The Basics of Employment-Based Visas

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When it comes to employment immigration, the U.S. Government is concerned with making sure that an alien who is living abroad does not take a job that could be filled by a U.S. citizen or permanent resident. Visas for employment purposes, therefore, are meant to benefit U.S. companies who cannot find a person in the United States who can fill the open job. It is the U.S. employer who is typically the petitioner in this process. And, in order to gain the benefit of U.S. immigration law, the employer must often take steps to show the U.S. Government that there is a need for a foreign worker to do the job.

Employer-Based Enforcement

U.S. employment law makes it the responsibility of the employer to make sure that it does not hire a person who does not have the legal ability to work in the United States. An employer may not knowingly hire an alien who does not have the right to work. Moreover, an employer may not ignore facts and circumstances that would lead a person to know about an alien's unauthorized status. An employer who fails to ensure that it hires only workers legally authorized to work in the United States could face civil and criminal penalties.

At the same time, an employer is forbidden from discriminating against a person because of that person's national origin. That is, an employer cannot refuse to hire a person because that person is not a U.S. citizen, or provide different working conditions.

Form I-9 and Employee Identification

To accomplish this goal, the U.S. Government requires all employers to have newly hired employees complete a form to confirm his or her identity. This is called the I-9 form. The new employee must complete this form on the first day of the job. The employee also has three days to show the employer appropriate proof of identification and authorization to work.

The employer must keep a copy of the I-9 for all of its employees. Also, when an employee leaves, the employer must retain the I-9 in its records for either three years after the date of hiring, or one year after the employee leaves, whichever date is longer.

Form I-9 sets out the types of proof of identification that are acceptable. The employer must keep in mind that the employee is free to choice which form of identification to show. That is, the employer may not require that the employee show only one type of identification. If the employee wants to show another type of identification and that type is listed on the form, the employer must accept it. The employer then writes on the I-9 the type of identification that the employee shows, and information about that identification. For example, if an employee shows a driver's license, the employer writes down that the identification is a driver's license, which state issued the license, the license number and the expiration date.

Independent Contractors

An employer is not required to verify the identification of any independent contractors that it hires. However, this does not mean that an employer can hire a person as an independent contractor, and be completely free of any responsibility. For example, if an employer knows, or has reason to suspect, that a person is an alien who is not authorized to

work in the United States, the employer cannot avoid civil and criminal penalties by hiring that person as an independent contractor.

If an employer hires a contractor to do work, the employer is not responsible for verifying the status of the contractor's employees. However, if the employer knows, or has reason to suspect, that the contractor is employing a person who is not authorized to work in the United States, the employer does have the responsibility to inform the contractor that the contractor may not continue to work if it hires unauthorized aliens.

No-Match Letters

Employers have the responsibility to withhold taxes from the employees' paycheck, and pay those taxes to the federal, state and local governments. This includes social security taxes. To accomplish this, the employee must provide the employer with a social security number. The employer then submits a W-2 form to the Federal Government.

The Social Security Administration ("SSA") uses the W-2 form to match the taxes paid to the accounts for each individual worker. Sometimes, the name on the W-2 form does not match the social security number that the SSA has in its records. When this happens, the SSA sends a letter to the employer, known as a "no-match" or "mismatch" letter.

The receipt of a no-match letter is not cause to terminate an employee. In fact, by firing an employee, without looking into the reason why the SSA's records do not match the information on the W-2, the employer may actually open itself up to a discrimination lawsuit.

There can be a number of reasons for the receipt of a no-match letter. The employer's records may contain a typographical error. The SSA's records could contain errors. The employee may have changed his or her name legally, for example, by marriage. Or, the information on the W-2 may not match the SSA's records because the employee is using a fraudulent document to work.

If an employer does receive a no-match letter, it should look into the matter promptly. The failure to provide accurate information could result in fines from the SSA. The first step should be to examine all of its personnel records regarding the employee who is the subject of the no-match letter, to see if all of the information in the employer's records matches. This search could reveal whether the employer made an error in completing the W-2.

The next step is to tell the employee about the no-match letter. Allow the employee to examine the I-9 form to see if the employee made an error in completing the form. At this stage, the employer may learn that the employee does not have the legal right to work in the United States, and may need to terminate the employee. If, however, the employee believes that there is a problem with SSA's records, the employer should give the employee the chance to address the problem with SSA.

One question that comes up when an employer receives a no-match letter is whether this can be used to show that the employer should have known that the employee was not authorized to work in the United States. SSA and the Department of Homeland Security ("DHS") recently adopted regulations that would have used the receipt of a no-match letter as one fact that could be used to show that the employer should have known about an alien's ability to work. The regulations also created a set of steps, similar to the ones discussed above, that the employer should take to avoid potential civil and criminal liability.

These regulations, however, were challenged in court. A U.S. District Court in California issued a preliminary injunction which prevented SSA and DHS from enforcing the regulations. One of the concerns of the court was that the error could be due to SSA's record, and not the fault of the employee. Thus, the regulations could have resulted in the termination of employees who in actuality were eligible to work in the United States. The injunction is still in effect. However, the case is still pending in court.

