Country Profile: United States

Emigra Ogletree Worldwide

Introduction

This country guideline provides general information on the most common corporate immigration processes for the United States. Please note that immigration processes in every country are subject to frequent change, and also that each case is assessed on its own merits. Therefore, this guideline should be taken as providing general information only and should not be construed as legal advice. For specific, detailed advice, please contact your representative.

This guideline is divided into the following sections. Please click on the links below to be taken directly to the relevant section.

Non-Immigrant Visas

Visa Waiver Program and B Visa - Business Visitor

Visa Waiver Program (No Visa)

Citizens of the below countries can enter the U.S. for business or pleasure without a visa and stay up to ninety (90) days. Effective, January 12, 2009, citizens and nationals of visa waiver countries will be required to obtain a travel authorization via the Electronic System for Travel Authorization (ESTA). For more information go to http://www.cbp.gov/ESTA.

Andorra; Australia; Austria; Belgium; Brunei; Chile; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Italy; Japan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Monaco;

Netherlands; New Zealand; Norway; Portugal; San Marino; Singapore; Slovakia; Slovenia; South Korea; Spain; Sweden; Switzerland; Taiwan; and United Kingdom.

Individuals (other than Canadian citizens) who enter the United States under the Visa Waiver Program will receive a "WB" notation on the I-94 card if admitted for business, or a "WT" if admitted as a tourist. Canadian citizens typically do not get issued an I-94 card at entry, unless admitted in one of the employment based categories noted below. Individuals seeking entry under the Visa Waiver Program must have a return ticket and arrive on an approved air or sea carrier.

A person who enters in WB or WT status may not (a) extend his/her stay beyond ninety (90) days; (b) with limited exceptions change to any other visa status without leaving the country; (c) receive any compensation from a U.S. source, other than certain WB business visitors who are eligible to receive reimbursement or a reasonable allowance to cover expenses during their stay.

B Visa - Business Visitor

Citizens of countries not listed above (other than Canada) must obtain B-1 visas in order to enter the U.S. for business or B-2 visas to enter as tourists or as dependent family members accompanying a B-1 business visitor. Individuals who are eligible to enter under the Visa Waiver Program may wish to consider obtaining a B-1 or B-2 visa as this will enable them to seek an extension of stay or a change of status after admission to the United States.

Individuals who seek entry into the United States as a B-1 visitor (and WB counterpart) are not authorized to engage in any productive work or employment on a U.S. payroll. Furthermore, the B-1/WB is not appropriate for those seeking to engage in active management of a U.S. enterprise.

Appropriate activities generally include the following: (a) engaging in commercial transactions which do not involve gainful employment in the U.S. (such as taking orders for goods manufactured abroad); (b) consulting with business associates; (c) participating in scientific, educational, professional or business conventions, conferences or seminars; (d) undertaking independent research; or (e) participating in litigation in a U.S. court. In addition, a B-1 (and WB counterpart) non-immigrant may, in limited circumstances, perform certain services or receive training in the U.S., provided they remain on the payroll of a foreign employer and do not receive any form of compensation from a U.S. source.

Special Rules for Canadian and Mexican Business Visitors

The North American Free Trade Agreement authorizes Canadian business visitors to enter the U.S. in B-1 visa status without a visa and to engage in a broader range of activities than non-Canadians who enter in B-1 or WB visa status. Mexican citizens may also enter in B-1 status to engage in the same range of activities, however, they must first obtain a B-1 visa from a U.S. embassy or consulate.

E-1 Treaty Trader/E-2 Treaty Investor

E-1 Treaty Trader

The E-1 Treaty Trader visa allows an individual to come to the U.S. for the purpose of furthering substantial trade that is international in scope. The trade must be primarily between the United States and the treaty country where the person holds citizenship.

The current list of E-1 treaty countries includes the following:

> Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark (does not include Faroe Islands or Greenland), Estonia, Ethiopia, Finland, France (includes Martinique, Guadaloupe, French Guiana and Reunion), Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan (includes Bonin and Ryukyu Islands), Jordan, Korea (South), Latvia, Liberia, Luxembourg, Macedonia Mexico, Montenegro, Netherlands (includes Aruba and Netherlands Antilles), Norway (does not include Svalbard), Oman, Pakistan, Paraguay, Philippines, Poland, Serbia, Singapore, Slovenia, Spain (applies to all territories), Suriname, Sweden, Switzerland, Taiwan, Thailand, Togo, Turkey, United Kingdom (applies only to British territories in Europe), and Yugoslavia (valid for new Republics that arose out of former Yugoslavia). (Although Iran is an approved treaty trader nation, the treaty has been rendered inoperative by the Executive Order preventing trade with Iran).

