job Creation; taxes; benefit to USA
 - Must show managerial/executive nature of the position: defined in INA and highly scrutinized
 - Avoids the PERM process
 - No prevailing wage requirement
 - NOT suitable for smaller companies

EB Immigrant Visas – Path III: EB-2-NIW

- Alien with Exceptional Ability in the field seeking a waiver of Labor Certification
- Drawback: needs “national interest” waiver
- Standard for NIW – relaxed – Matter of Dhanasar (AAO, December 2016) – NYSDOT overruled
- Current economic and political climate
- **IMPORTANT: CAN self-petition!**

EB Immigrant Visas – Path IV: Schedule A, Groups I and II – 20 CFR § 656.5

- The USDOL has determined that there are shortages of certain occupations in the USA and exempt from Labor Certification
 - Schedule A, Group I:
 - Professional Nurses
 - Licensed Physical Therapists
- And for other professionals, Schedule A, Group II – Aliens of exceptional ability (not EB-2)

**EB Immigrant Visas – Path IV: Schedule A,
Group II – 20 CFR § 656.5**

- *Aliens (except for aliens in the performing arts) of exceptional ability in the sciences or arts...who have been practicing their science or art during the year prior to application and who intend to practice... in the United States. (no degree req't!)*
- *Performing arts.* Aliens of exceptional ability in the performing arts whose work during the past 12 months did require, and whose intended work in the United States will require, exceptional ability.
- **Applicable standard: Exceptional Ability:** must meet at least 2 out of 7 criteria; suggested elements – show recognition in the academic/professional community; international scope and reach; as well have previous “exceptional” work – similar to EB-2 criteria
- **Needs Prev. Wage and employment offer; Employer sponsored**

EB-5: The investor visa

- Why: because most immigrants are entrepreneurs at heart!
- Highly skilled and creative talent
- Must invest either US \$ 1 Million or \$ 500,000 if in high unemployment / Regional Centers
- Must create at least 10 US jobs
- Conditional status for 2 years, then full LPR
- Option – non immigrant “E” visa status

Some Statistics about Immigrant Investors

2011 Kauffman Foundation report:
“immigrants were more than twice as likely to start businesses each month than were the native-born in 2010.”

September 2010 Hamilton Project of the Brookings Institution report: “among people with advanced degrees, immigrants are three times more likely to file patents than U.S.-born citizens.”

Executive Order 13788 of April 18, 2017
Buy American and Hire American

This has put a serious wrinkle in the employment-based non-immigrant and immigrant process!
The EO is being implemented by the USCIS in all employment-based applications.
Specific portions of the EO restrict H-1b workers

Executive Order 13788 of April 18, 2017
Buy American and Hire American

Sec. 5. Ensuring the Integrity of the Immigration System in Order to "Hire American." ... (a) the Secretary of Homeland Security shall, ...propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.
...and.....

Executive Order 13788 of April 18, 2017
Buy American and Hire American

Sec. 5. (b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help *ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.*

What does the EO mean for the graduating student or the EB-1 or EB-2 self petitioner?

It means that the standard of review will be much higher

It means that the entry level worker at the Level 1 wage will probably NOT qualify for an H-1b after graduation and OPT

It means that only highly skilled workers will qualify.

What am I advising my clients?

You must have substantial proof of your abilities and the quality of your work or research must be at a sustained high level;

If applying for an H-1b, you must have more than a Level 1 (entry level) wage; and

If applying for a H-1b, the job description and requirements must be higher than for an entry-level position (apply the SOC – O*Net)

Adjustment of status interview and form 245(J)

Questions and Answers

Thank you for attending!

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