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IMMIGRATION NEWS

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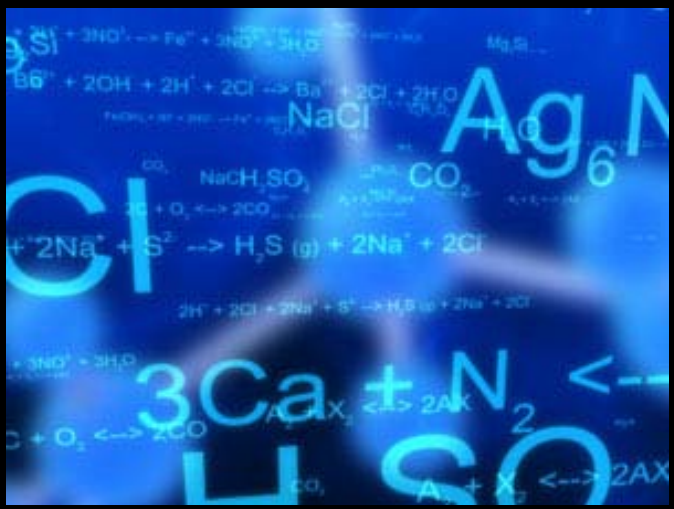
OBTAINING PERMANENT RESIDENCY: OPTIONS FOR PROFESSORS, RESEARCHERS, AND POST-DOCS



An individual may qualify for permanent residency in the United States as a priority worker. For academicians and researchers, a priority worker is characterized as one who has extraordinary ability OR those who are outstanding professors and researchers.

1.) ALIENS OF EXTRAORDINARY ABILITY

Under U.S. Immigration Laws an individual will qualify as a priority worker as an Alien of Extraordinary Ability if:

- the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- the alien's entry into the United States will substantially benefit prospectively the United States.

A person of extraordinary ability is defined as a person demonstrating a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor and that the alien has sustained national or international acclaim and whose achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (i.e., the Pritzker Architecture Prize, Pulitzer Prize, or Nobel Prize), or at least three of the following:

- Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor; *(continued on Page 2)*

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- Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

- Published material about the alien in professional or other major trade publications or major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

- Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;

- Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

- Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

- Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

- Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

- Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

- Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video sales.

It should also be noted that the list above is not exhaustive as the immigration services will allow comparable evidence as proof of extraordinary ability. A checklist approach in satisfying three of the criteria above does not automatically guarantee approval of the petition. Rather the quality of one's work, reputation of the publisher, or citations of one's work by other scholars in the field is essential in a successful petition.

A single reference letter written by a Nobel Laureate about the extraordinary nature of the beneficiary may be sufficient to carry the petition to approval. In contrast a library of letters written by individuals who are not top tier members of the profession will not likely impress the adjudication officer. For example in a recent case, a Japanese sculptor was seeking admission to the United States as an Alien of Extraordinary Ability. Her petition was approved based on her body of work and a single letter from a Chinese artist of international renown whose work had been recognized by the United Nations.

A beneficiary of the petition may also wish to include a citation index showing the number of times his or her work has been cited by others in his or her field. Additionally, if submitting publications, the quality of the professional journal or publisher will also matter, where a well known publisher or recognized journal will be given more weight than self published materials or those of vanity presses.

Entry to Work in the Field of Extraordinary Ability

Beneficiaries of an "extraordinary" petition do not need a U.S. sponsor or employer. The requirement is that the beneficiary must be coming to continue work in the area of his or her expertise. Further, the work need not be in the same research area that initially brought the beneficiary fame so long as it is in the same field. Satisfying this requirement would be easier if the beneficiary already had an employer or a prospective employer. Generally, evidence needed to satisfy this requirement include: 1.) employer letters from current employers or prospective employers verifying a job opportunity, 2.) employment contracts, 3.) a detailed statement from the beneficiary on how he or she will continue their work in the area of expertise, or 4.) any other documentary evidence relevant to meet this requirement. *(continued on Page 3)*

OBTAINING PERMANENT RESIDENCY: OPTIONS FOR PROFESSORS, RESEARCHERS, AND POST-DOCS

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Substantial Benefit Prospectively to the United States

The final requirement is that the beneficiary will substantially benefit prospectively the United States. The immigration services will generally assume that this requirement is met if the beneficiary is working in an area of expertise as a person of extraordinary ability. This requirement is generally linked with the indices for extraordinary ability stated earlier in this article.