E-Verify

DHS and SSA have developed a web-based system for employers to verify the employment authorization of a worker. It is called the E-Verify system. The system started as a voluntary program. However, several states now require all employers to use the system, and other states have similar laws pending.

An employer who uses E-Verify must verify the employment authorization of all new hires, not just selected new employees. The employee's information from the I-9 must be entered into the system within 3 days of hiring the new employee. The system then checks with databases from SSA and the U.S. Citizenship and Immigration Service to verify whether the new hire is authorized to work in the United States.

After inputting the data, the employer will receive one of three messages: (1) Employment Authorized; (2) SSA Tentative Nonconfirmation; or (3) DHS Verification in Process. With the receipt of a tentative nonconformation, the employer must inform the employee in writing, and give the employee eight Federal Government working days to begin addressing the problem with SSA. So long as the employee begins addressing the problem in those eight days, the employer must allow the employee to continue working, and provide the same working conditions as other employees. If the employee does not begin to address the problem with SSA within those eight days, or if the employee cannot fix the problem with SSA, then the employer may terminate the employment.

Employers using the E-Verify system must still be careful of discriminatory practices. The system is not to be used as a screening mechanism before hiring a new employee. It is to be used for all new hires. It is not to be used to verify the employment eligibility of current employees.

One exception to the rule that the system is not to be used for current employees can be found in President Bush's amendment to Executive Order 12989. This amendment requires all Federal contractors to use the E-Verify system to verify the employment eligibility of all persons hired during the contract term, and all current employees assigned to perform work on a Federal contract.

Non-Immigrant and Immigrant Visas

Before discussing the process for applying for a visa to allow an alien to work in the United States, it is important to understand the differences between immigrant visas and non-immigrant visas. An immigrant visa is one where the alien is applying for permission to come to live and work in the United States permanently. By contrast, a non-immigrant visa is one where the alien is applying to come to the United States to work for a temporary period of time.

The first important difference between immigrant visas and non-immigrant visas is the intention of the alien. An alien who applies for an immigrant visa intends to stay in the United States permanently. However, for most non-immigrant visas, the alien must intend to come to

the United States for a temporary period of time, and return to his or her home country. The difficulty for the alien will be in proving his or her intent. An alien may need to show enough links back to his or her home country that would show that he or she intends to return. Such links could be a house or other property in the home country, close relatives in the home country, or a bank account in the home country. There are a few non-immigrant visas that are exceptions to this rule, such as H1-B, which is for specialty skilled workers. Such visas will be discussed later in this report.

The second major difference between immigrant visas and non-immigrant visas is the process for certifying for a foreign worker to do the job in the United States. An employer who files a petition for an alien to receive an immigrant visa typically faces a rigorous process to show that there is no worker in the United States qualified to do the job. This is called a labor certification. For non-immigrant visas, the labor certification process tends to be a little easier.

Immigrant Visas

The process of applying for an immigrant employment visa is often complex, and can involve the approval of three different departments of the executive branch of the U.S. Government. This section first gives an overview of the process, and then discusses in greater detail each step in the process.

Overview of the Process

In most cases, there are several steps to apply for an immigrant visa. First, the employer must usually go through a labor certification process with the U.S. Department of Labor. This process is to ensure that there is no available U.S. worker to fill the job. Next, the employer files a petition for the visa, called the form I-140. The petition is filed with the U.S. Citizenship and Immigration Service ("USCIS"). If USCIS approves the petition, the alien must then wait for the visa to become available.

Employment visas are available based on a preference system. That is, the number of employment visas available each year is limited. There are five preference categories, each with its own annual quota. Once the quota for the year is used, more visas for that particular category will not be available until the next year. Also, the quota in each category is divided among the different countries. This means that the wait for a visa for alien from some countries, such as the Philippines, will be longer than aliens from other countries.

Once the visa has become available, the alien must apply for the visa. If the alien is living abroad, he or she applies for the visa through the U.S. Consulate in his or her home country. The U.S. Consulates are run by the U.S. Department of State. The forms, rules and regulations, therefore, are all issued by the Department of State.

If the alien is in the United States lawfully when the visa becomes available, the alien may be able to apply for an adjustment of status through USCIS. This can happen, for example, when an alien is working in the United States on a non-immigrant visa, such as the H1-B. The alien should be careful, however, not to apply for a non-immigrant visa, such as a B-2 tourist visa, simply to come to the United States in order to apply for adjustment of status. Such an action could be seen as visa fraud, and could have severe consequences for the alien.

Labor Certification

The first step in filing a petition for an immigrant visa for a foreign worker is usually the labor certification. The labor certification serves the purpose of making sure that there are no qualified U.S. workers available to fill the job. This process will also make sure that the employer is not trying to undercut the salary normally paid to a U.S. worker by hiring a foreign worker at a lower wage.

The process for filing for a labor certification is complex, and requires an employee to be aware of timing. There are essentially three required activities that an employer must do before filing. They are: (1) request a prevailing wage determination; (2) engage in a minimum level of recruitment activities; and (3) post a notice of filing for the benefit of the employer's U.S. employees.

Preparation

Before engaging in the required activities, the employer would be wise to do some preparation work. The employer should first consider the position requirements. That is, what duties will the employee be required to do. What kind of experience, training and education will the employee need for the job?

