HOW TO MAKE IMMIGRATION LAW WORK FOR YOUR BUSINESS:

A Small Business Guide

PROSKAUER ROSE LLP

Senior Editors
Patricia Gannon, Esq.
Lawrence R. Sandak, Esq.

Editor
Christine Alber, Esq.

Contributing Authors
Christopher Cates
Erica Loomba, Esq.
Parisa Salimi, Esq.
June 2005

For businesses large and small, keeping abreast of developments in immigration law is essential to maintaining a competitive workforce. Standing at the crossroads of domestic labor policy, foreign relations and homeland security, the nation’s immigration policy is undergoing unparalleled change. During the last several years alone, more than fifty Congressional enactments have affected virtually every aspect of the immigration process. Within the last two years, the administrative and regulatory framework for enforcing the nation’s immigration laws was dismantled and overhauled. Today’s businesses understandably find it difficult to adapt to this ever-evolving area of the law.

Proskauer Rose LLP has been assisting businesses for over 125 years. As one of the few law firms that is a national member of the U.S. Chamber of Commerce, we combine our day-to-day representation of businesses with activities that help shape U.S. immigration policy. The firm’s Immigration Law Practice Group - one of the largest immigration practice groups within a full-service law firm - assists U.S. businesses from coast to coast and around the world. In keeping with the firm’s commitment to the business community, we are honored to have been asked to sponsor and produce “Immigration Law: A Guide For U.S. Businesses.” We hope it will become an important resource that will help your company successfully navigate the complex and ever-changing array of immigration laws and regulations.

We gratefully acknowledge the cooperation and support of the U.S. Chamber of Commerce, particularly the Chamber’s Vice-President, Labor, Immigration and Employee Benefits, Randel K. Johnson, in bringing this project from concept to completion, and Angelo I. Amador, Director of Immigration Policy, for his insightful editorial assistance. We appreciate the invaluable assistance of our colleagues Peter M. Avery, Christie Del-Rey Cone, Rosetta Ellis, Elana Gilaad, Judson L. Hand, Yvette Gordon Jennings, Devora L. Lindeman, Avram Morell, Mark A. Saloman, Frederick Strasser and Marguerite S. Wynne. We would also like to thank Bre Injeski, a student at the Georgetown University Law Center, for her significant contributions.

Sincerely,

Lawrence R. Sandak
## Contents

### Foreword

[iv]

### Part One

**AN OVERVIEW OF U.S. IMMIGRATION**

- Chapter 1—A Brief History and Overview of U.S. Immigration ..................................................[2]
- Chapter 2—Government Agencies Principally Responsible for Immigration ..........................................................[5]

### Part Two

**FOREIGN VISITORS AND TEMPORARY WORKERS**

- Chapter 3—Nonimmigrant VISAS Generally ..................................................................................[9]
- Chapter 4—B-1 Classification - Visitors for Business ..................................................................[14]
- Chapter 5—E Classification - Treaty Traders and Treaty Investors ..................................................[18]
- Chapter 6—H-1B Classification - Specialty Occupation Workers ..................................................[21]
- Chapter 7—H-2B Classification - Skilled and Unskilled Workers (Nonagricultural Workers) ..................................................................................................................[28]
- Chapter 8—L-1 Classification - Intra-Company Transferees .........................................................[31]
- Chapter 9—O Classification - Individuals of Extra Ordinary Ability .............................................[34]
- Chapter 10—TN Classification - NAFTA Professional Workers ..................................................[37]
- Chapter 11—F-1 Classification - Students ......................................................................................[39]
- Chapter 12—H-3 Classification - Trainees ......................................................................................[43]
- Chapter 13—J-1 Classification - Exchange Visitors .........................................................................[44]

### Part Three

**LAWFUL PERMANENT RESIDENCE - OBTAINING A GREEN CARD**

- Chapter 14—The Green Card Process - Generally ...........................................................................[47]
- Chapter 15—Labor Certification Under Program Electronic Review Management (PERM) ...........................................................................................................[53]
- Chapter 16—Employment-Based Immigration Without Labor Certification ..................................................[67]

### Part Four

**EMPLOYMENT ELIGIBILITY VERIFICATION**

- Chapter 17—Overview of Employer Obligations Under IRCA .....................................................[72]
- Chapter 18—Employment Eligibility Verification Requirements ....................................................[81]
- Chapter 19—I-9 Record Keeping ...........................................................................................................[81]
- Chapter 20—Antidiscrimination Provisions of IRCA .......................................................................[82]
- Chapter 21—Enforcement and Penalties .............................................................................................[84]

### Part Five

**APPENDICES** ..................................................................[86]
In the last decade, national security concerns have driven changes in immigration legislation and focused the attention of employers on employee identification and employment authorization. Accordingly, U.S. businesses too often view the immigration laws as a burden rather than an opportunity, overlooking the significant economic advantages afforded by the global workforce. Yet, businesses, large and small, which have recruited and hired foreign nationals, have secured a competitive edge.

To a small construction company needing laborers not available in its local workforce; a start-up technology firm in need of employees with highly-specialized knowledge and experience; a resort seeking seasonal workers; a biotechnology firm requiring the services of a particular, internationally-known, researcher; or a multi-national conglomerate wishing to transfer key personnel to its U.S. operation, a working knowledge of immigration law is vital. This Guide will outline key immigration law concepts and provide strategies to assist businesses facing the labyrinth of ever-changing laws and regulations. The Guide will identify the alphabet soup of federal agencies with jurisdiction over elements of the immigration process and provide a roadmap to assist U.S. businesses in navigating through the process.

The Guide will not answer every question or apply to every situation. It is intended to provide basic information and, at the very least, a starting point for employers recruiting and hiring from the global workforce.

* * *

Nothing contained in this Guide is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This Guide is intended for educational and informational purposes only.
Part One

AN OVERVIEW OF
U.S. IMMIGRATION
A BRIEF HISTORY AND OVERVIEW OF U.S. IMMIGRATION

America’s rich immigration history has been a central, if often overlooked, source of the nation’s achievement and economic growth. For centuries, foreign nationals striving for better lives have looked to our shores for opportunity. It is the combination of economic opportunity and the human desire to succeed that has made the U.S. a destination for many foreign workers who, in turn, have helped build and sustain our nation’s economic and technological prowess.

