

U.S. Immigration System: A Brief Overview

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U.S. immigration laws are administered by various U.S. government agencies and departments, including the Department of Homeland Security (DHS), the U.S. Department of Justice, the U.S. Department of State and the U.S. Department of Labor. DHS has divided its functions into three bureaus: the Bureau of Citizenship and Immigration Services (BCIS), the Bureau of Immigration and Customs Enforcement (BICE), and the Bureau of Customs and Border Protection (CBP). In some cases, these U.S. agencies are assisted by the State Workforce Agencies (SWA). Depending on the type of visa desired, applications and/or petitions must be made to one or more of these entities.

Due to the complexity and fast-changing nature of U.S. immigration laws, it is highly recommended to seek the counsel of U.S. immigration lawyers in the processing of U.S. immigration benefits.

The U.S. immigration system is divided into nonimmigrant and immigrant visas. Nonimmigrant visas are temporary visas issued for purposes of employment, education, training, etc. as well for accompanying spouses of foreigners in the U.S. Immigrant visas (U.S. permanent residence visas) are obtained on the basis of family-based or employment-based petitions, granting the beneficiary the right to reside and work in the U.S. indefinitely. After fulfilling certain minimum residence and other requirements, lawful U.S. permanent residents may apply for U.S. citizenship.

Due to the complexity of the legal issues presented under each visa category, in this overview, we will briefly outline a select group of nonimmigrant and immigrant visas.

Section 1.01 Nonimmigrant Visas

(a) B-1 BUSINESS VISITORS/B-2 VISITORS FOR PLEASURE

There are two types of B visas: B-1 visas for business visitors, and B-2 visas for visitors for pleasure.

In order to demonstrate nonimmigrant intent, B-1/B-2 visitors must document the sufficiency of their financial arrangements for the trip, specificity of trip itinerary and strong ties to the visitor's home country.

Generally, B-1 and B-2 visas are issued for multiple entries valid for ten years. The stamp will indicate B-1/B-2 allowing the recipient to enter the U.S. using either visa classification to conduct authorized activities allowed by the specific visa. Note that this visa does not imply automatic admission to the U.S. nor does it mean that the visitor can stay in the U.S. for the validity of the visa. The visa simply allows the visitor to apply for admission at a U.S. point of entry. The BCIS inspector at the port of entry makes the final determination regarding



admission to the U.S. by authorizing the visitor to stay in the U.S. for a specified period of time as noted in their white Form I-94 card.

(i) B-1 Business Visitors

The B-1 Business Visitor category is available to persons who can demonstrate that 1) they have no intention of abandoning their foreign residence and 2) they are visiting the U.S. temporarily for business. B-1 visa holders may not engage in productive employment in the U.S. either for a U.S. employer or independently. Instead, business activities in the U.S. must relate to international trade or commerce, be performed on behalf of a foreign employer while on their payroll. Some appropriate B-1 activities include: 1) attending board meetings of a U.S. company; 2) conducting business meetings and negotiations; 3) litigation, 4) attending business, scientific, professional or educational conferences, seminars, or conventions; 5) coming to set up an investment in the U.S. or open a U.S. office for a foreign entity.

(ii) B-2 Visitors for Pleasure

The B-2 Business Visitor category is available to persons who can demonstrate that 1) they have no intention of abandoning their foreign residence and 2) they are visiting the U.S. temporarily for pleasure. The B-2 visa covers such recreational activities as tourism, visits to relatives or friends, rest, medical treatment and other authorized social activities. Prospective students can also obtain a B-2 visa, but they must announce their intention to do so to the consular authorities.

(b) L-1 INTRACOMPANY TRANSFEREE VISAS

The L-1 visa facilitates the transfer of high-level executive, managerial or specialized employees from a foreign corporation to a U.S. branch, parent/subsidiary or affiliated entity. Also, pursuant to recent legislation, the spouses of L-1 visa holders may obtain separate employment authorization after admission to the U.S. In addition, certain L-1 visa holders may later, under certain conditions, pursue green card processing under the EB-1 Multinational /Executive/Manager category for employment-based immigrants.