Usually, the employer is engaging in the labor certification process because the employer already has a foreigner that it would like to hire in mind. The employer may have even already offered the job to the foreign worker. Nonetheless, the employer must still go through the labor certification process in order to allow for U.S. workers to apply for the position. Defining the job requirements beforehand will be helpful in preparing the recruitment activities. Moreover, assuming the recruitment process does not result in the finding of a qualified U.S. worker, the employer should have evidence ready that shows that the foreign worker possesses the qualifications necessary for the job offered.

Prevailing Wage Determination

Once the employer has decided on the position requirements, the employer must then file for a prevailing wage determination ("PWD") from the state workforce agency ("SWA"). The PWD will tell the employer the salary that the employer must offer in order to qualify for the labor certification. That is, the employer must be willing to pay the new employee at least the amount stated in the PWD. The PWD will be valid for at least 90 days, and may be valid for as long as 365 days. Each SWA is free to adopt its own procedures concerning the length of validity of the PWD.

Recruitment Activities

Before filing for the labor certification, the employer must engage in a minimum level of recruitment activities. A good practice is to start these activities after receiving the PWD, so that the employer has the required salary available. There are three items that are required in

the recruitment process for all positions. If the position is a professional one, then the employer has additional recruitment requirements. A professional job is generally one where a bachelor's degree or higher is a usual hiring requirement.

The three requirements that applies to all positions are the placement of a job order with the SWA, and the placement of two advertisements in the Sunday edition of a local newspaper of general circulation. When an employer places an order with the SWA, the SWA will post the job for thirty (30) days. That means that anyone who contacts the SWA in those 30 days will have the ability to apply for that job.

For professional positions, if the industry standard is to advertise in a professional journal, then one of the advertisements may be in that professional journal instead of a Sunday edition newspaper. The other advertisement must in the Sunday edition of the newspaper.

There are additional recruitment requirements for professional jobs. The employer must engage in three more activities, chosen from a list of 10 contained in the regulations. The additional activities are: (1) participation in a job fair; (2) advertisement on the employer's website; (3) advertisement on a job search website; (4) participation in on-campus recruiting; (5) advertisement with a campus placement office (where no experience is required for the job); (6) advertisement with a trade or professional organization; (7) advertisement with a private employment firm; (8) participation in an employee referral program; (9) advertisement in a local or ethnic newspaper, where appropriate; and (10) advertisements through radio or television.

If a U.S. worker applies for the position, and that worker appears qualified, then the employer must interview that person. If the employer rejects that U.S. worker's application for the job, the employer must have a valid reason for doing so. The valid reason cannot be that the employer intends to give the job to the foreign worker.

Notice of Filing

Finally, the employer must post a notice of filing for the benefit of its current U.S. employees. This gives the U.S. employees notice of the open position, and the ability to object to the granting of the labor certification and the hiring of a foreign worker.

If the workplace has a bargaining representative, that is, if the job is a union job, the notice must be given to the bargaining representative. Otherwise, the notice must be posted in a visible place where the workers can see it. If the employee normally posts employment notices on some type of in-house media, then this notice must be posted there as well. The notice must be posted for 10 consecutive business days. If must also be posted between 30 and 180 days before the date of filing for the labor certification.

The notice of filing must contain certain information. Among the required pieces of information are: the reason that the notice is being posted, a description of the position, the wage rate, and where an applicant can send a resume or application. The job description in the notice cannot exceed the job requirements that will be included in the filing for the labor certification. The terms offered cannot be less favorable than those offered to the foreign worker.

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Timing Considerations

If the recruitment process has not resulted in the identification of an available qualified U.S. worker (including a permanent resident), then the employer may file for a labor certification with the Department of Labor. The employer must file for the labor certification while the PWD is still valid, but only after the employee has given sufficient time to go through the recruitment process. As stated above, the PWD may be valid for as little as 90 days. Likewise, the employer must give the SWA at least 30 days for the job order. The employer must wait an additional 30 after all recruiting activity is complete before filing for the labor certification. However, if the job is a professional one, then one of the additional activities may take place in this last 30 days. Moreover, the employer must give sufficient consideration to the posting of the notice of filing, as outlined above.

Record Keeping

The Department of Labor will not require the employer to submit proof that the employer has completed all of the steps outlined above when the employer files the application. Rather, the employer will only be required to submit the application itself. However, the Department of Labor may perform an audit of the employer to ensure that the required steps have been taken. Accordingly, the employer should keep a file on record of all of its activities. This file should be kept for 5 years after the date of the filing of the application.

The first document that should be in that file is the Recruitment Report. This is a report, signed by the employer, which states all of the steps that the employer took to recruit for the open position. The report should state the results of that recruitment activity, such as whether there were any new hires. The report should also record the number of applicants who were rejected, categorized by the reason for rejection.

The recruitment file should also contain documentation of all of the recruitment steps. For example, it should show that the appropriate advertisements in the Sunday editions of the newspaper were made. The file should contain the PWD, the job order with the SWA, the notice of filing, and the resumes or applications of everyone who applied for the job. If the job involves a special situation, such as a foreign language requirement, the file should contain documentation to show that the foreign language requirement is a bona fide business need for the employer (note that the Department of Labor will be pay particular close attention to a foreign language requirement).