Immigration legislation is a barometer of our society’s acceptance of—and tolerance for—the admission of foreign nationals. During the nation’s first one hundred years, Congress neither promoted nor discouraged the influx of foreign nationals; in practice, the law was virtually unrestricted, thus giving literal meaning to the phrase, “a nation of immigrants.” But as economic, social, and cultural conditions changed, so did immigration law.

During the Nineteenth Century, immigration to the U.S. increased rapidly, with 10 million immigrants arriving in search of a better life; while Europe was witnessing the end of its Industrial Revolution, the U.S. Industrial Revolution was just beginning. Foreign nationals who faced depression, persecution, and war at home were lured by the flourishing labor markets in the cities of America’s Northeast. The introduction of so large a pool of competing labor caused unrest in the domestic labor force and strained employer/employee relations. In keeping with the predominant economic and cultural viewpoints of the time, Congress responded by enacting a series of qualitative restrictions on immigration targeting the mentally, economically, morally, and criminally “suspect.”

On January 2, 1892, both immigration and deportation processing began at the new Federal Immigration Station on Ellis Island in New York Harbor. By 1905, as the number of new immigrants grew to exceed one million annually, Congress created the Dillingham Commission to make a full inquiry and examination of immigration to the U.S. The Commission’s findings were partially embodied in the Immigration Act of 1917, which reflected both Congressional opposition to unrestricted immigration and the nation’s increasing hostility toward new immigrants who were believed to be resistant to assimilation. The Commission’s recommendation to implement numerical quotas was ratified by Congress in the Quota System Act of 1921 and the National Origins Act of 1924, establishing the centrality of national origin in the imposition of strict annual limitations on immigration. National origin would remain the foundation of basic immigration law until the passage of the Immigration and Nationality Act, also known as the “McCarran Walter Act, “ in 1952.
Chapter 1

The Immigration and Nationality Act affected several groundbreaking changes in immigration law. It eliminated race as a complete bar to immigration and established the foundation of the current employment-based preference system. The Act also gave new attention to the importance of the family unit; in codifying a preference for the familial relationship, it established a cornerstone of modern immigration law.

In 1965, the Immigration and Nationality Act was amended to eliminate the national origin quota system, although longstanding hemispheric quotas were effectively left intact. By 1976, the two hemispheres had been gradually equalized and combined into one annual worldwide quota of 290,000 visas. In recognition of the changing face of the global economy, foreign nationals seeking permission to work in the U.S. had to obtain a “labor certification” from the Secretary of Labor that U.S. workers were unavailable to fill their particular positions. This protected the U.S. labor market from foreign competition where U.S. workers were available, while permitting foreign nationals to fill open positions where U.S. workers were not available.

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) which imposes penalties on employers who hire undocumented workers or fail to take mandatory steps to ascertain whether their employees have permission to work in the U.S.

In the last decade of the Twentieth Century, acting to harmonize the law with the globalization of the world economy, Congress enacted the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991. The new statutory provisions restructured the preference system, modified and established new nonimmigrant categories, and, notably, created the “outstanding researcher or professor immigrant” category and a national interest waiver exemption from the labor certification requirement.

As the Twentieth Century ended, immigration law again came strongly to reflect the U.S. political climate. The Oklahoma City bombing was followed by Congressional enactment of the Antiterrorism and Effective Death Penalty Act of 1996, which aimed at both domestic and international terrorism by expanding deportation grounds for foreign nationals with criminal convictions and strengthening border controls. Again, after the September 11 attacks, sweeping anti-terrorism legislation was enacted impacting the issuance of visas at U.S. Consulates abroad, the review of petitions and applications for immigration benefits, and inspections and admissions at the border. In an effort to exclude suspected terrorists at U.S. borders, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act) added new grounds of inadmissibility and allo-
cated additional funds for border security.

On November 25, 2002, the Homeland Security Act was signed into law. Although the Act primarily focused on security and enforcement to prevent terrorist attacks in the U.S., it also abolished the former Immigration and Naturalization Service (INS), created the Department of Homeland Security (DHS), and, as discussed in the following chapter, reallocated responsibility for immigration among various new and existing federal departments and agencies.
GOVERNMENT AGENCIES PRINCIPALLY RESPONSIBLE FOR IMMIGRATION

A. IMMIGRATION ADMINISTRATION AND ENFORCEMENT

Like immigration law itself, principal authority for the administration and enforcement of U.S. immigration law has shifted from one organ of government to another based on prevailing views concerning the benefits and risks of the admission of foreigners. At its inception, immigration law enforcement was handled by state boards under the direction of the federal Department of Treasury. Because of the government’s overriding concerns about the economic impact on American workers of an influx of foreign labor, in 1903, the function was transferred to the newly-created Department of Labor.

In 1940, prior to the U.S. entry into World War II, President Roosevelt’s Reorganization Plan recognized immigration as a matter of national security. The INS was then transferred from the Department of Labor to the Department of Justice. Primary responsibility for the administration and enforcement of immigration laws remained with the Department of Justice until 2003.

With the enactment of the Homeland Security Act of 2002 (HSA), the DHS was created as part of the largest U.S. government reorganization in more than 50 years. The HSA merged and reorganized the functions of 22 agencies, which together employed 170,000 federal workers. On March 1, 2003, the INS ceased to exist, and the functions previously handled by that agency were transferred to the DHS. The transfer of responsibility included a deliberate separation of the sometimes-conflicting functions previously performed by the INS into the following agencies within DHS.