The first requirement for L-1 eligibility is for the beneficiary to have been continuously employed abroad for one year during the last three years for a parent, affiliate, or subsidiary of the prospective U.S. employer. Any time spent in the U.S. will not count toward the one year of required employment abroad.

Second, the foreign employer and the U.S. company must have a “qualifying relationship.” The U.S. and the foreign entities must meet certain strict share ownership and/control requirements delineated in the regulations. Failure to fulfill these requirements would lead to a denial of the L-1 visa petition.

Third, the beneficiary must have been employed at the foreign company in a managerial, executive or specialized knowledge capacity for one year during the three years preceding the L-1 visa petition process and he/she must be transferred to the U.S. entity in one of these qualifying categories.



Persons coming to open up a new office in the U.S. will only be granted a one-year stay in L-1 status. The BCIS tends to carefully scrutinize newly established and small companies during the initial L-1 visa application and visa extension process.

L-1 visa petitions must first be approved by the BCIS Service Center. After the approval of the petition, the employee must apply at the U.S. Consulate for the visa. The Consulate reserves the right to delay or deny issuance of an L-1 visa where the Consulate possesses certain information not available to the BCIS at the time of adjudication, thus requiring further inquiry.

Executives and managers are entitled up to a total of seven years in L-1A visa status. Specialized knowledge employees are entitled up to five years in L-1B visa status. The visas are granted for initial periods of three years with extensions of two years. Prior periods spent in H and L visa status are deducted from the seven/five years entitlement, unless the individual has spent one year outside of the U.S.

(c) E-1 TREATY TRADER/E-2 TREATY INVESTOR VISAS

The E visa category is available for nationals of countries with which the U.S. has entered into certain treaties of trade and investment conferring reciprocal benefits to nationals of each country. Depending on the applicant's personal circumstances, the applications may be made through the BCIS and/or the U.S. Consulate. Pursuant to recent legislation, the spouses of E-1/E-2 visa holders may obtain separate employment authorization after admission to the U.S.

E-1/E-2 visa applicants must intend to depart the U.S. upon completion of their U.S. employment in E status.

(i) E-1 Treaty Trader Visas

E-1 Treaty Trader Visas are available to individuals who will enter the U.S. solely to carry on substantial trade, including trade in goods, monies, or services, principally between the U.S. and the foreign country of which the person is a national. To qualify, there must exist a treaty between the U.S. and the country in question. The applicant must be a national of the treaty country. At least 50% of the ownership of the U.S. trading company must be held by nationals of the visa applicant's home country. To be eligible for an E-1 visa the person should be an owner, manager, executive, or hold an "essential" position within the company. As indicated, qualifying employees of corporate investors are also eligible for E-1 visa status.

Trade for E-1 purposes must fulfill the following requirements: 1) it must constitute an exchange between the U.S. and the treaty country, 2) be international in scope and 3) involve qualifying activities.

Trade between the U.S. company and the treaty country must already be in existence. A foreign national cannot qualify for E-1 status for the purpose of searching for a trading relationship.



To qualify as substantial, trade must be a continuous flow, involving numerous transactions over time. U.S. Consular officers will focus primarily on the volume of trade conducted while considering the monetary value of the transactions.

(ii) E-2 Treaty Investor Visas

E-2 Treaty Investor Visas are available to individuals who will enter the U.S. solely to develop and direct the operations of an enterprise in which the individual has invested, or is actively in the process of investing, a substantial amount of capital. To qualify, there must exist a bilateral investment treaty between the U.S. and the country in question. The applicant must be a national of the treaty country. At least 50% of the ownership of the U.S. company must be held by nationals of the visa applicant's home country. To be eligible for an E-2 visa the applicant should be an owner, manager, executive, or hold an "essential" position within the company. As indicated, qualifying employees of corporate investors are also eligible for E-2 visa status.