The recruitment file should document the foreign worker’s qualifications. It should demonstrate that the foreign worker meets all of the requirements for the job. Finally, the file should contain a copy of the approved application.

Filing

The labor certification will be requested electronically with the Department of Labor. The system is called PERM. The application is made on a form called the ETA 9089.

The employer must be very careful in making the application. Any errors on the form can result in a denial from the Department of Labor. The employer should therefore prepare a

paper copy of the form, and check, double-check and triple check the information on that form. The information itself will be completed on-line. However, having a paper copy as back-up is always a good idea. Specifically, the paper copy should be shown to the foreign worker so that the foreign worker can verify the information. Having the foreign worker sign the form can be useful to show that the foreign worker agrees with the accuracy of the information provided.

In many instances, the actual on-line application is made by the employer's attorney. Once the form is submitted on-line, the Department of Labor will send the employer an e-mail to verify that the employer directed that the application for a labor certification be filed. The employer must respond to this e-mail. If the employer does not, then the application will be denied.

The approval process can take some time. In some instances, the approval can come within a matter of days. In other instances, the process can take months. Case-specific circumstances, such as the need for an audit, can affect the amount of time it takes to receive an approval.

Preference Categories

There are five categories of immigrant visas based on employment. Most of the employment-based immigrant visas require that the employer seek a labor certification as outlined above. However, there are exceptions.

Special Categories: EB-1 and Schedule A

The first exception to the requirement that the employer file a labor certification is the EB-1 category. The EB-1 category includes workers of extraordinary ability, outstanding university professors or researchers, and transferring managers or executives of multinational corporations. In fact, workers of extraordinary abilities need not even have a job offer, and may petition on their own behalf.

A worker of extraordinary ability is one who works in the arts, sciences, education, business, or athletics. The worker must have received national or international acclaim for his or her achievements in his or her particular field. A winner of a Nobel Prize, for example, may fall within this category. An internationally recognized athlete may also fall within this category.

The second exception to the requirement that the employer file a labor certification are workers whose occupations fall within "Schedule A." This is a list that the Department of Labor keeps of occupations in the United States for which there is a recognized shortage of labor. Among the occupations listed in Schedule A are:

- Physical therapists, provided they possess all of the qualifications necessary to take the physical therapist licensing examination in the state where they intend to practice.
- Professional Nurses who have passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) Examination; or who hold a full and unrestricted license to practice professional nursing in the state where they intend to work.

- Aliens of exceptional ability in the sciences or arts (except the performing arts) who have been practicing their science or art for one year before their application. This category included college and university teachers of exceptional ability. The alien must intend to practice the same science or art in the United States.

EB-2

The EB-2 category includes: (1) members of the professions holding advanced degrees or their equivalent; and (2) aliens who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States.

To qualify as a professional with an advanced university degree, the alien must have more than simply a bachelor's degree or its equivalent. The alien must hold either a graduate level degree or a professional degree requiring postgraduate education. Or, the alien may hold a bachelor's degree or its equivalent, and five years of work experience. If the degree was earned outside of the United States, the alien may be required to submit an academic credentials evaluation from an accredited consulting service to prove the U.S. equivalent of the foreign degree.

Persons of exceptional ability in the sciences, arts or business is similar to the EB-1 category. However, the alien need not received international recognition for his or her work. Rather, the alien must submit three of the following:

1. An official academic record showing the alien has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability;
2. Letters documenting at least ten years of full-time experience in the occupation being sought;
3. A license to practice the profession or certification for a particular profession or occupation;
4. Evidence that the alien has commanded a salary or other remuneration for services which demonstrates exceptional ability;
5. Membership in professional associations;
6. Recognition for achievements and significant contributions to the industry or field by peers, government entities, professional or business organizations.

However, if these standards do not apply to the alien's profession, other comparable evidence may be acceptable.

Generally, an alien who seeks to immigrate under category EB-2 must have a job offer from a U.S. employer. There is an exception for an alien who can show that his or her admission to the United States as a permanent resident would be in the benefit of the National Interest. This is called the "National Interest Waiver." If USCIS grants the waiver, then a labor certification will not be required.

USCIS determines whether an alien qualifies for the National Interest Waiver on a case-by-case basis. National Interest Waivers are generally difficult to obtain. USCIS will consider:

(1) the importance of the occupation (whether the occupation has any intrinsic merit, and is thus related to an important national goal); (2) whether the benefit the alien will bring will be national in scope; and (3) whether the benefit the alien will bring significantly outweighs the national interest in protecting U.S. workers through the labor certification system. Special rules apply for physicians who agree to work full-time in: (1) an area designated as a health professional shortage area by the U.S. Department of Health and Human Services; or (2) a Veteran's Administration hospital.

EB-3

The EB-3 category includes: (1) skilled workers with at least two years of experience; (2) professionals with a bachelor's degree or its equivalent; and (3) other workers with less than two years experience, such as an unskilled worker. Only 40,000 visas are available each year in this category. Of that amount, only 10,000 are available for unskilled workers. Moreover, the unskilled workers must be able to do work for which qualified workers are not available in the United States.