1. Directorate of Border and Transportation Security (BTS)

BTS is responsible for preventing the entry of terrorists into the U.S., securing its borders, carrying out the immigration enforcement functions formerly performed by the INS, establishing national immigration enforcement policies and priorities, and establishing and administering rules governing the granting of visas or other forms of permission to enter the U.S. While the HSA established the Bureau of Border Security under BTS to perform these functions, the Administration reconfigured the structure and divided mission responsibilities into two enforcement bureaus:
Chapter 2

a. United States Customs and Border Protection (CBP)

CBP is made up of about 30,000 employees, including former INS inspectors, as well as agents of U.S. Customs, Agricultural Quarantine Inspections, and Border Patrol. CBP focuses on the movement of people and goods across borders and ensures consistent inspection procedures and coordinated border enforcement.

b. United States Immigration and Customs Enforcement (ICE)

ICE is in charge of interior enforcement (as opposed to border enforcement) and is made up of about 14,000 employees from the former INS, U.S. Customs, and the Federal Protective Service. A significant function of ICE is the detention and removal of unauthorized foreign nationals.

2. United States Citizenship and Immigration Service (USCIS)

USCIS has jurisdiction over all immigration services previously performed and benefits previously conferred by the INS. These functions include the adjudication of visa and naturalization petitions, as well as asylum and refugee applications. In addition, USCIS is responsible for immigration field offices. USCIS is comprised of 18,000 federal employees and contractors working in approximately 250 locations around the world.

B. ADDITIONAL FEDERAL AGENCIES HAVING A SIGNIFICANT ROLE IN THE IMMIGRATION PROCESS

The Department of Labor, the Department of State, and the Department of Justice play a significant supporting role in the administration of U.S. immigration laws.

1. Department of Labor (DOL)

DOL is charged with the administration and enforcement of various federal labor laws and enforcing and administering certain provisions of the Immigration and Nationality Act regarding foreign workers seeking admission to the U.S. for employment. The DOL’s Division of Foreign Labor Certification ensures that the admission of foreign workers to the U.S. will not adversely affect the job opportunities, wages, and working conditions of U.S. workers.

2. Department of State (DOS)

With few exceptions, foreign nationals seeking entry to the U.S. must first apply for a visa at a U.S. Consulate outside the U.S. In general, the DOS has authority over consulates and embassies abroad through its Bureau of Consular Affairs. The HSA removed and revised some duties
formally held by the DOS and transferred ultimate responsibility for visa issuance to the DHS. The HSA charges the Secretary of State with the administration and enforcement of its provisions and all other immigration and nationality laws relating to diplomatic and consular officers of the U.S., except those relating to the granting or denial of visas.

The DOS and DHS work in concert to grant or deny applications for nonimmigrant and immigrant visas at U.S. consular posts. Under the terms of a Memorandum of Understanding between the DOS and DHS, the DOS continues to process visa applications and the Secretary of State retains the authority to direct a consular officer to deny a visa to a foreign national in the interest of national security. A consular officer’s decision to deny a visa is non-reviewable and final. However, the DHS is ultimately responsible for assuring that security concerns are sufficiently addressed. Therefore, consular officers will receive visa issuance training from the DHS and any and all visa approvals are subject to review by DHS employees assigned to consular posts by the Secretary of Homeland Security.

3. Department of Justice (DOJ)

Within the DOJ, the Executive Office of Immigration Review (EOIR) administers and interprets federal immigration laws and regulations through immigration court proceedings, appellate reviews, and administrative hearings in individual cases. EOIR has three main components: the Board of Immigration Appeals (BIA), which hears appeals of decisions made in individual cases by Immigration Judges, DHS District Directors, or other immigration officials; the Office of the Chief Immigration Judge, which oversees all Immigration Courts and their proceedings; and the Office of the Chief Administrative Hearing Officer, which adjudicates cases concerning employer sanctions, document fraud, and immigration-related employment discrimination.
Part Two

Foreign Visitors and Temporary Workers
NONIMMIGRANT VISAS GENERALLY

A. INTRODUCTION
The accelerating globalization of the world economy has fundamentally changed the U.S. economy and labor markets and the manner in which U.S. employers conduct business. Domestic businesses and multinational companies with operations in the U.S. routinely recruit and hire the best qualified candidates from around the world to remain competitive. In addition, U.S. employers often seek to hire foreign nationals who possess special skills to overcome shortages among American workers in certain occupations.

Knowledge of U.S. immigration laws, therefore, has become crucial to the success of many U.S. businesses. Businesses which employ foreign workers in the U.S. are required to employ only those individuals who are authorized to work in the U.S. and are subject to fines and penalties if they fail to do so. Foreign national employees are responsible for maintaining authorized status while in the U.S. or they will face removal and/or a bar from re-entering the U.S. in the future.

Immigration law creates two classes of foreign nationals, nonimmigrants and immigrants. Nonimmigrants are allowed a temporary stay in the U.S., while immigrants may remain indefinitely. U.S. immigration law has designated over twenty different types of nonimmigrant categories, ranging from ambassadors to tourists to students to temporary workers. Each nonimmigrant classification is assigned a letter between A and V, and has its own eligibility requirements and duration. To determine which visa category is most appropriate, a U.S. employer should assess the purpose of an individual’s visit to the U.S. or the reason for hiring the foreign national, i.e. the position the foreign national will fill and the job duties to be performed. The chapters which follow describe the immigration process for each business purpose.

B. NONIMMIGRANT VISA PROCESSING
A U.S. business may hire a foreign national living either in the U.S. or abroad. A newly-hired foreign national already in the U.S. may be eligible to remain here through a change of employer or visa status. Typically, however, a foreign national’s initial entry to the U.S. begins by applying for a visa at the U.S. Consulate abroad and admission at a designated port-of-entry.

A foreign national living outside the U.S. obtains a visa from the U.S. Consulate. A U.S. visa allows an individual to travel and apply for admission at a designated port-of-entry. The visa does not allow entry to the
Chaper 3

U.S. It is simply a travel document permitting the visa holder to present himself or herself before a CBP officer.

A consular officer will adjudicate the foreign national’s visa application to determine whether the individual qualifies for the requested nonimmigrant classification. The consular officer must determine whether a foreign national has “nonimmigrant intent,” the intent to return to a foreign residence abroad after his or her temporary stay in the U.S. Immigration law presumes that all persons seeking entry into the U.S. are immigrants who intend to reside in the U.S. permanently. A foreign national seeking nonimmigrant classification must overcome this presumption and prove to the consular officer that he or she intends to depart the U.S. at the end of the permitted stay by showing ties to his or her home country. Such rebuttal evidence could include proof of foreign residence, family and social ties, financial assets abroad, and a round trip ticket. If the consular officer favorably adjudicates the application, the consulate will issue a visa stamp to the foreign national.