2.) OUTSTANDING PROFESSORS AND RESEARCHERS

- An academic will qualify as a priority worker if he or she meets the following criteria:
- the alien is recognized internationally as outstanding in a specific academic area,
- the alien has at least 3 years of experience in teaching or research in the academic area, and
- the alien seeks to enter the United States,
- for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
- for a comparable position with a university or institution of higher education to conduct research in the area, or
- for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

3.) FILING PROCEDURE

A beneficiary must file a form I-140, Immigrant Petition for Alien Worker with the United States Citizenship and Immigration Service Center having jurisdiction over the petition. As of the writing of this article all I-140 visa petitions are filed with the Nebraska Service Center. The current filing fee is $475.

If the beneficiary is outside the U.S. then he or she will obtain permanent residency through a U.S. Consulate abroad. If the beneficiary is in the U.S. then they may, in some circumstances, file an application for permanent residency at the same time they file the I-140 visa petition. As of this writing all priority worker beneficiaries may file concurrent applications for permanent residency with the I-140 visa petition. The application for permanent residency is the form I-485, Application to Adjust Status. If filing form I-485 then one may also file form I-765, Application for Employment Authorization, and form I-131, Application for a Travel Document. The current fee for form, I-485 is $1010 (which includes the biometric fee); for form I-765, $340; and for form I-131, $305. Note: Filing fees are subject to change therefore it is important to ascertain the correct filing fee before filing.

IMMIGRATION VISA BACKLOG: OPTIONS FOR EMPLOYERS AND THEIR FOREIGN WORKERS

According to the December, 2007 Visa Bulletin foreign workers falling in the EB-3 category and EB-2 workers from Mainland China and India will be affected by a severe backlog of visa numbers. This means there are more individuals wishing to immigrate than there are allotted visas. As a result, foreign workers in the effected categories may have a wait time exceeding 5 years before they are able to file an application to adjust status to that of a permanent resident.

Filing a New Labor Certification as an EB-2

The same employer who had filed an EB-3 application for a foreign worker may file a new labor certification for EB-2 classification for the same foreign worker if the job offer as an EB-2 is bona fide and the foreign worker possesses the requisite educational and employment experience that meets the criteria for EB-2 classification. (*continued on Page 4*)

IMMIGRATION VISA BACKLOG: OPTIONS FOR EMPLOYERS THEIR FOREIGN WORKERS

(continued from Page 3)

If there is a bona fide job offer as an EB-2 and the foreign worker is qualified, filing a new labor certification as an EB-2 may eliminate or dramatically reduce their backlog wait time. This may be especially advantageous for employers who have already filed and have an I-140 Visa Petition approved for a foreign worker. If the I-140 for EB-3 classification has already been approved, the foreign worker may seek to retain the old priority date on the new I-140 as an EB-2.

Filing a New Petition as an EB-1

A petition for EB-1 can be filed for aliens of extraordinary ability, multi-national executives and managers, and outstanding researchers or professors. Though rare, we have seen cases that should have been initially filed as EB-1s instead filed as EB-2s, or EB-3s. Those individuals may wish to file a new visa petition as an EB-1 to avoid the backlog. Those with EB-2 or EB-3 I-140 Visa Petitions already approved can seek to retain the priority date of the initially approved I-140. Individuals may be tempted to file a new petition in an attempt to circumvent the backlog. However, a new petition should not be filed unless there is real merit to warrant such a filing. As such a careful examination of your current job duties and its requirements should be made in contrast to the job duties and requirements on which the first petition was based.

No Downside

Many employers and foreign workers have expressed concerns that a new petition may jeopardize their approved visa petition. However, a new labor certification and visa petition as an EB-2 represents a new job offer that is separate and apart from the job offer that supported the EB-3 labor certification and visa petition. In the case of filing a new petition as an EB-1, one is merely filing a petition seeking benefits in a classification they qualified all along, but had instead chosen to file the initial labor certification and visa petition as an EB-2 or EB-3. There is no risk to the approved visa petition if there is a legitimate step up in job duties, job requirements, and the foreign national qualifies for the new position as an EB-2 or if the foreign worker could have initially filed as an EB-1, but did not.

H-1B 7th Year Extension and the Visa Backlog

What is an H-1B?