With respect to professionals, the alien must hold either a U.S. bachelor's degree, or an equivalent foreign degree. To prove that the foreign degree is equivalent, the alien may be required to submit an academic credentials evaluation from an accredited consulting service. The alien cannot show that he or she meets this requirement through a combination of education and experience. In addition, the job must require a minimum of a bachelor's degree.

EB-4: Special Immigrants

The EB-4 category is called the special immigrants category, and includes a wide range of people:

- Religious workers such as pastors, ministers, religious instructors and missionaries,
- Graduates of a foreign medical school who came to the United States before January 9, 1978,
- People who were employed by the U.S. Government abroad,
- Retired employees of international organizations who lived in the United States prior to retirement,
- A foreign-born child who is declared dependent on a juvenile court in the United States (for example, children who, due to abuse or neglect: (1) are eligible for long-term foster care; or (2) have been committed to the care of a state agency),
- People who served for 12 years in the U.S. military after October 12, 1978, and
- The spouse and children of special immigrants.

EB-5: Certain Investors

The final category of immigrant visas available through employment are for certain investors in the U.S. economy. To qualify, the alien must invest a minimum of $1 million in a

new business or the restructuring or expansion of an existing business. The business must employ at least 10 people, not including the alien, the alien's spouse or the alien's children. However, the alien must take an active role in the business. Passive investment is not enough.

If the alien invests in a rural area, or an urban area with a high unemployment rate, the amount of the minimum investment is reduced to $500,000. To qualify as having a high unemployment rate, the urban area must be certified by the state government to have an unemployment rate that is 150% of the national average.

The investor will be granted conditional residence, which means that the alien will need to apply for the removal of conditions within 2 years. USCIS will look at the business to ensure that it is still operating, that there are 10 employees, and whether the alien still owns the business.

The Visa Petition

With a few exceptions, an alien can only immigrate to the United States based on an employment visa if the alien actually has a job offer. Once the employer has received a labor certification, and has offered the job to the alien, the employer may then file the visa petition. This is done through form I-140.

The employer will be required to submit more than simply the form I-140. The employer must also submit supporting documentation, including a copy of the approved labor certification, evidence that the job falls within one of the preference categories, and evidence that the alien possesses the appropriate education and/or experience to qualify for the job. The employer will also be required to show that it can afford to pay for the alien's salary.

The employer must then wait for USCIS to approve of the visa petition. This process can take several months. Once the visa petition is granted, the alien then waits for a visa to become available. Once available, the alien can apply for the visa.

Applying for the Visa

Each category of employment-based immigrant visas has an annual quota of the number of visas that can be granted. The quota is further divided by country. For some countries, in some categories (especially the unskilled labor category), the wait for an available visa can be years. For other categories, there is no current wait.

To determine whether there is a wait for a certain visa category, you need to check the Visa Bulletin, which is published every month by the U.S. State Department. The Visa Bulletin is a chart, which lists each visa category in separate rows. The chart is further divided into several columns for different countries. To find whether a visa is available for a person from China, who falls within the EB-2 category, you would go to the row marked "2nd," and move across to the column for China. Below is a chart showing the Visa Bulletin from August of 2008. In the chart, you can see that as of August of 2008, any alien from China in the EB-2 category who has a priority date of June 1, 2006 or earlier can apply for a visa.

The priority date is the date on which the employer applied for the labor certification. Thus, if an alien from China fell within the EB-2 category, and the employer filed for the labor certification on January 29, 2001, that alien could apply for a visa. By contrast, if the employer

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had filed for the labor certification on February 15, 2001, that alien could not apply for a visa just yet.

	All Chargeability Areas Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
Employment-Based					
1ST	C	C	C	C	C
2ND	C	01JUN06	01JUN06	C	C
3RD	U	U	U	U	U
Other Workers	U	U	U	U	U
4TH	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5TH	C	C	C	C	C
Targeted employment Areas/Regional Centers	C	C	C	C	C

Source: U.S. Department of State, Visa Bulletin For August 2008 (available at: http://travel.state.gov/visa/frvi/bulletin/bulletin_4310.html)

The alien can apply for the visa is one of two ways. If the alien is inside the United States on a valid immigration status, the immigrant may apply in the United States for an adjustment of status with USCIS. This allows the alien to stay in the United States until USCIS approves of the application. The alien must be in the United States on a valid immigration status. If the alien is not in the United States, or is in the United States but undocumented, then the alien may not apply for the visa through this process. Also, if an alien is present in the United States through a visa waiver program, that alien may not apply for an adjustment of status.

The alien should be careful not to apply for a temporary visa, such as a B-2 tourist visa, just for the purpose of coming to the United States in order to apply for an adjustment of status. This is because the B-2 visa is a non-immigrant visa. In order to qualify, the immigrant must have the intention of returning to his or her home country. If the immigrant applies for a B-2 visa with the intention of applying for an adjustment of status and staying in the United States, the alien did not possess the required intent to qualify for the B-2 visa. This would be visa fraud, and could prevent the alien from being admitted to the United States for several years.

The second way that an alien can apply for the visa is through consular processing. This means that the alien applies with the U.S. Consulate in the country where the alien is located for the visa. Typically, this is the consulate of the alien's home country. The alien may be able

to apply through a Consulate that is not located in his or her home country. However, the alien should be prepared to provide an explanation for doing so, and should contact the Consulate in advance to verify that the Consulate will accept the application.