C. ADMISSION AT THE PORT OF ENTRY

Once the foreign national has received a visa stamp, the next step in the nonimmigrant process occurs upon arrival at the U.S. port of entry. At the border, the CBP inspects and admits the foreign national in the status for which the visa was granted. The CBP officer will endorse a foreign national’s Arrival/Departure card, entitled Form I-94 (or Form I-94W for visa waiver applicants, discussed below). The Form I-94 is attached to the foreign national’s passport and records the date of admission, the status in which the foreign national is admitted, and the duration of his or her authorized stay in the U.S.

The date on the Form I-94 controls the duration of an individual’s authorized stay in the U.S. Even though the visa used to travel to the U.S. has its own validity dates, those dates have nothing to do with the length of a foreign national’s authorized stay in the U.S. Assume, for example, that a foreign national who traveled to this country under a visitor for business visa (B-1) that expires on September 1, 2005 is admitted to the U.S. on January 1, 2005. If the Form I-94 indicates admission in B-1 status
until March 1, 2005, the foreign national must leave by that date. By March 2, 2005, if the foreign national does nothing to extend his or her authorized stay, the foreign national has overstayed his or her visit in the U.S. It is irrelevant that the foreign national’s visa is valid until September 1, 2005.

D. NONIMMIGRANT VISITORS AND THE US-VISIT ENTRY/EXIT PROGRAM

All nonimmigrant visa holders at the U.S. port of entry are subject to the newly designed entry/exit system known as the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT). The system collects arrival and departure information for nonimmigrants traveling to the U.S. to enhance national security and eventually decrease wait times for admission to the U.S. Individuals subject to the program have their two index fingers scanned and a digital photograph taken to match and authenticate their travel documents. In July 2005, DHS announced that first-time visitors to the U.S. will be required to have all ten fingers scanned upon entry, with continued two finger scans for departures and subsequent
entries. Foreign nationals subject to US-VISIT who fail to comply with its procedures may be denied admission to the U.S. on a subsequent trip.

E. EXTENSION OR CHANGE OF STATUS AFTER ADMISSION

Once a foreign national has entered the U.S., he or she may wish to extend or change nonimmigrant status. A nonimmigrant who wishes to extend or change status may, with limited exceptions, apply to a USCIS Service Center. The application must be made while the foreign national is within his or her authorized period of stay. Approval of an extension or change of status request is reflected on the USCIS Form I-797A, which contains a new Form I-94 with updated information on the foreign national’s visa classification and/or period of admission.

F. APPLICATIONS FOR LAWFUL PERMANENT RESIDENCE BY NONIMMIGRANTS

All intending nonimmigrants have the burden of demonstrating a genuine intent to remain in the U.S. temporarily. Certain nonimmigrant categories require that the foreign national maintain a residence in a foreign country which he or she has no intention of abandoning. Individuals admitted to the U.S. in those categories generally may not seek lawful permanent residence while in the U.S.

An exception to the rule that nonimmigrants have the burden of demonstrating a genuine intent to remain temporarily in the U.S. applies to workers classified as “H,” “L” and “O” nonimmigrants. Foreign nationals in these nonimmigrant classifications may have dual intent,
meaning they may seek lawful permanent residence in the U.S. without jeopardizing their nonimmigrant status.

G. NONIMMIGRANT CLASSIFICATIONS FOR BUSINESSES PURPOSES

Nonimmigrant visa categories commonly encountered by U.S. businesses include classifications carved out for temporary business activities, foreign nationals with authorization to work in the U.S., trainees and visitors on exchange programs. The B-1 visa and the visa waiver program are most often used by foreign nationals traveling to the U.S. to conduct business. However, foreign nationals traveling to the U.S. for employment will most often enter in one of the following categories: E (treaty traders and investors); H-1B (specialty occupation workers); H-2B (temporary workers); L-1 (intra-company transferees); O (Aliens with Extraordinary Ability and Essential Support Personnel); and TN (Trade, NAFTA Professionals). Certain categories of nonimmigrants are authorized to work incident to their primary status in the U.S. Statues that permit entry to the U.S. for specific purposes, which might also allow employment, include students and foreign exchange visitors. A U.S. company may also sponsor a foreign national for the purpose of providing training. The chapters below provide guidance on the range of nonimmigrant classifications, including eligibility criteria, procedures, and special characteristics applicable to each.
B-1 CLASSIFICATION - VISITORS FOR BUSINESS

The most common types of nonimmigrant visas are those issued to temporary visitors for tourism or business. Business travelers often come to the U.S. to attend conferences or company meetings and usually are permitted to remain for the duration of their business purpose. However, to safeguard the jobs of American workers, B-1 visitors are not permitted to hold jobs in the U.S.

A. PROCEDURE FOR B-1 CLASSIFICATION

A B-1 visitor who seeks admission to the U.S. must undergo two separate reviews, one abroad and the other at the U.S. port of entry. He or she must first file an application for a visa with the U.S. Consulate abroad. A consular officer will issue a B-1 visa to a business visitor if the officer believes that the individual:

• Intends to leave the U.S. at the end of the temporary stay;
• Has permission to enter a foreign country at the end of the temporary stay;
• Has the financial means to enable him or her to carry out the purpose of the visit and depart from the U.S. without engaging in unlawful employment; and
• Has a legitimate temporary business purpose that does not involve productive employment.

The foreign national must present sufficient documentation to satisfy each inquiry. Most notably, the foreign national must show that he or she intends to depart the U.S. by demonstrating that he or she has an abandoned foreign residence to return to after the U.S. visit.

If a business visitor meets the above requirements, a consular officer may issue a B-1 visa for a length of time in accordance with reciprocity schedules set by agreement between the U.S. and foreign nations, up to a maximum of 10 years. The consular officer has sole discretion to decide the length of visa validity. In the event that the consular officer denies a foreign national’s visa application, there is no procedure for appeal. The foreign national may, however, refile if he or she so chooses and may present documentation to address the consular official’s concerns about the proposed business travel.