An H-1B temporary worker is a foreign national who is coming temporarily to the U.S. to perform a specialty occupation. A specialty occupation is defined as "an occupation that requires (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States." INA214(i); 8USC 1184(i)

Limitation on Duration of Stay

An employer may request initial employment for up to a maximum of 3 years. The H-1B can be extended. Generally, the maximum amount of time that an individual can hold H-1B visa status is 6 years.

On the 6th Year as an H-1B + Visa Backlog = Trouble

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H-1B 7th Year Extension and the Visa Backlog

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A major issue created by the EB-3 (and EB-2) backlog is its effect on many H-1B workers who are subject to the 6 year limitation. Unless a labor certification and visa petition were filed for an H-1B holder at the beginning of their stay, many H-1Bs are faced with the possibility of having to return to their home country because the visa backlog has created a time gap between the end of their H-1B stay and the anticipated time they would adjust their status to that of a permanent resident. Furthermore, employers who have invested resources in training the H-1B worker will lose the benefit of that training, if the foreign worker is forced to leave.

Employers should be aware of the exceptions to the 6 year limitation of the H-1B visa:

(1) A foreign worker in H-1B status is entitled to an extension beyond the 6 year limitation in 1 year increments IF he or she has a labor certification or I-140 visa petition that has been PENDING for over 365 days;

(2) The same worker is entitled to an additional 3 year H-1B extension beyond the 6 year limitation IF he or she has an approved I-140 visa petition and his or her Employment Based category is subject to the backlog;

(3) The H-1B worker is entitled to get back all days he or she spent outside of the United States because only actual presence in the United States is counted toward the 6 year limitation imposed by the H-1B visa.

Real Facts... Real Results

Here are some facts of actual cases and results

Case #1: The beneficiary was an H-1B as an Electrical Engineer with a Master's Degree in Electrical Engineering and no experience. A labor certification (PERM) was filed on March 7, 2007 and approved on March 9, 2007 as an EB-2. A form I-140 Visa Petition was concurrently filed with an Application to Adjust Status, form I-485 on May 10, 2007. The I-140 Visa Petition was approved on August 15, 2007. The I-485, Application to Adjust status to that of permanent resident was approved on September 11, 2007.

Case #2: The applicant, born in India, was in lawful H-1B status. The applicant's dependent spouse was born in France. Visa numbers as an Indian Born EB-2 was backlogged. Nonetheless, the applicant and his spouse were able to file for adjustment of status based on visa numbers available to the dependent spouse even though visa numbers were unavailable for the applicant.

Case #3: A Hong Kong born H-1B concurrently filed a form I-140 Visa Petition and form I-485 Application to Adjust Status based on a separate state of chargeability for Hong Kong born Chinese, where visa numbers were not immediately available for individuals from Mainland China of which Hong Kong is now a part.

Case #4: An employer hires a Korean born beneficiary as an Environmental Engineer in H-1B status. A labor certification application (PERM) was filed and approved as is the I-140 Visa Petition for EB-3. The beneficiary has a subsequent change in job duties to a management position. A new PERM labor certification application was filed as an EB-2 and upon approval a new I-140 Visa Petition was submitted with notice to the U.S. Citizenship and Immigration Services of the prior I-140 approval. The new I-140 Visa Petition as an EB-2 was approved retaining the priority date established by the first I-140 as an EB-3.

Employment Based Immigration: 3 Steps to Understanding the Process

U.S. employers wishing to sponsor a foreign national for permanent residency face the daunting task of navigating through the treacherous waters of U.S. immigration laws. This article seeks to provide employers with a basic outline of the process.

EMPLOYMENT BASED IMMIGRATION

A U.S. employer may sponsor a foreign national who is abroad or currently in the U.S. under their employ for permanent residency (colloquially known as a "greencard.") through an employment based immigrant petition.

There are 5 categories or preferences within the Employment Based (EB) system, e.g. EB-1, 2, 3, 4, and 5. The vast majority of applicants will likely fall into the EB-2 or EB-3 category. EB-1 petitions involve foreign nationals of extraordinary ability, multi-national executives and managers, and outstanding researchers or professors. EB- 4 and 5 pertain to certain special immigrants and investors respectively.

Generally, EB-2 and EB-3 Petitions require a labor certification from the Department of Labor and a job offer. Workers hoping for permanent residency on the basis of an EB-2 or EB-3 petition must generally undergo a three step process.