The application process is meant to make sure that the alien is "admissible" to the United States. That is, the U.S. Government will make sure that there is not something about the alien, such as a criminal record or communicable disease, that would legally prevent the alien from entering the United States. The alien will be required to provide police certificates, biometric information, and a certificate from a civil surgeon who has physically examined the alien, before the visa is granted. The alien will also be required to attend an interview, where a U.S. Government official will ask questions about the alien's visa application.

A Selection of Non-Immigrant Visas

A discussion of the entire list of the available non-immigrant visas would be too long for the purpose of this special report. What follows is a list of the most common types of no-immigrant visas. This report then goes into further detail on the requirements and process involved in some of the more common non-immigrant visas. This is not meant to be a complete list, and is meant just to give an idea of the types of temporary visas that are available.

B-1 Business visitors
B-2 Tourist visitors
E-1 Treaty Traders
E-2 Treaty Investors
F-1 Academic or Language Students
F-2 Immediate family of F-1 visa holders.
F-3 Students who commute from Canada or Mexico
H-1B Specialty Workers
H-2A Temporary Agricultural Workers
H-2B Temporary Workers
H-3 Trainees
H-4 Immediate family members of H-1, H-2 or H-3 visa holders
J-1 Exchange Visitors
J-2 Immediate family members of J-1 visa holders
L-1 Intracompany Transfers
L-2 Immediate family members of L-1 visa holders
M-1 Vocational or Non-Academic Students
M-2 Immediate family members of M-1 visa holders
M-3 Vocational students who commute from Canada or Mexico
O-1 Persons of extraordinary ability in the sciences, arts, education, business or athletics
O-2 Essential support staff of O-1 visa holders
O-3 Immediate family members of O-1 and O-2 visa holders
P-1 International recognized athletes and entertainers and essential support staff
P-2 Entertainers performing in the United States through an exchange program

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P-3 Artists and entertainers who will engage in culturally unique performances
P-4 Immediate family members of P-1, P-2 and P-3 visa holders
TN NAFTA professionals
TO Immediate family members of TN visa holders

Visitor Visas: B-1 and B-2

Visas are available for people who will visit the United States temporarily. The B-1 visa is for business visits. The B-2 visa is for tourism. Many times these two visas are issued together. Generally, these visas are good for ten years, and are multi-entry visas. This means that during the period of validity of the visa, a person may leave the United States and return.

Travelers should be careful, however, not to confuse the period of visa validity with the amount of time that a person may stay in the United States. While the B-1 and B-2 visas are valid for ten years, generally, when a person enters the United States with one of these visas, the U.S. Customs and Border Protection officer will issue the traveler a white card, called an I-94, which states how long the traveler may stay in the United States. Generally, the I-94 is good for a six month stay. However, it may be extended.

Applications for a B-1 or B-2 visa is made at the Consulate. All applicants will be required to attend an interview. Applicants should also be prepared to show sufficient connections to his or her home country in order to satisfy the Consulate that the traveler intends to return to his or her home country after a short visit to the United States. The traveler may also need to have evidence showing where he or she will be staying in the United States, and proof that he or she has sufficient funds to support his or her needs while in the United States. That is, the traveler will need to show that he or she can afford to pay for food and shelter while in the United States, or that someone else, such as a family member will be supporting the traveler.

The visit may be for business purposes, and the traveler may be paid for his or her activities in the United States. However, the traveler must be paid by a foreign employer. That is, the source of the traveler's income while in the United States may not come from a U.S. company.

Treaty Traders and Investors: E-1 and E-2

A treaty trader qualifies for an E-1 visa. A treaty trader is defined as a person who will be in the United States solely to carry on trade, which is international in scope and of a substantial nature. The alien may work on his or her own behalf or as an employee of a foreign person or organization. The foreign person or organization must be engaged in trade principally between the United States and alien's home country. The alien's home country must have a treaty commerce and navigation with the United States. Moreover, the alien must intend to depart from the United States when the visa expires.

The countries, as of July 25, 2008, that have a treaty with the United States which would qualify a person to apply for an E-1 visa are: Argentina, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brunei, Canada, Chile, China (Taiwan), Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel,

Italy, Japan, Jordan, South Korea, Latvia, Liberia, Luxembourg, Macedonia, Mexico, the Netherlands, Norway, Oman, Pakistan, Paraguay, the Philippines, Poland, Singapore, Slovenia, Spain, Suriname, Sweden, Switzerland, Thailand, Togo, Turkey, the United Kingdom, and Yugoslavia.

A treaty investor qualifies for an E-2 visa if he or she has invested or is actively in the process of investing a substantial amount of capital in *bona fide* enterprise in the United States. Investment means that the funds are placed at risk with the goal of realizing a profit. If the alien is in the process of investing, he or she must show that the funds are irrevocably committed to the enterprise. Whether the investment is substantial is determined on a proportional basis. The amount must be sufficient to ensure the investor's financial commitment to the success of the enterprise.

The purpose of the visit must be to develop and direct the enterprise. The investor must possess a 50% ownership of the enterprise, have operational control by virtue of his or her position, or show that he or she will direct or control the enterprise by other means. Finally, the investor must show that he or she intends to leave the United States once the E-2 visa expires.