Once the B-1 visa has been issued by the U.S. Consulate abroad, the foreign national business visitor travels to the U.S., where he or she must submit to the second review. Upon arriving at a U.S. port of entry, the foreign visitor undergoes “inspection” by an officer of the CBP. The CBP officer reviews the visitor’s visa, and will question him or her regarding the purpose and proposed duration of the visit. If the CBP officer believes
that the visitor’s trip is consistent with the B-1 classification, the visitor will be admitted to the U.S. in B-1 status for a length of time necessary to carry out the purpose of the trip. Although a visa may be issued by a consular officer for up to 10 years, visa validity does not determine the period of admission set by the CBP officer at the port of entry. Typically, a foreign national may only be admitted for an initial period of up to one year. Extensions of stay may be granted in six month increments. Extension requests must include evidence supporting the need for the additional period of stay.

B. CHARACTERISTICS SPECIFIC TO THE B-1 CLASSIFICATION

B-1 visas are available to foreign nationals engaged in legitimate commercial or professional activities as opposed to employment or labor for hire (i.e. performing services for which a U.S. worker could be hired). B-1 visas are issued to individuals whose functions in the U.S. are incident to international trade and commerce. Therefore, the visitor’s foreign employer would normally direct and supervise the B-1 visitor’s employment, and a B-1 visitor generally receives remuneration from that foreign employer. Permissible activities include, for example, taking orders for goods manufactured abroad, negotiating contracts, consulting with associates, involvement in litigation, participation in conferences or research projects, as well as attending meetings of the Board of Directors of a U.S. corporation. Participating in scientific, educational, professional, religious, and business conventions are also considered acceptable B-1 activities.

C. DEPENDENTS

The spouse and children (under age 21) of a B-1 nonimmigrant may accompany their family member to the U.S. by obtaining B-2 status. B-2 status may be granted for the duration of the principal B-1’s stay. Dependents in B-2 status may not accept employment in the U.S.

D. B-2 CLASSIFICATION - VISITORS FOR PLEASURE

The B-2 classification can be used by foreign nationals who enter the U.S. for pleasure or for medical treatment. The term "pleasure" has been defined by the DOS as legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature. Participation in conferences with fraternal, social, or service organizations would also be considered proper B-2 activities. Visitors for pleasure may not engage in employment.

A consular officer will issue a B-2 visa to a visitor for pleasure if the
officer believes that the individual:
- Intends to leave the U.S. at the end of the temporary stay;
- Has permission to enter a foreign country at the end of the temporary stay;
- Has the financial means to carry out the purpose of the visit and depart from the U.S. without engaging in unlawful employment; and
- Has shown that the purpose of the trip is for pleasure.

If a visitor for pleasure meets the above requirements, a consular officer may issue a B-2 visa for an initial period of up to 6 months. The consular officer has sole discretion to decide the length of visa validity. In the event that the consular officer denies a foreign national’s visa application, there is no procedure for appeal. The foreign national may, however, refile if he or she so chooses and may present documentation to address the consular official’s concerns about the proposed travel.

E. VISA WAIVER PROGRAM

Although most business visitors apply for a B-1 visa at a U.S. Consulate abroad, citizens of certain designated countries are allowed to travel to the U.S. without a visa for a period of 90 days or less, pursuant to the visa waiver program (VWP). This eliminates the need to appear before the U.S. Consulate abroad and apply for a visa, simplifying the process of travel to the U.S. Business visitors admitted to the U.S. under the VWP are authorized to conduct the same commercial activities as B-1 foreign nationals. The designated countries are selected by the DOS because they historically have low visa denial rates, reciprocally admit U.S. citizens without visas, and do not jeopardize the interests of U.S. law enforcement or national security. For a country to be considered for the program, it must be sufficiently stable to ensure that conditions, such as overstay rates in the U.S., are not likely to alter significantly. Currently, the following 27 countries are members of the visa waiver program: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

Chapter 4

Kingdom. An estimated 13 million VWP visitors enter the U.S. annually.

The main advantage of the VWP is that a visa is not required. VWP applicants apply for admission directly at the port of entry. VWP visitors, however, are not entitled to an extension or change of status. VWP applicants must have a round trip ticket indicating their intention to depart within 90 days. As of September 30, 2004, US-VISIT entry and exit procedures were expanded to include visitors traveling to the U.S. under the VWP.

Travelers applying for admission under the VWP must now possess a machine-readable passport. Transportation carriers will be fined $3,300 per violation for transporting any VWP traveler to the U.S. who does not possess a machine-readable passport. In addition, as of October 26, 2005, all passports from VWP countries must contain a digital picture of the passport holder on the data page. If a traveler from a VWP country does not have a digital photograph, he/she must obtain a visa before entering the U.S. As of October 26, 2006, DHS will require that all VWP countries issue E-Passports. E-Passports contain an integrated computer chip which stores biographic information, a digital photograph and personal identifiers.
E CLASSIFICATION - TREATY TRADERS AND TREATY INVESTORS

The E visa category is only available to nationals of a country where a Treaty of Friendship, Commerce and Navigation (FCN), or a Bilateral Investment Treaty (BIT), exists between the country and the U.S. There are two types of E visas available: E-1 for Treaty Traders and E-2 for Treaty Investors.

An individual visa applicant must be a national of a treaty country, and the individual’s nationality must be the same as the majority owner(s) of the company sponsoring the visitor. Majority ownership is defined as “at least fifty percent of the shares” of the company. The individual may be the principal treaty trader or treaty investor, or an employee of the U.S. sponsoring company.

There are two levels of personnel who may qualify for treaty visa status. The first level is for executive or managerial employees. The second level is reserved for personnel with “specialized or essential skills and/or knowledge” of the company’s products, marketing strategies, international system of operations, or other knowledge not readily available in the U.S. job market.

The individual must intend to depart the U.S. upon the completion of the E visa activities, but does not need to show an unabandoned residence in the home country. An E visa holder may extend status in the U.S., without limitation, and may be the beneficiary of an immigrant visa petition.