STEP 1 - THE LABOR CERTIFICATION

A Labor Certification is a determination made by the Department of Labor that there are no U.S. workers who are qualified and available for a position in which a U.S. employer seeks a foreign worker. To receive such a determination, an employer must show valid recruitment for a prescribed period of time and demonstrate that there are still no qualified and available U.S. workers to fill that position. The Department of Labor then issues a ruling on the application. The application for labor certification is called PERM (Program Electronic Review Management).

A Labor Certification is NOT an Application for Permanent Residency

Time and time again we have seen clients come to our office who have been incorrectly (sometimes wrongfully) led to believe that their labor certification is an application for permanent residency. Merely filing a labor certification DOES NOT provide a foreign worker with immigration status nor give him or her authorization to work for the sponsoring employer. A foreign employee must have an independent basis for work authorization, such as a nonimmigrant visa classification in E, O, L, and, H, etc.

STEP 2 - THE VISA PETITION

Once a labor certification is approved the employer will submit to the United States Citizenship and Immigration Services a petition for alien worker, Form I-140 along with the certified labor certification and the necessary support documents.

The purpose of the visa petition is to establish the relationship between the sponsoring employer and the foreign worker. Often times the employer will be asked to submit financial evidence indicating its financial ability to pay the foreign worker the prevailing wage established under the labor certification. The foreign worker must also demonstrate he or she possesses the required years of experience and educational level required by the labor certification. Depending on the minimum requirements stated on the labor certification, the employer will file a petition for either EB-2 or EB-3 classification.

Who Qualifies for EB-2?

A foreign worker qualifies for an EB-2 petition, if he or she:

- Has an approved labor certification, unless waived through a National Interest Waiver; AND *(continued on Page 7)*

Employment Based Immigration: 3 Steps to Understanding the Process *(continued from Page 6)*

- Possesses an advanced degree and the job offer requires a person with an advanced degree. To minimally qualify for an advanced degree the foreign worker must have a baccalaureate degree accompanied by at least 5 years of post-baccalaureate progressive experience; OR
- Possesses an exceptional ability and the job offer requires a person of exceptional ability.

Under the EB-2 classification the Labor Certification requirement may be waived if the criteria can be met through documentary evidence that it is in the national interest to do so called the National Interest Waiver.

Who Qualifies for EB-3?

A foreign worker qualifies for EB-3 if he or she:

- Has a labor certification approved, AND
- Is a professional where the worker holds a U.S. baccalaureate degree or equivalent foreign degree and evidence that a baccalaureate degree is required for entry into the profession; OR
- Is a skilled worker who possesses the minimum requirement of 2 years of training or experience.

STEP 3 - ADJUSTMENT OF STATUS

A foreign worker may file an application for Adjustment of Status to gain permanent residency if he or she is in the United States, have not been out of nonimmigrant status for 180 days or more, and visa numbers are available to him or her in his or her Employment Based Preference category. Visa numbers represent the numerical limitation established by the State Department of persons allowed to immigrate to the United States within each preference category. If too many petitions are filed subscribing to a particular EB category, then visa numbers for that category may run out resulting in a backlog, i.e. a waiting list develops.

Concurrent Filing of Visa Petition and Application for Adjustment of Status

The visa petition (Form I-140) and application for Adjustment of Status (Form I-485) may be concurrently filed if visa numbers in a particular Employment Based preference are currently available. Otherwise, only the Visa petition (Form I-140) may be filed but not the Application for Adjustment of status (Form I-485).

CONCLUSION

There are many elements to consider when hiring a foreign national. A missed element or mishap in procedure is the difference between a successful and unsuccessful application or petition. A basic understanding of the immigration and labor certification process allows an employer to be become better informed to make decisions in meeting the challenges of global recruitment.

Employers Must Use New I-9 Form

U.S. Citizenship and Immigration Services (USCIS) announced in a Federal Register notice on Nov. 26, 2007 that employers must transition to the revised Employment Eligibility Verification Form (I-9) not later than Dec. 26, 2007. All employers are required to complete a Form I-9 for each employee hired in the United States on or after November 7, 2007

On Nov. 7, USCIS announced the availability of the revised version of Form I-9 (includes the revision date -- (Rev. 06/05/07)N printed on the lower right corner of the form) which is now the only version valid for use. In that Nov. 7 announcement, USCIS explained that employers would have 30 days, beginning on the date the Federal Register notice is published, to transition to the revised form.