The countries, as of July 25, 2008, that have a treaty with the United States which would qualify a person to apply for an E-2 visa are: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Cameroon, Canada, Chile, China (Taiwan), Colombia, Congo (Brazzaville), Congo (Kinshasa), Costa Rica, Croatia, the Czech Republic, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Grenada, Honduras, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, South Korea, Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Mexico, Moldova, Mongolia, Morocco, the Netherlands, Norway, Oman, Pakistan, Panama, Paraguay, the Philippines, Poland, Romania, Senegal, Singapore, the Slovak Republic, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Ukraine, and the United Kingdom.

H-1B: Specialty Workers

The H-1B is often called the work-horse of the non-immigrant visas. This visa category involves a shorter labor certification process. Moreover, this non-immigrant visa category is one of the exceptions to the rule that the alien must intend to return to his or her home country. Often, employers and aliens will use the H-1B visa to bring the worker to the United States to allow him or her to work legally, if only temporarily, and then start the process for an immigrant visa based on employment.

The problem with the H-1B visa is that there is a tight quota of visas available every year. Plus, unlike the immigrant visas, if the alien does not make the quota for the current year, the alien cannot wait for a visa to become available. Rather, the employer and the alien must re-apply in the next year. By statute, the quota is 65,000 per year. Of those visas 20,000 are specifically set aside foreign workers with a Master's degree or higher from a U.S. academic institution. For certain countries that have a treaty with the United States, such as Singapore and Chile, there is a special visa category, the H-1B1. Congress has allocated 6,800 visas annually for the H-1B1 category.

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The visas are distributed annually. The visa permits the foreign worker to come to the United States to begin work on October 1. To apply for a visa to begin on October 1 of the current year, the employer may file the visa petition as early as April 1. If all of the visas for the year have been distributed, the alien will not be put on a wait list, as would be the case with the preference system. Rather, if the employer still wants to hire the alien, he or she will have to re-apply the following year.

The quota for the H-1B category is so tight, that in the past few years there have been more applications on the first day of filing than there were available visas. (In 2008, however, USCIS permitted all applications for H-1B visas to be made between April 1 and April 3, and be treated as if they were filed on April 1.) When the number of applications filed on the first day have exceeded the number of available visas for the year, the U.S. Government awarded the visas by lottery.

The tight quota on the H-1B visas emphasizes the point that the visa petition must be complete and ready for filing by April 1. Even a perfect petition, with all of the necessary supporting documentation, filed on April 1, may be denied because of this tight quota. The employer and alien should be prepared for the possible disappointment.

Some aliens in the H-1B category are not subject to the annual quota. They are:

- Aliens who are employed, or who have received an offer of employment, by institutions of higher education or a related or affiliated nonprofit entity.
- Aliens who are employed, or who will be employed, by a nonprofit research organization or a governmental research organization.

To qualify for the H-1B visa category, the occupation must be one that requires a bachelor's degree or higher. Although, the category also includes certain fashion models of distinguished merit.

H-2A: Certain Agricultural Workers

U.S. agricultural employers may employ foreign workers on a temporary basis to do agricultural work when U.S. labor is in short supply. The non-immigrant visa category for this is the H-2A. The employment must first be certified by the U.S. Department of Labor. Specifically, the Department must certify: (A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and (B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

H-2B: Temporary or Seasonal Workers

The H-2B visa is the category for an alien to come to the United States to work temporarily performing non-agricultural labor or services. Congress limits the amount of H-2B visas to 66,000 per year. This quota is divided between two halves. Thus, 33,000 H-2B visas are available during the first half of the year, and 33,000 during the second half. If all 33,000 visas

are not used in the first half, they will be added to the number of visas available in the second half.

H-3: Trainees

An alien who has received an invitation to receive training in any field of endeavor (except physicians seeking graduate medical education or training) may apply for an H-3 non-immigrant visa. Any business entity, academic, or vocational institute may provide the training. To qualify:

- The training must be unavailable in the alien's home country;
- The alien may not be placed in a position which is part of the normal operation of the business and which would otherwise be occupied by a U.S. citizen or resident worker;
- The alien may not be engaged in productive labor (other than incidental labor necessary to the training); and
- The training will benefit the alien pursuing a career outside the United States.

Intra-Company Transfers: L-1

A multi-national company may obtain a temporary, non-immigrant visa for certain employees who are transferred to the United States. The employee must be: (1) management; (2) an executive; or (3) an employee with specialized knowledge or skills. The employee must have been employed by the foreign employer continuously for at least one year out of the last three years.

The business entity in the United States where the employee will work must be related to the overseas employer. It can be a U.S. office of the same employer, a U.S. branch of the foreign employer, the foreign employer's parent company, a subsidiary of the foreign employer, or an affiliated company.

Students: F-1 and M-1

Students in an academic or language program may qualify for an F-1 visa. Students in vocational programs may qualify for an M-1 visa. In either case, the school must be approved by USCIS. The student must study on a full-time basis, and either be proficient in English or be enrolled in classes meant to make the student proficient in English. The student must have enough money to support himself or herself during the educational program. Finally, the student must have the intention of returning to his or her home country.