In order for a business to qualify to utilize E-1 visas, the company must demonstrate that the U.S. business has created substantial trade between the U.S. and the treaty country. Trade is not limited to goods and services. However, the trade must be principally with the treaty country. In other words, the U.S. business must be able to document that more than 50% of the total volume of international trade will occur between the U.S. and the treaty country. In the event the U.S. entity is a branch office, the foreign business must have more than 50% of its trade with the U.S.

At least 50% of the U.S. entity must be owned by non-U.S. resident nationals of the treaty country. If the company is publicly traded, the firm's nationality is considered to be that of the country in which the firm's stock is listed and traded.

E-2 Treaty Investor

The E-2 Treaty Investor visa allows an individual to come to the U.S. for the purpose of furthering a substantial investment in a U.S. enterprise made by individuals or businesses that are citizens of a treaty country.

The current list of E-2 treaty countries includes the following:

> Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Cameroon, Canada, Chile, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France (includes

Martinique, Guadeloupe, French Guiana and Reunion), Georgia, Germany, Grenada, Honduras, Iran, Ireland, Italy, Jamaica, Japan (includes Bonin and Ryukyu Islands), Jordan, Kazakhstan, Korea (South), Kosovo, Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Moldova, Mongolia, Morocco, Netherlands (includes Aruba and Netherlands Antilles), Norway (does not include Svalbard), Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Romania, Serbia, Senegal, Singapore, Slovak Republic, Spain (applies to all territories), Sri Lanka, Suriname, Sweden, Switzerland, Taiwan, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Ukraine, United Kingdom (applies only to British territories in Europe), and Yugoslavia (valid for new Republics that arose out of former Yugoslavia).

In order for a business to qualify to utilize E-2 visas, the company must demonstrate that a substantial investment in the U.S. business has been made by individuals or companies that are citizens of the treaty country. Whether the amount invested will meet the “substantiality” test will depend on a variety of factors, such as the nature and type of business and typical startup costs for similar businesses. In addition, the investment must be placed “at risk” (actually invested into the business) and not be "marginal" (not made solely for the purpose of earning a living).

Similar to the E-1, at least 50% of the U.S. entity must be owned by nationals of the treaty country in order to qualify to utilize E-2 visas.

E-1 or E-2 Visa Processing

Before an individual can apply for an E-1 or E-2 visa, the sponsoring entity in the United States where he or she will work must be registered as an E-1 or E-2 qualified petitioner. An initial request to qualify and register the U.S. entity for E-1 or E-2 status must be filed together with at least one (1) individual's E-1 or E-2 application at the U.S. Embassy or Consulate that has jurisdiction over the treaty country. Once the company is E-1 or E-2 qualified, an individual who is a national of the treaty country may apply for an E-1 or E-2 visa if he or she is seeking admission to work in an executive or supervisory capacity, or as an essential employee of the company. Employment with the company abroad is not a pre-requisite for E-1 or E-2 status.

E-1 and E-2 visas can be issued for up to five (5) years and are renewable indefinitely provided the company and the individual maintain eligibility for E-1 or E-2 status. Upon each entry to the United States, E-1 and E-2 visa holders may be granted up to two (2) years of E status on Form I-94 provided the E-1 or E-2 visa is valid at the time of entry. Spouses and dependent family members of E-1 or E-2 visa recipients are also eligible for E-1 or E-2 dependent visas. Moreover, E- spouses are eligible to apply for employment authorization after they enter the United States.

E-1 or E-2 non-immigrants who do not plan to travel internationally may submit a petition with the U.S. Citizenship and Immigration Services to extend their stay for up to two (2) years.

H-1B Visa - Temporary Employment

One of the more frequently used non-immigrant visa classifications for temporary employment of foreign workers is the H-1B visa for “professional” or "specialty occupations." The USCIS (U.S. Citizenship and Immigration Service) defines

"specialty occupations" as positions that typically require the theoretical and practical application of a body of highly specialized knowledge. This is most commonly evidenced by the attainment of a bachelor's degree (or foreign degree equivalent) in a relevant field of study. For certain individuals with specialized skills and considerable work experience, academic equivalency evaluations may be obtained to establish the individual possesses the functional equivalent of a bachelor's degree.