Accordingly, effective Dec. 26, 2007, employers who fail to use the revised form will be subject to applicable penalties. For an electronic copy of the new I-9 form and instructions please email us at johnmei@danzigerlaw.com.

Timely Filed H-1B Petitions: Avoiding 4 Common Mistakes to Prevent Rejection

The United States Citizenship and Immigration Service (USCIS) will accept H-1B petitions for fiscal year 2009 on April 1, 2008 for jobs starting on October 1, 2008. Mistakes in filing procedure or including improper filing fees will cause the rejection of an H-1B petition. Such rejections may have dire consequences for your H-1B candidate and your company. Here are four common mistakes to avoid.

Mistake #1 Thinking You Have Plenty of Time to File: Lessons from History

Filing H-1B petitions for delivery at USCIS service centers on April 1, 2008 is no longer an option. This past April thousands of employers saw their petitions rejected because they did not file early enough. On the very first day H-1B petitions were being accepted this April, USCIS received 133,000 petitions seeking one of the 65,000 available H-1B slots. Those employers whose petitions arrived on the second day of filing were rejected because the H-1B quota had already been met. Do not be one of those to get rejections because you filed too late. Early document preparation is essential to making timely filed H-1B petitions.

Mistake # 2 Filing with the Incorrect USCIS Service Center

Filing a petition with the incorrect USCIS Service Center will result in a rejection. A petition is filed with the California Service Center if the temporary employment will be in the following states: Arkansas, Arizona, California, Colorado, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, Wisconsin, or Wyoming.

A petition is filed with the Vermont Service Center if the temporary work will be performed in: Alabama, Arkansas, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, U.S. Virgin Islands, or West Virginia.

When the temporary employment will be in different states, the state where your company is located will determine the Service Center for submission of the petition. For example, if the beneficiary will work in Arizona and Texas, and your company is located in California, file your H-1B petition with the California Service Center.

Mistake #3 Using Non-bonded Couriers for Delivery to the California Service Center

If you send documents to the California Service Center using courier services other than the U.S. Postal Service, make sure they are a bonded carrier appearing on the Service Center's list of approved carriers. If the private carrier is not on the Service Center list, delivery of your petition will be turned away at the entrance to the Service Center.

Mistake #4: Incorrect Filing Fees

Petitions with Incorrect filing fees will result in a rejection. Generally, an employer must pay for the H-1B Form I-129 filing fee ($320), H-1B Training Fee of either $750 or $1500 depending on the size of your company, and a Fraud Prevention and Detection Fee ($500).

If a company currently employs 1-25 full-time equivalent employees, the H-1B Training Fee is $750. Companies who employ more than 25 full-time equivalent employees will need to pay $1500. The employer must pay the H-1B Training Fee upon the initial hire and the first H-1B extension of the same employee. The H-1B Training Fee is not required for second or subsequent petitions for H-1B extension. The Fraud Prevention and Detection fee needs to be paid when the employer initially hires the employee even if he or she is currently working as an H-1B with another employer.

A simple way to remember this is that every employer needs to pay for the H-1B Training Fee twice for each H-1B employee and the H-1B Fraud Prevention and Detection Fee needs to be paid once for each H-1B employee.

CSC Policy Change on Concurrent H-1B employment

The California Service Center (CSC) of the United States Citizenship and Immigrations Services has informed the American Immigration Lawyers Association that it has changed its policy with respect to certain forms of concurrent H-1B employment.

In the past, the CSC would approve an H-1B petition for concurrent H-1B employment that is cap-subject if the alien was the beneficiary of an approved H-1B petition submitted by a cap-exempt employer, applying a literal reading of the applicable INA § 214(g)(6). The CSC has advised that they will start denying concurrent H-1B Petitions filed by cap-subject petitioners notwithstanding the fact that the alien is already working for a cap-exempt institution.

About the Attorneys

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Max Danziger has practiced immigration law exclusively since 1975. He is admitted to practice and has presented cases before the California Superior Court, Federal District Courts, the 9th Circuit Court of Appeals and the United States Supreme Court. He has represented thousands of clients before the Immigration Court system. Mr. Danziger is a member of the American Immigration Lawyers Association where he has held a variety of offices. He is author of "*The Book for Immigrating Religious Workers*." Danziger has also held teaching posts on Immigration Law at several Southern California law schools.

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