The E visa category is based on particular treaties of commerce and navigation or bilateral trade agreements between the U.S. and designated foreign countries that are intended to facilitate commercial interactions and investment. This classification is available only for citizens of those particular countries that have entered into a requisite treaty with the U.S. to qualify for E-1 or E-2 treaty trader or investor status.

A. PROCEDURE FOR E CLASSIFICATION

E visa applicants must apply for a visa at the U.S. Consulate with jurisdiction over their place of residence. E visas may be issued for a maximum of five year increments. Once the E visa has been issued, the foreign national must apply for admission at a U.S. port of entry and may have his or her I-94 arrival/departure card stamped for an admission period of two years. E nonimmigrants may reside in the U.S. as long as they remain an investor, trader or employee of the sponsoring company.
B. CHARACTERISTICS SPECIFIC TO THE E CLASSIFICATION

1. Intention to Depart the United States

A foreign national in E status must demonstrate an intention to depart the U.S. at the completion of his or her E activities. However, unlike the B classification, the foreign national does not have to establish an intention to remain in the U.S. for a specific amount of time or demonstrate an unabandoned foreign residence. Intent can be demonstrated through a written statement.

2. Eligibility Requirements

Both categories of E visas are nationality-specific. The nationality of a business is decided based on the nationality of its owner(s). If a company is owned by more than one individual, the sponsoring employer’s nationality is determined by the nationality of the majority (50 percent or more) owners of the company. An E employee must possess the same nationality as the employer. Individuals may be granted E status if they are the trader or investor, or sponsored as an employee who is an executive, manager or individual with essential skills.

3. E-1 Treaty Trader

In addition to the general eligibility requirements for the intended employee, a sponsoring employer must also meet certain criteria to qualify as an E-1 Treaty Trader organization. The company must be engaged in “substantial trade” principally between the treaty country and the U.S. Substantial trade means the systematic exchange, purchase or sale of goods and/or services. Factors that are analyzed to determine the substantiality of the trade include trade volume, value, continuity, and the size of transactions. Trade may be binding contracts that call for a future exchange. Services include international banking, insurance, transportation, communications, data processing and advertising. The exchange should be traceable and identifiable and title to the trade item must pass from one treaty party to the other. Regulations require that over 50 percent of the total volume of international trade conducted by the sponsoring employer be between the U.S. and the treaty country.

4. E-2 Treaty Investors

In addition to the general eligibility requirements for the intended employee, a sponsoring employer must also meet certain criteria to qualify as an E-2 Treaty Investor organization. Specifically, the investment in the U.S. sponsoring company must be “substantial,” and the source of investment must have been lawfully acquired and traceable.
Substantial investment is defined as an “at-risk” committed capital investment made to generate a profit. At-risk capital is that which is susceptible to loss, and may be an investor’s unsecured business capital, or capital secured by the business’s assets. Further, non-cash assets such as intellectual property, inventory, and real estate may also be considered as invested capital for E-2 purposes. The investment must be a substantial portion of the total value of the business or start-up costs of the business in the U.S. There is no minimum dollar investment requirement for E-2 eligibility, and the test for whether the actual investment made is “substantial” will be determined by the type of business conducted by the U.S. entity. The investment must either have already been made, or be actively in progress at the time of the visa application. That is, a qualifying E-2 entity must show the actual commitment of the investment funds.

Finally, the investment made in the U.S. sponsoring company cannot be the main source of income for an individual treaty investor. This means that income generated by the U.S. company must surpass the level required for living expenses of the investor and his or her family.

5. E Dependents

The spouse and children (under age 21) of an E nonimmigrant may accompany their family member to the U.S. by obtaining derivative E status. Derivative status is granted for the duration of the principal E’s stay. Dependent spouses may apply for permission to accept employment. They must apply for an employment authorization document at a USCIS Regional Service Center. The dependent spouse should include proof of the marital relationship, authorized admission to the U.S. and his or her spouse’s status. Employment Authorization Documents (EADs) may be issued for up to two years, but not longer than the period of the principal E’s status.
**H-1B CLASSIFICATION - SPECIALTY OCCUPATION WORKERS**

The H-1B specialty occupation program is one of the most common nonimmigrant classifications used by U.S. employers to employ foreign professionals. The H-1B classification is available for positions for which a U.S. bachelor’s degree in a related field is the minimum educational requirement, and the foreign national has that degree or its equivalent. The program requires that an employer make attestations to the DOL regarding the employment of H-1B nonimmigrants through submission of a Labor Condition Application (LCA). The employer may not file the H-1B petition for the foreign national until an LCA has been certified for the position. Only a limited number of H-1B visas are issued each year.

**A. PROCEDURE FOR H-1B CLASSIFICATION**

Two separate U.S. government agencies have responsibility for the H-1B program: the DOL and the USCIS. First, the DOL evaluates and certifies the employer’s LCA, in which the employer makes four attestations regarding wages and working conditions. After obtaining a certified LCA, the employer may file the H-1B petition with the USCIS Regional Service Center with jurisdiction over the work location. The USCIS adjudicates an employer’s H-1B petition on behalf of the foreign national, which describes the job to be performed and the foreign national’s qualifications.

Under current law, a foreign national may remain in the U.S. for a total of six years in H1-B status. Time in L status (if applicable) is counted toward this six year limit. Initial H-1B petitions are normally granted for three years with one three year extension. After the sixth year, a foreign national must leave and remain outside the U.S. for one year before another H-1B petition can be approved. Certain foreign specialty occupation workers may extend their status beyond the six-year limit in one year increments if an application for permanent labor certification or an immigrant visa petition has been filed on their behalf and at least 365 days have passed since the date of filing. Furthermore, certain foreign nationals working on Department of Defense projects may hold H-1B status for 10 years.

**B. CHARACTERISTICS SPECIFIC TO THE H-1B CLASSIFICATION**

1. **Specialty Occupation**

A specialty occupation is a job that requires the theoretical and practical application of a body of highly specialized knowledge, evidenced by attainment of a bachelor’s degree or higher in the particular specialty, as a minimum requirement for entry into the occupation in the U.S. The for-
Chapter 6

Foreign national must meet the requirements for performing in that specialty occupation.