Prior to submitting an H-1B petition with the USCIS, the company must file a Labor Condition Application (LCA) with the Department of Labor. The LCA defines the employer's obligations to ensure that employing a foreign worker under the H-1B program will not adversely impact the wage or working conditions of similar situated United States workers. Upon approval of the LCA, the H-1B petition is filed with the USCIS. H-1B petitions must be accompanied by the requisite H-1B filing fees. Companies with twenty-six (26) employees or more must submit a $1500.00 Education and Training fee for the initial petition and the first extension of stay; employers with twenty-five (25) or fewer employees are required to pay one-half of the fee, or $750.00. Certain educational institutions and nonprofit or government research organizations are exempt from the Education and Training Fee. All employers must submit a one-time Fraud Detection and Prevention fee of $500.00 for each initial H-1B petition. Employers subject to the one (1) time Fraud Detection and Prevention fee may also be assessed a further $2,000 fee if they employ more than fifty (50) individuals in the U.S.; more than 50% of the employees in the U.S. are in H-1B or L-1 status; and the petition is filed before October 1, 2014. In addition, a $325.00 filing fee is required for each new H-1B petition that is filed as well as each extension filed. H-1B petitions may be filed requesting premium processing for an additional $1225.00 fee. Premium processing guarantees adjudication of the H-1B petition within fifteen (15) days of filing.

Work authorization under the H-1B employment is specific to the employer/petitioner, worksite location and the position described on the petition. A material change in the terms and conditions of employment may necessitate the filing of an amended petition. Individuals who are currently in or have been previously admitted into the United States in H-1B status, and have not engaged in unauthorized employment in the United States, may be eligible for H-1B "portability." H-1B portability permits qualified H-1B holders to commence employment with a new company upon the filing of a new H-1B petition with USCIS. Employers should be certain that portability applies before bringing prospective H-1B employees onto payroll. Generally, individuals who are not in valid H-1B status must generally wait for USCIS approval prior to beginning work with a new company.

New H-1B visas are subject to annual limits each fiscal year (the U.S. government fiscal year begins on October 1 and ends September 30). Currently, the annual limit is 65,000 per year with an additional 20,000 available to H-1B applicants that possess an advanced degree or higher from a U.S. academic institution. Once the H-1B cap is reached, employers must wait until the beginning of the next fiscal year to petition for new or first time H-1B candidates. Due to the cap, employers must often plan far in advance and should file as early as possible to ensure they secure H-1B status for the next fiscal year. (Note: Only first time or initial H-1Bs are subject to the cap. Also, certain educational institutions and nonprofit or government research organizations are H-1B cap exempt. In addition, a number of H-1Bs are set aside for H-1B non-immigrants who are citizens/nationals of Chile or Singapore pursuant to special Free Trade Agreements).

Under current law, an alien can be in H-1B status for a maximum period of six (6) years at a time. After that time the H-1B non-immigrant must remain outside the United States for one (1) year before another H-1B petition can be approved. Certain H-1B non-immigrants working on Defense Department projects may remain in H-1B status for up to ten (10) years. Time spent outside the United States does not count towards the H-1B six (6) year limit and may be recaptured. Employees should retain any documentation that evidences time spent abroad.

In addition, qualifying H-1B non-immigrants may obtain an extension of H-1B status in one (1) year increments beyond the six (6) year maximum period, when:

a) a labor certification is unexpired at time of filing the H-1B beneficiary's H-1B petition and the labor certification was filed at least 365 days prior to the date the beneficiary will have exhausted six (6) years of H-1B status, or

b) 365 days or more have passed since the filing of an employment based immigrant petition that has not been denied or revoked.

Furthermore, if the H-1B non-immigrant is the beneficiary of an approved immigrant petition, but is unable to move forward with their permanent resident processing due to a per country limit, the individual may obtain a three (3) year extension beyond the six (6) year limit.

Spouses and children of H-1B non-immigrants are eligible for H-4 visas and may be admitted for the same duration of stay as the H-1B principal. Dependent family members in H-4 status are not eligible for work authorization.

L-1 Visa - Temporary Employment

The L visa allows qualifying multinational companies with a parent, subsidiary, branch or affiliate abroad to transfer managers and executives (L-1A) and employees with "specialized knowledge" (L-1B) to work in the United States. To qualify, the transferee, within the three (3) year period preceding entry to the United States, must have been employed abroad in an executive, managerial or specialized knowledge capacity by an affiliated entity of the U.S. employer for at least one (1) continuous year. Any time that the transferee spends in the United States will not count toward the one (1) year employment abroad requirement.

There are three (3) alternatives for pursuing the L-1 visa. In most cases, the L-1 employer must submit a petition with the requisite filing fee with the United States Citizenship and Immigration Service (USCIS) and obtain USCIS approval before the transferee is able to apply for a visa at a U.S. consulate abroad or change their status to L-1 while lawfully present in the United States. L-1 petitions may be filed requesting premium processing for an additional $1225.00 fee. Premium processing guarantees adjudication of the L-1 petition within fifteen (15) days of filing.

Canadian citizens are eligible to submit an L-1 visa petition directly with any Class A port of entry at the U.S./Canadian border. L-1 border petitions are usually processed the same day. As Canadian citizens are visa exempt, they may seek admission into the U.S. in L-1 status immediately after the L-1 petition is approved.