Investment for E-2 purposes must fulfill the following requirements: 1) it must be active, not passive, 2) substantial, and 3) non-marginal.

No set dollar figure constitutes a minimum amount of investment to be considered "substantial" for E-2 visa purposes. This requirement is met by satisfying the "proportionality test." The test is a comparison between two figures: The amount of qualifying funds invested, and the cost of an established business or, if a newly created business, the cost of establishing such a business.

In addition, the investor must not be investing in a marginal enterprise solely for the purpose of earning a living. The economic impact of the enterprise, including its employment-creation aspects will be taken into account in assessing the marginality of the business.

(d) H-1B WORKERS IN SPECIALTY OCCUPATIONS

The key issues in determining eligibility for the H-1B visa category are 1) whether the position is a specialty occupation, and b) whether the individual in question meets the requirements for the specialty occupation.

Specialty occupation is defined as an occupation that requires 1) theoretical and practical application of a body of highly specialized knowledge, and 2) attainment of a bachelor's or higher degree in the specific specialty or its equivalent.

To qualify for H-1B visa status, the individual will need 1) full state licensure to practice the occupation, if such licensure is required to practice in the occupation in the state of intended employment, 2) completion of a U.S. bachelor's or higher degree (or its foreign equivalent) in the specialty or a related field; or 3) education, training, or experience in the specialty equivalent to the completion of such degree.

Whether a given position falls within a specialty occupation is a decision made by the BCIS in adjudicating the H-1B visa petition. This decision is influenced by many different factors including existing relevant case law. Other considerations influencing the BCIS decision-making include the changing nature of U.S. industry and professions, which, of necessity vary



over the course of time, as occupations become more complex and the needs and requirements of U.S. employers change accordingly.

Moreover, depending on certain attributes of the position in question, the nature/size of the U.S. employer, and sometimes even without any apparent legitimate or valid reason, the BCIS may scrutinize and question whether a university-trained employee is "really" needed for the offered position.

H-1B visa status will be valid for the length of time the individual's services will be required, for an initial three year period, with one extension period of three years up to a maximum period of stay of six years. Prior periods spent in H and L visa status are deducted from the six year entitlement, unless the individual has spent one year outside of the U.S.

The regulations governing the H-1B process entail burdensome procedural and documentary requirements for employers identified as "H-1B dependent" but also significant responsibilities for all H-1B employers. Notably, if the employer is H-1B dependent, it is required to test the U.S. labor market prior to H-1B visa processing. The regulations regarding the "H-1B dependent" employers expired in October 1, 2003. They may be reinstated in the future.

The employer's obligations under the H-1B visa program are reflected in the various employer attestations required by the Labor Condition Application (LCA), which must be filed with and certified by the Department of Labor prior to H-1B visa processing. Each of these attestations is explained in detail in the LCA cover pages and regulations. The attestations pertain to the employer's obligations regarding the required wage, working conditions, strike and lockout disputes, and notice to other employees or bargaining representative.

Also, the employer is required by the regulations to pay the employee's transportation costs to his/her home country, if employment is terminated prior to the expiration of the H-1B visa. Unlike E and L visa holders, spouses of H-1B workers may not work in the U.S. incident to their immigration status. They would need to obtain a separate employment visa in order to accept U.S. employment.

The H-1B visa category is subject to quotas which are at 195,000 for fiscal year 2003 and which will be reduced to 65,000 on October 1, 2003 for fiscal year 2004.

(e) H-3 VISAS FOR TEMPORARY TRAINEES

An H-3 is a nonimmigrant who seeks to enter the U.S. at the invitation of an organization or company for the purpose of receiving training in any field. This visa category is not applicable to physicians.

The offered U.S. training program may not be designed primarily to provide productive employment, but some such employment may be authorized if it is incidental and necessary to the training.



There are certain restrictions on the attributes of the training programs and the nature of the training offered must also meet certain specific criteria enunciated in the regulations.