To establish that the job offered to the foreign national qualifies as a specialty occupation, the employer must show the following:

- A bachelor’s or higher degree (or its equivalent) in a field related to the duties is the minimum educational requirement for the position;
- The degree required is common to the industry, or the job is so unique that it can only be executed by a person with the requisite degree;
- The employer normally requires a degree for this position; or
- The nature of the specific duties is so specialized and complex that the knowledge is usually associated with the attainment of a bachelor’s or higher degree.

The foreign national, in turn, must demonstrate that he or she has the required education, or its equivalent, for the job offered. USCIS regulations permit a foreign national to qualify for the specialty occupation based on a foreign degree and/or experience that is equivalent to the required bachelor’s degree. The USCIS will accept a foreign university degree if it has been evaluated as equal to a U.S. degree by an independent credentials evaluator.

For a foreign national to qualify for a specialty occupation based on experience that is equivalent to a bachelor’s degree, the foreign national must show that he or she gained experience through “progressively responsible positions relating to the specialty.” Specialized training and/or work experience may wholly substitute for a bachelor’s degree. Equivalency may be determined by the USCIS through application of the “three-for-one” rule in which three years of specialized training and/or work experience may be substituted for each year of college-level education that the foreign national lacks.

2. Numerical Limit on H-1B Nonimmigrants

The issuance of new H-1B visas is capped at an annual limit of 65,000, of which 6,800 visas are reserved for citizens of Singapore and Chile. Once the cap has been reached, applications for the following fiscal year (beginning October 1) may not be submitted until April 1, which is 180 days prior to the beginning of the next fiscal year.

Certain H-1B petitions are not subject to the cap, and can therefore be approved in addition to the 65,000 already allocated for the classification. Exemptions from the cap include H-1B petitions for amendments, extensions, and transfers of status. The cap also does not apply to petitions filed by government research organizations, institutions of higher education and nonprofit research organizations. In addition, doctors employed pursuant
to “State 30” or beneficiaries of federal government agency waivers to work in underserved communities are exempt from the numerical cap. An additional 20,000 H-1B visas are also available for graduates of U.S. master’s or higher degree programs.

3. Labor Condition Attestation Application (LCA)

The LCA is a prerequisite to the filing of any H-1B petition with USCIS. The LCA includes basic information regarding employment, such as title and salary for the position and the work location. The LCA also contains four attestations that the employer must make:

- It will pay all H-1B foreign nationals the higher of either the actual wage paid to others with similar experience and qualifications for the specific job or the prevailing wage for the occupational classification in the geographical area;
- It will provide working conditions for the H-1B employee that will not adversely affect the working conditions of workers similarly employed in the area;
- There is no strike or labor dispute in the occupation at the place of employment; and
- It has provided a notice of the filing to the bargaining representative (if the position is covered by union representation), or if there is no bargaining representative, it has posted a notice of filing in at least two conspicuous locations at the place of employment for a period of 10 business days.

The employer must make available at its offices for public examination a copy of the LCA and necessary supporting documentation. This public access folder must contain:

- A copy of the LCA filed with DOL. (Once the LCA has been certified by DOL, a copy of the certified LCA should also be placed in the folder.)
- The documents showing the source of the employer’s prevailing wage determination.
- A statement of the wage rate to be paid to the H-1B worker.
- Documentation summarizing the system used to set the actual wage for the occupation.
- Copies of the posting notices (or notice given to the bargaining representative).
- Summary of the benefits offered to the H-1B employee showing that they are the same as those offered to U.S. employees.

On or before the H-1B employee’s first day of work, a copy of the certified LCA should be provided to the employee. In addition, certain documentation may be added to the public access file after LCA certification.
For example, where an employer undergoes a change in corporate structure and the new organization chooses to assume LCA liability for the H-1B employee, a statement regarding the assumption of liability must be added to the public access file. In addition, statements regarding changes in the H-1B employee’s wage rate should be added to the file.

4. Violations and Penalties

Violations of LCA regulations may result in assessment of back pay wages, civil monetary penalties and debarment from filing any immigrant or nonimmigrant petitions for at least one year.

5. Employer Obligation Upon Dismissal of Employee During H-1B Period

If the employment of an H-1B employee is terminated before the end of the H-1B authorized stay, the employer is liable for the reasonable cost of return transportation to the foreign national’s last place of foreign residence. Limited exceptions to this rule are the foreign national’s voluntary termination of employment or dismissal for cause. If an H-1B worker’s employment is terminated before the end of the H-1B petition approval period, the employer should notify the USCIS of the termination and withdraw the H-1B petition.

6. Change of Employer - H1-B Portability

The American Competitiveness in the Twenty-First Century Act (AC21) facilitated the process of changing employers for H-1B foreign nationals. Pursuant to AC21, an H-1B professional may begin working for a new employer once that employer has filed an H-1B petition requesting extension of valid H-1B status with USCIS. In the past, an H-1B nonimmigrant was required to wait for the petition to be approved by USCIS before he or she could begin working for the new employer. H-1B portability is only available to foreign workers who were lawfully admitted to the U.S. and who have not engaged in unauthorized employment.

C. H-1B DEPENDENTS

The spouse and children (under age 21) of an H-1B nonimmigrant may accompany their family member to the U.S. by obtaining H-4 status. H-4 status is granted for the duration of the principal H-1B’s stay. Dependents in H-4 status may not accept employment in the U.S.

D. RECENT H-1B LEGISLATION

The Consolidated Appropriations Act of 2005 contains a number of provisions affecting H-1B nonimmigrants. Relevant provisions of the bill
include: reinstatement of the H-1B dependent employer attestations (which sunset on September 30, 2003); imposition of a modified education and training fee for H-1B filings (which also sunset on September 30, 2003); changes in prevailing wage determinations for LCAs and permanent labor certifications; and imposition of a new anti-fraud fee. The bill also provides for an exemption from the annual H-1B cap for up to 20,000 graduates of U.S. university master’s or higher degree programs.

1. Reinstatement of the H-1B Dependent Employer Attestations

H-1B dependent employers are defined as those employers whose workforces, in terms of full-time equivalent employees, are composed of at least 15% H-1B professionals. Under the Act, dependent employer attestations have been reinstituted and made permanent. These attestations require H-1B-dependent employers to affirm that they have attempted to recruit U.S. workers and have not displaced U.S. workers during defined periods prior and subsequent to the filing of the LCA.