Lastly, certain multinational companies may qualify for an L-1 Blanket. Qualifying multinationals that obtain an L-1 Blanket are not required to obtain USCIS approval as a prerequisite to L-1 visa sponsorship. Transferees may apply for an L-1 visa directly with their home U.S. consulate abroad. Applicants must still produce evidence to show they meet the one (1) year employment abroad requirement. In addition, L-1B specialized knowledge transferees applying through the Blanket program must produce evidence that they are a "professional." In other words, they must provide evidence that they possess a U.S. bachelor's degree or the foreign degree equivalent. L-1Bs are not required to produce evidence of a U.S. bachelor degree or the foreign degree equivalent for non-blanket petitions.

Employers are responsible for paying a one (1) time Fraud Detection and Prevention fee ($500) for each initial L-1 application.

Note: The L-1 Reform Act of 2004 imposed strict prohibitions on the placement of L-1B specialized knowledge transferees at third party client sites IF (1) the transferee will be principally controlled and supervised by the third party client; or IF (2) the arrangement is primarily for providing general labor to the third party client. L-1B transferees may still perform work at third party client sites provided that it can be clearly documented and shown that the L-1 sponsoring employer will retain ultimate authority and maintain full supervision and control over the transferee's work, and that the work to be performed requires specialized knowledge of the employer's product or service that is being implemented at the third party client site.

L-1 visa status may be approved for an initial period of up to three (3) years, and can be extended for up to a maximum of seven (7) years for an L-1A (manager or executive) or five (5) years for an L-1B (specialized knowledge). In addition, multinational companies that are in the process of launching a new office in the United States may petition to transfer an employee to the United States for an initial period of one (1) year; L-1 status may be extended for an additional two (2) year period at the end of the first year term. Once the maximum L-1 period of stay in the U.S. has been reached, the transferee must remain physically outside of the U.S. for a full year before he or she is eligible to return to the U.S. in L -1 (or H-1B) status. However, time spent outside the United States does not count towards the L-1 maximum period of stay and may be recaptured. Employees should retain any documentation that evidences time spent abroad.

Spouses and children of L-1 transferees are eligible for L-2 visas and may be admitted for the same duration of stay as the L-1 principal. L-2 spouses are currently eligible to pursue employment in the United States and have the option to apply for an employment authorization document (EAD) once they arrive to the U.S.

TN - NAFTA Professional

The North American Free Trade Agreement authorizes Canadian and Mexican citizens to enter the U.S. in "TN" visa status for employment in certain "professional" occupations. The TN visa category is similar to the H-1B visa category, but it does not require the filing of a Labor Condition Application (LCA) with the Department of Labor (DOL) or a visa petition with USCIS. In addition, unlike the H-1B, individuals attempting entry to the United States in TN status must be able to prove that they do not have intention of immigrating to the United States. Canadian citizens may present the TN visa application directly at a Class A border crossing or Pre Flight Inspection as no visa stamp is required. Mexican

citizens are required to have a visa stamp prior to entering the United States and must apply for the TN visa stamp at the appropriate U.S. Consulate in Mexico.

TN visa status may be obtained for Canadian and Mexican citizens employed in the following occupations:

> Accountant; Architect; Computer Systems Analyst; Disaster Relief Claims Adjuster; Economist; Engineer; Forester; Graphic Designer; Hotel Manager; Industrial Designer; Interior Designer; Land Surveyor; Landscape Architect; Lawyer; Librarian; Management Consultant; Mathematician; Medical/Allied Professionals [Dentist; Dietician; Medical Laboratory Technologist; Nutritionist; Occupational Therapist; Pharmacist; Physician (Teaching and/or Research only); Physio/Physical Therapist; Psychologist; Recreational Therapist; Registered Nurse]; Veterinarian; Range Manager (Range Conservationist); Research Assistant (Post-Secondary Education); Scientific Technician/Technologist; Scientists [Agriculturist; Animal Breeder; Animal Scientist; Apiculturist; Astronomer; Biochemist; Biologist; Chemist; Dairy Scientist; Entomologist; Epidemiologist; Geneticist; Geologist; Geochemist; Geophysicist; Horticulturist; Meteorologist; Pharmacologist; Physicist; Plant Breeder; Poultry Scientist; Soil Scientist; Zoologist]; Social worker; Sylviculturist; Teachers [College, University and Seminary]; Technical Publications Writer; Urban Planner; and Vocational Counselor.

With a few exceptions, a bachelor's level university degree or a professional license is the minimum qualification necessary for TN visa status. Canadian citizens seeking entry in TN visa status may simply present the following documents to CIS at the border: (a) Proof of Canadian citizenship; (b) A diploma, transcript, license or other document establishing the necessary education or other professional qualification; and (c) A letter from a U.S. employer briefly describing the intended employment and establishing that the position is at a professional level. As detailed above, Mexican citizens must apply for and obtain a TN visa from a U.S. Consulate in order to be admitted into the U.S. in TN status.