The maximum period authorized for an H-3 visa is 24 months. An H-3 trainee who has spent the full two years in H-3 status may not change status to, nor apply for an H or L visa before spending six months in his or her home country.

H-3 visa applicants must have nonimmigrant intent - that is, they must intend to depart the U.S. upon completion of their U.S. training. Spouses of H-3 visa holders may not work in the U.S. incident to their immigration status. They would need to obtain a separate employment visa in order to accept U.S. employment.

(f) O-1 VISAS FOR INDIVIDUALS WITH EXTRAORDINARY ABILITY

To qualify for the O-1 visa, the individual in question must possess extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim. The achievements of O-1 beneficiaries must be recognized in the field through extensive documentation, as provided in the regulations.

Generally, when filing the O-1 visa petition with the BCIS, a written consultation is required from a labor union, a management organization or a peer group covering the type of activity/occupation in question.

O-1 beneficiaries are allowed admission for as long as the duration of the event in question up to a maximum period of three years, with one year extensions for authorized events thereafter.

Also, the employer and the petitioner, if separate, are jointly and severally liable to pay the employee's transportation costs to his/her home country, if employment is terminated prior to the expiration of the O-1 visa. Spouses of O-1 visa holders may not work in the U.S. incident to their immigration status. They would need to obtain a separate employment visa in order to accept U.S. employment.



Section 1.02 U.S. Permanent Residence - Immigrant Visas

Apart from nonimmigrant visas, U.S. immigration laws permit individuals to obtain lawful permanent residence (LPR)(the so-called green card) on the basis of employment and close family relationships. LPR status enables the individual to reside and work in the U.S. indefinitely.

There are several employment-based immigrant visa classifications, most of which have built-in protections for the U.S. labor market. Generally, employment-based immigration requires a strong showing that the individual is one of the best in the field or that there are no qualified U.S. workers available to fill the position.

The employment-based immigration system includes the following categories:

(a) FIRST PREFERENCE: EB1-PRIORITY WORKERS

- 1) Workers of Extraordinary Ability
- 2) Outstanding Professors and Researchers
- 3) Multinational Executives and Managers

(b) SECOND PREFERENCE: EB-2

- 1) Advanced Degree Professionals
- 2) Individuals possessing Exceptional Ability

(c) THIRD PREFERENCE: EB-3

- 1) Professionals
- 2) Skilled Workers
- 3) Other Workers

The second and third preference categories indicated above require issuance of a labor certification from the U.S. Department of Labor certifying that there are no qualified, available, willing U.S. workers to fill the position.

However, there is an exception to the labor certification requirement in the second preference category. If the foreign worker will serve the U.S. national interest, labor certification may be waived thereby eliminating an arduous and lengthy Department of Labor processing.

(d) FIFTH PREFERENCE: EB-5 (IMMIGRANT INVESTORS)

This immigrant visa category was created for individuals seeking to enter the U.S. to engage in a commercial enterprise that will benefit the U.S. economy and create at least 10 full-time jobs to U.S. workers. The amount required to invest is \$1 million, although that amount may be \$500,000 if the investment is made in a “targeted employment area.” Also, the foreign investor must take at least a policymaking role in the enterprise.



The new commercial enterprise may be established in one of four ways: (1) creating an original business; (2) purchasing and restructuring an existing business; (3) expanding, and thereby substantially changing the net worth or number of employees in a business; or (4) investing in a troubled business.

Section 1.03 Employer Sanctions and Paperwork Violations

In 1986, Congress enacted the Immigration Reform and Control Act of 1986, commonly known as IRCA, bringing significant legal responsibilities to U.S. employers.

IRCA imposes penalties on employers for knowingly hiring or continuing employment of workers who lack U.S. employment authorization. To aid in the enforcement of this law, employers must verify the identity and employment eligibility of all new employees hired after November 6, 1986 and ensure that all such employees properly complete Form I-9.

This “I-9 Process” includes U.S. citizens, permanent residents and all other persons employed by an employer after November 6, 1986.

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