Students may work for one year. However, the work must be related to the field of study.

Exchange Visitors: J-1

An alien may qualify for a J-1 visa if he or she has been accepted to participate, and intends to participate, in an exchange visitor program designated by U.S. Department of State.

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The exchange visitor must have enough money to cover his or her own expenses, and must be proficient in English. If the exchange visitor is not proficient in English, the organization operating the exchange program must be aware of this, and be willing to accept the visitor anyway.

Some exchange visitors are required to live in their home country for two years after the program has ended before being able to apply for another visa to the United States. This is true of certain graduate medical students, and students attending a program funded by the U.S. Government or the government of the alien's home country.

Visa Opportunities for Particular Occupations

This section focuses on a few specific occupations to discuss generally some opportunities that may be available to obtain a visa. This discussion is by no means an exhaustive list, but only meant to serve as an illustration.

Nurses

Qualified nurses are in great demand in the United States. U.S. immigration law recognizes this, and creates opportunities for nurses to immigrate permanently. Professional nurses who have passed the CGFNS examination, or who are licensed in the state where they intend to work are in a Schedule A occupation. This means that the employer may file the visa petition without going through the labor certification process.

Certain registered nurses in specialized field may be eligible to apply for an H-1B specialty worker visa. Examples include supervisory nurses, clinical nurse specialists, certified registered nurse anesthetists, certified nurse-midwives, and certified nurse practitioners (APRN-certified). The H-1B is a non-immigrant visa that is generally valid for three years. However, the alien may apply for extensions. Also, unlike other non-immigrant visas, the alien does not need to have the intent to return to his or her home country.

Athletes

Athletes may fall under a number of different visa categories. Exceptional athletes may fall under the EB-1 category, and may be eligible to immigrate to the United States without a labor certification or job offer. Exceptional athletes, however, must be nationally or internationally recognized for their skills. There is a similar non-immigrant visa category as well, the O-1.

Athletes may apply for non-immigrant visas under the P-1 category if:

- The athlete as an individual plays at an internationally recognized level,
- The athlete is part of a team that plays at an internationally recognized level,
- The athlete is a professional athlete,
- The alien is an athlete or a coach with a team based in the United States that is a member of a foreign league or association of 15 or more amateur sports teams of the highest level of amateur play, or

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- The athlete is a professional or amateur participating either individually or as part of a group in a theatrical ice skating production.

The athlete or athletes, however, must have the intention of returning home.

Nannies

Nannies are a particularly difficult category for which to obtain an employment-based visa. The reason is that nannies are considered unskilled labor. For immigrant visas, this means that the first hurdle will be the labor certification. A person who wishes to hire an alien to immigrate and act as a nanny will have to apply for a PWD and be willing to pay the prevailing wage. That person will also have to take the same recruiting steps outlined above. Because the job is unskilled, it would be difficult to disqualify every U.S. applicant responding to the recruitment for valid reasons. Finally, the process takes several months, which will dissuade most U.S. parents from even trying.

U.S. parents could try the route of applying for a non-immigrant visa. However, nannies would fall under the H-2B category. This may not make the process easier, as the application for an H-2B visa also requires a labor certification process. This will involve steps to recruit a nanny from the United States before the alien may be hired.

Students in the United States with an F-1 or M-1 visa will not be able to work as a nanny. These students are permitted to work in the United States for one year. But, the work must be related to their field of study.

Some U.S. parents may be tempted to hire an alien to act as a nanny "under the table." That is, the parents may be tempted to hire the nanny without paying social security taxes, without paying Medicare taxes, and without making sure that the alien has the legal right to work in the United States. Parents who do so take a great risk. As stated above, the U.S. Government uses employers as one mechanism for enforcing its immigration laws. If U.S. parents knowingly hire an illegal alien, or hire someone they should have known was an illegal alien, they may be hit with fines and jail time.

Hiring a nanny without complying with U.S. employment laws, including immigration laws and employment-based taxes, can be especially dangerous for professional women who have ambitions for public office. Many presidential nominees for such positions as the Attorney General and a Justice on the Supreme Court have had to withdraw their names from consideration due to allegations of irregularities in hiring a nanny.

Conclusion

Applying for an employment-based visa is a complicated process. With as many as three different U.S. agencies involved in the process, there are numerous places where the process can go wrong. It would benefit a U.S. employer to consider the entire process before attempting to hire a foreign worker, and to develop a comprehensive plan. An immigration lawyer is essential for such a plan. U.S. employers looking to hire foreign workers would therefore be doing themselves a favor by hiring a qualified lawyer to guide them through the process, and advocate on their behalf with the U.S. Government.

About the Author

William J. Kovatch, Jr. worked as a staff attorney with the U.S. Government for almost eight years, concentrating on international law related issues. Bill has litigated complex cases before U.S. courts, NAFTA panels, and the World Trade Organization. Prior to his government work, Bill served as a judicial clerk with the District of Columbia Court of Appeals.

Bill earned his law degree from Temple University in 1998, and then his Master of Law degree, with a concentration in Transnational Law, in 2000. He holds a Master of Arts degree in Comparative Politics from the American University, and a Bachelor's degree from the University of Miami.