TN status is granted in one (1) year increments and can be renewed indefinitely. The spouse and unmarried minor children of a TN worker are admitted in "TD" status for the same duration as the TN worker. TD visa holders are not authorized to work in the United States.

Immigrant Visas

Employment-Based Permanent Residence

To obtain permanent residence through U.S. employment, the foreign national must first have an approved non-immigrant visa (i.e., H-1B, L-1, etc.). Employment-Based immigration is broken down into five (5) different preference categories and each category has an overall limit of immigrant visas available.

The first three (3) Employment-Based categories are subject to an overall annual limit of 120,000 visas. The other two (2) employment-based categories are each allotted 10,000 visas annually. Certain preference categories within the employment-based immigration category may require an approved Labor Certification from the Department of Labor

before an immigrant visa petition can be filed with U.S. Citizenship and Immigration Services (CIS). A Labor Certification is a determination by the U.S. Department of Labor that the applicant's skills are in short supply in the U.S. and that the applicant's employment will not adversely affect U.S. workers.

The following is a description of the most relevant Employment-Based preference categories:

First Preference (EB-1)

- Aliens of extraordinary ability in the sciences, arts, education, business, and athletics – no labor certification is required in this category.
- Outstanding professors and researchers – no labor certification is required in this category.
- Managers and executives subject to international transfer to U.S. – no labor certification is required in this category.
- Does not require a Labor Certification.

Second Preference (EB-2)

- Aliens of exceptional ability in the sciences, arts or business.
- Advanced degree professionals.
- Usually requires a Labor Certification.

Third Preference (EB-3)

- Professionals with bachelor's degrees not qualifying in the second preference.
- Skilled workers.
- Unskilled workers.
- Always requires Labor Certification.

Fourth Preference (EB-4)

- Certain special immigrants including those in religious vocations.

Fifth Preference (EB-5)

- Alien investors in new commercial enterprises.

PERM

What is PERM?

The PERM process is the first step in the employment-based immigration process for most applicants. It covers the second (EB-2) and third preference (EB-3) employment related categories described above.

Overview

In March 2005, the U.S. Department of Labor (DOL) launched the Program Electronic Review Management or "PERM" system for permanent labor certification, replacing the traditional and reduction-in-recruitment (RIR) methods of labor certification. Similar to the prior methods, PERM requires an employer to advertise the position to determine whether there are any qualified U.S. workers willing and able to accept the position at the salary, terms, and conditions offered.

PERM is an attestation and audit process in which employers conduct advertising and recruitment prior to filing a labor certification application. In an effort to streamline the labor certification process, DOL has stated that applications should take between forty-five (45) and sixty (60) days to adjudicate, thereby reducing the multi-year adjudications that have become the norm. However, certain applications will be selected for audit, either randomly or because responses have triggered the need for additional information and/or supervised recruitment.

How to File a PERM Case

PERM applications are filed electronically on Form ETA 9089 at a dedicated DOL website. The employer – and not an attorney – must register and create a user account before filing the first labor certification. Employers can, however, create sub-accounts for their attorneys. Mailed in paper filings are accepted at one (1) of two (2) labor certification processing centers, but the DOL has indicated that paper filings will be processed at a slower rate than electronic filings.

Prevailing Wage Determinations

Prior to PERM, State Workforce Agencies (SWAs) were responsible for administering and processing labor certification applications, in addition to making prevailing wage determinations. Under PERM, SWAs only make prevailing wage determinations and primarily rely on the DOL's Occupational Employment Statistics (OES) in making the determinations, depending on the skill level of the particular position.

Where the OES system previously provided for two (2) levels of wages, the DOL has a four-tier system that allows employers to more accurately determine the correct wage level for a particular position commensurate with experience, education, and the level of supervision. The SWA will make a prevailing wage determination selecting one (1) of the four (4) wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements by looking at the tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. In addition, the DOL requires that 100% of the prevailing wage be paid; the 5% variance is no longer permitted.

The prevailing wage determination is valid from ninety (90) days to one (1) year, depending on the particular SWA. The PERM regulation requires that employers begin recruitment or file the labor certification during the validity period of the prevailing wage determination.

Job Requirements

Under PERM, the OES is used exclusively to determine Specific Vocational Preparation (SVP) levels. The SVP is the amount of lapsed time required by a typical worker to learn the techniques, skills, and knowledge to perform a specific job.

The OES system contains a smaller number of occupational categories as compared to the Dictionary of Occupation Titles (DOT), which is no longer used. The OES categorizes jobs according to five "job zones," with each job zone containing a range of SVP levels. Employers are required to demonstrate that a job opportunity's stated requirements are in fact the actual minimum requirements for the position. For example, many occupations that were categorized as an SVP 8 in the DOT were revised and are now categorized as an SVP 7 in the OES system, thereby reducing the amount of education and/or experience that can be required to perform the job.

Experience gained while working for the petitioning employer may continue to be used to satisfy the minimum requirements but ONLY IF such experience was gained in a position "not substantially comparable" to the position for which certification is sought. "Substantially comparable" is defined as a position requiring performance of the same duties for more than 50% of the time.

Under the prior methods, job requirements that exceeded the normal requirements were considered to be "unduly restrictive" unless the employer could demonstrate that the requirements are reasonably related to the occupation in the context of the employer's business, or a "business necessity." Under PERM, employers continue to be able to justify requirements that exceed the level of education, training, and experience deemed normal for the occupation as determined by OES. Because the standard of what is deemed "normal" for occupations changed under PERM, an increase in the number of applications requiring a "business necessity" justification is likely.

Recruitment

Under the PERM rule, employers have between thirty (30) and 180 days to conduct recruitment prior to filing the labor certification application. This rule is more stringent than the requirements under the previous RIR method.

Under PERM, the employer is required to place a job order with the appropriate State Workforce Agency (SWA) for 30 days. In addition, two (2) print ads must be placed in Sunday editions of a newspaper of general circulation in the area of employment; however, one (1) national journal ad may be substituted for one newspaper ad for a job that requires experience and/or an advanced degree. Further, three (3) additional steps are required for professional positions (i.e., those requiring a college degree or higher), from a list of ten (10) acceptable recruitment channels. They include: (1) the employer's internet site; (2) job fairs; (3) job search websites, including internet versions of a newspaper's print ad; (4) private employment agencies; (5) on-campus recruiting; (6) trade or professional organizations; (7) employee referral programs; (8) campus placement offices, where a degree but no experience is required; (9) local and ethnic newspapers; and (10) radio and television ads.

Notice must be provided to the bargaining representative, or if there is none, notice must be posted for ten (10) consecutive business days in a conspicuous location at the place of employment. In addition, employers must publish the notice in any and all in-house media normally used to fill the position in the organization in accordance with normal procedures used for recruitment for similar positions in the organization, or for ten (10) consecutive days, whichever is longer.

Record-keeping and Documentation

Unlike the RIR method, recruitment results are not submitted up front with the PERM application, but must be provided if selected for an audit by the DOL. The recruitment results would include evidence of the advertising conducted, copies of resumes received, the job-related reasons for rejecting applicants, and a recruitment report, signed by the employer. In addition, the employer is required to maintain documentation of layoffs in the area of intended employment and in the occupation that is the subject of the labor certification or a related occupation. All documentation must be retained for five (5) years.

What Happens to Pending Labor Certifications?

For those labor certifications filed prior to PERM, the DOL has provided for the ability to re-file a labor certification case under the PERM system without losing the already-established priority date. This is an important issue for those foreign workers from countries whose visa numbers have retrogressed. However, in order to properly "convert" a previously filed labor certification under the RIR or traditional methods to a PERM case, the following requirements must be met: (1) no job order has been placed with the SWA; (2) the job opportunity is deemed "identical" to the job description in the original labor certification; (3) all other PERM-related provisions (recruitment, prevailing wage, etc.) have been met; and (4) the employer requests that the original tradition or RIR filing date be used for the new PERM filing.

Employment-Based Immigrant Visa Petition

The procedure for obtaining an Employment-Based immigrant visa involves filing an Immigrant Visa petition (Form I-140) with the U.S. Citizenship and Immigration Services (CIS). For those categories where no Labor Certification is required, the Form I-140 is filed with the required supporting documentation to demonstrate that the beneficiary meets the necessary qualifications. For those Employment-Based preference categories where a Labor Certification is required, the Form I-140 is filed with the original approved Labor Certification and other supporting documentation to prove that the beneficiary meets the requirements stated on the Labor Certification.

Once CIS approves the Immigrant Visa petition, the applicant is classified as a person qualified to immigrate. This is the first step towards obtaining permanent residency through the Employment-Based preference categories. Once the beneficiary has been classified as a person qualified to immigrate in one of the preference categories, he or she can then apply for permanent residency. This application can be made at a U.S. Consulate or if the beneficiary is in the United States and is eligible, an application to adjust status can be made in the United States. Recently, however, this process was streamlined such that a beneficiary can file both the Immigrant Visa petition and the Application to Adjust Status

concurrently. This is intended to shorten the processing time for Applications to Adjust Status. The Adjustment of Status Petition and Consular Processing process is discussed further in this profile.

Adjustment of Status

Upon the approval of an Immigrant Visa Petition by the U.S. Citizenship and Immigration Services (CIS), an applicant who is lawfully present in the United States has the option to process the last step of the permanent residence application at a CIS regional service center. This process is known as Adjustment of Status, and is also commonly referred to as I-485 processing (named after the CIS application form that is used for this purpose).

Several years ago, the CIS issued new regulations permitting the concurrent filing of Form I-140 Employment-Based Immigrant Visa Petitions with I-485 Applications for Adjustment of Status. This policy allows applicants to file the last stage of the permanent residence process more quickly, provided that the applicant elects to process through the Adjustment of Status process. The regulation applies to all employment-based I-140 applications filed under the first, second and third priority preference application categories. The purpose of the regulation is to shorten the time that employees will have to wait to receive approval of permanent resident status by combining two steps into one. In theory, this should reduce the total processing time by several months, depending on the regional CIS office where the application is filed. Concurrent filing of the I-485 Application for Adjustment of Status requires the employee's priority date to be current.

The concurrent filing option does not apply to Consular Processing applications. Applicants who wish to process their final permanent residence application at a U.S. Embassy or Consulate abroad are not eligible to proceed with final processing until their Form I-140 has been approved.

Another provision in the law allows adjustment of status applicants whose applications have been pending for 180 days or more to change jobs or employers without invalidating the underlying I-140 or Labor Certification, provided that the new job is in the same or similar occupational classification described in the original petition.

Other important aspects of the Adjustment of Status process:

Work Authorization

Adjustment of Status applicants (including spouses and children) may obtain temporary work authorization while their adjustment applications are pending.

International Travel

International travel is permitted only with the proper CIS documents and authorization. Persons with pending I-485 applications who travel abroad must obtain proper CIS authorization or risk the abandonment of their permanent residence applications.

Interviews

CIS has the discretion to require that any Adjustment of Status applicant attend a personal interview at a CIS District Office. In many cases, CIS will approve the case without a personal interview.

Approval

When an Adjustment of Status application is approved, an applicant's status is changed, or "adjusted," to that of lawful permanent resident. The approved applicants' passports are stamped with interim travel and work authorization. The permanent residence "green card" will arrive in the mail several months later.

Consular Processing

Upon the approval of an Immigrant Visa petition by the U.S. Citizenship and Immigration Services (CIS), an applicant has the option to process the last step of the permanent residence application process at the U.S. Embassy or Consulate in his or her country of birth or residence.

Applicants who wish to process their final permanent residence application at a U.S. Embassy or Consulate abroad are not eligible to proceed with final processing until their Form I-140 Immigrant Visa petition has been approved.

If an applicant wishes to proceed with the consular processing option, the following is a brief outline of the major points of immigrant visa processing at a U.S. Embassy or Consulate.

Upon approval of an Immigrant Visa petition by CIS on behalf of an applicant who has chosen consular processing, the immigrant visa file will be transferred to the State Department's National Visa Center (NVC) which serves as the liaison between the CIS and overseas Consulate. The NVC will conduct initial processing of the application, and initial application documents must be submitted to the NVC in most cases. Filing procedures vary depending upon the consulate where final processing will occur. The NVC will issue a series of application documents and materials, known as "Packet III." Before an applicant may file a Packet III with the NVC or consulate, the applicant must obtain all necessary application documents, including birth and marriage certificates, and financial records if required. The applicant must also obtain police clearances for all countries where the applicant has resided for more than six (6) months since the age of sixteen (16) years.

Once the applicant has obtained all necessary supporting documents and has filed the Packet III application, the file will be finalized and transferred to the appropriate U.S. Consulate. Thereafter, the Consulate will issue "Packet IV," scheduling all applicants for a personal interview at the Consulate. Packet IV also contains consulate-specific application information, including instructions concerning the scheduling of a required medical examination. At the time of interview, each applicant will be required to produce a completed medical examination report from a Consulate-approved physician. At the mandatory interview at the consulate, the consular officer will review each applicant's immigration file, application materials, and original supporting documents.

Assuming that all documents are in order and the applicant successfully completes the interview process, the immigrant visa application will be approved by the consular officer. Upon approval, applicants will be given original application documents and travel authorization that will permit entry to the U.S. The immigrant visa approval issued by the Consulate is valid for four (4) months, and a successful applicant must enter the United States within that time.

Upon entry to the U.S., the applicant will undergo final processing by the CIS and will become a lawful permanent resident at that time. The actual "green card" will be mailed to the applicant within several months.

Family-Based Permanent Residence

Individuals may obtain Permanent Residence ("green card") through U.S. citizen or Permanent Resident family members. All that is required is a qualifying family relationship. Qualifying relationships are grouped into two (2) main categories - immediate relatives and other close family members.

Immediate relatives of U.S. citizens are given special preferential treatment in that they are allowed to immigrate in unlimited numbers. Immediate relatives are spouses, unmarried children under 21 and parents of U.S. citizens.

Other close family members of citizens and permanent residents are also allowed to immigrate, subject to annual numerical limitations. All of these categories currently have backlogs.

The following are the Family-Based categories and annual limits on each category:

- **Family-Based 1st Preference (FB-1): 23,400**
    - Unmarried adult children of citizens
- **Family-Based 2nd Preference (FB-2): 114,200**
    - FB-2A: Spouses and unmarried children under 21 of permanent residents
    - FB-2B: Unmarried children over 21 of permanent residents
- **Family-Based 3rd Preference (FB-3): 23,400**
    - Married adult children of citizens
- **Family-Based 4th Preference (FB-4): 65,000**
    - Brothers/sisters of citizens

Note: The sponsor-status, relationship and age limitations for the preferences above must be met from the time the petition is filed until the time the sponsored foreign national completes permanent residence processing. However, if a

change in the above occurs at any point in between, the case automatically converts to another preference, as long as there is an applicable preference category.

Process

Immigrant Petition (Form I-130)

A U.S. citizen or permanent resident sponsor will file an immigrant petition for the foreign national demonstrating one of the qualifying relationships listed above exists. These petitions can be filed at a U.S. Citizenship and Immigration Services (CIS) District Office or Service Center in the United States, a CIS office abroad, or even the U.S. Consulate abroad. Determining where to file the immigrant petition depends on whether or not there is a backlog in visas and where both parties live.

Adjustment of Status or Consular Processing

If a visa number is currently available, a foreign national may apply for Adjustment of Status in the United States if they are present here and otherwise eligible. These applications are filed at the CIS District Office having jurisdiction over the individual. Form I-485, Application to Adjust Status to that of U.S. Permanent Resident is filed along with numerous other forms such as documentation of proof of the relationship (husband/wife, parent/child, etc.), medical forms and photos. A complete list of documentation needed in each case can be found at http://www.uscis.gov/.

If a visa number is currently available, and the foreign national is not in the United States, they will apply for an immigrant visa at a U.S. Consulate abroad. DS-230 Forms are filed with much of the same supporting documentation as Adjustment of Status.

Priority Dates

The priority date determines the foreign nationals' place on the waiting list. The priority date is determined by the date the CIS receives the immigrant visa petition. Based on the category the foreign national falls under and their country of birth, the waiting time can be determined by viewing the Visa Bulletin which is printed monthly by the Department of State. Once the priority date is "current", the foreign national can apply for Adjustment of Status or Consular Processing to obtain permanent residence.

As mentioned above, immediate relatives (spouse, unmarried children under twenty-one (21) and parents of U.S. citizens) have no quota lines and therefore can apply for their permanent residence immediately upon approval of the immigrant petition. If the immediate relative is in the U.S. and otherwise eligible for Adjustment of Status, they may file both the immigrant petition and Adjustment of Status application concurrently with the District CIS Office.

Affidavits of Support

In all Family-Based cases, at the time of final processing for permanent residence the applicant must provide a special Affidavit of Support (Form I-864) signed and notarized by the sponsoring family member. The Affidavit of Support is necessary to show the foreign national will not become a "public charge". The sponsor must attach a copy of the last three (3) years of federal income tax returns plus current evidence of income and/or assets.

The income of a household member may be added through a related form, Form I-864A. The form and evidence must demonstrate income (or assets) sufficient to support the sponsor's household members plus all the sponsored foreign nationals at 125% of the latest poverty guidelines. If not a joint sponsor, an affidavit must also be provided. In addition, the Affidavit of Support forms a contractually and legally binding contract with the sponsor in which the sponsor agrees to repay the government any means tested benefits provided to the foreign national until the foreign national has worked forty (40) quarters [ten (10) years] or becomes a U.S. citizen, even if the family relationship is terminated.

Special Issues

- **Derivatives.** In most cases, the sponsored foreign nationals spouse and children (unmarried and under age twenty-one (21) at the time of their final processing) may derive permanent residence from the immigrant petition filed on behalf of the principal and can accompany or follow to join the principal foreign national without separate petitions approved. However, immediate relative spouse and children do not derive permanent residence, but need separate petitions filed on their behalf.

- **Conditional Residence**. If, at the time permanent residence based on a marriage is granted, the marriage is less than two (2) years old, permanent residence is only conditional. A conditional resident has the same rights and obligations of a permanent resident. However, within a ninety (90) day window preceding the second anniversary of the grant of conditional permanent residence, the individual will need to file a petition to remove the conditions with the CIS Service Center that has jurisdiction over them. If approved, the conditions are removed and the individual becomes a permanent resident.

Last reviewed: February 2015

10688800.1