2. Education and Training Fee for H-1B Filings

In 1998, Congress imposed an education and training fee of $500, which in 2000 was raised to $1,000. The education and training fee has been reintroduced, made permanent, and increased to $1,500 for most H-1B employers. Employers with fewer than 25 full-time equivalent employees pay only $750. The total number of employees must be determined by including all of an employer’s affiliates and subsidiaries. The education and training fee is applicable to an employer’s initial petition and first extension on behalf of a foreign worker. Exempted from the fee requirement are certain petitioners, including government research organizations, institutions of higher education and nonprofit research institutes.

3. Prevailing Wage Determinations

The Act eliminates provisions permitting a five percent variance for prevailing wage determinations for LCAs and permanent labor certifications. Pursuant to this provision, all employers filing new H-1B petitions (including requests for extensions) and labor certification applications, must offer the beneficiary 100% of the prevailing wage. Re-evaluation of wages currently paid to H-1B professionals working pursuant to already-approved petitions is not required.

The Act also requires that the DOL provide four tiers, rather than the former two-tiered approach used by Occupation Employment Statistics, for prevailing wage surveys, and where the DOL continues to use a two-tier survey, it must provide a mathematical formula to employers so they may derive the additional tiers. The four tiers of wages must be commensurate
with experience, education and level of supervision of the H-1B beneficiary.

4. **Anti-Fraud Fee**

The Act also introduced a $500 anti-fraud fee. The fee must be paid by the employer at the time of the filing of all initial H-1B petitions. The fee applies only to the principal foreign national, not to his or her derivative family members and is not required upon extension of the H-1B classification. However, the fee is required where a new petition is filed due to a change of employer. The revenue from the fee will be divided equally among the DOL, the DHS and the DOS for use in anti-fraud activities, including the hiring of additional personnel.

In addition, the Act allows the DOL to begin LCA investigations without receiving a formal complaint, based only on a “reasonable cause to believe” an employer has violated LCA regulations.

5. **H-1B1 Category For Chileans and Singaporeans**

A limited number of visas, designated as H-1B1’s, are available to citizens of Singapore and Chile. The H-1B1 visa is in addition to all of the other visa categories for which Singaporeans and Chileans are eligible.

Like the H-1B visa, the H-1B1 visaholder must be coming to work in a specialty occupation and must have attained a Bachelor’s degree or higher in the specialty field. Like the H-1B, the U.S. employer must provide a labor condition attestation certified by the DOL.

Singaporeans and Chileans who do not possess a Bachelor’s degree, but are offered jobs as Disaster Relief Claims Adjusters qualify for H-1B1 status, as do certain management consultants. In addition, Chileans also qualify without attaining a Bachelor’s degree if they are offered jobs as Agricultural Managers and Physical Therapists.

To qualify, the job offered must be temporary, not to exceed 18 months. H-1B1 visas are valid for up to 12 months, and are renewable indefinitely.

6. **New Visa Category for Australians**


The E-3 visa allows Australians to enter the U.S. to perform a specialty occupation. Thus, the E-3 visa is a hybrid of an H-1B and an E visa. Like the H-1B visa, the E-3 visa holder must be coming to work in a specialty occupation and must have attained a Bachelor’s (or higher) degree in the
specialty field. In addition, the employer is required to file a Labor Condition Application with the DOL. Like the E visa, the E-3 can be renewed indefinitely, with admission periods of up to two years. E-3 visa holders can work for any U.S. employer, unlike the E classification where an employee must work for a treaty employer that is majority-owned by the citizens of his or her home country. The number of E-3 visas is limited each year.
H-2B CLASSIFICATION - SKILLED AND UNSKILLED WORKERS (NONAGRICULTURAL WORKERS)

H-2B visas are widely used by employers who seek to fill temporary seasonal, peak load or intermittent employment needs in industries like hospitality, construction, lodging, and professional sports. A key characteristic of the H-2B classification is that it requires the employer to file a labor certification application which must be distinguished from the Labor Condition Application (LCA). The LCA is used with the H-1B and E-3 petitions (among others) and does not require the employer to go through the time-consuming recruitment process required by a Labor Certification Application. The labor certification process is discussed more fully in Chapter 15 of this Guide.

A. PROCEDURE FOR H-2B CLASSIFICATION

Filing an H-2B application is a two step process. First, the employer must file a Labor Certification Application with the DOL, 60 to 120 days prior to the commencement of employment. Processing of the application is expedited so that employers can meet their staffing needs. If the DOL approves the Labor Certification Application, the employer must then file a nonimmigrant petition with the USCIS. The DOL decision to approve the labor certification is only advisory to the USCIS. The petition must include documentation evidencing the foreign national’s qualifications for the job as specified in the application for labor certification. Furthermore, documentation should include an employment contract and a statement describing the employer’s need for temporary workers in the U.S.

The length of stay permitted for H-2B foreign nationals is limited by the duration of the employer’s temporary need for additional workers, as specified in the labor certification. The initial period of stay in H-2B status may be granted for up to one year. Extensions are issued by the USCIS in one year increments for an additional two years. An employer must file for recertification for each extension of stay requested on behalf of the foreign national.

B. CHARACTERISTICS SPECIFIC TO THE H-2B CLASSIFICATION

1. Labor certification

The Labor Certification Application is filed by the employer with the DOL. The DOL is charged with certifying the application. In order for the DOL to certify the Labor Certification Application the employer must show and must attest on the labor certification that there are no qualified,
able, willing U.S. workers available for the job; that the employment of the foreign national will not affect the wage rate and working conditions of similarly situated employed US workers and that the employers need for the job is a one time, seasonal, peak load or intermittent, that is the job must be for less than one year.

Once the employer has filed the Labor Certification Application, the DOL will instruct the employer on recruitment requirements, including advertising the job opportunity in a newspaper of general circulation. Responses from interested prospective employers are sent to the DOL which then refers qualified candidates to the employer for interviews. The employer must prepare a recruitment report that includes the name and addresses of each applicant and the lawful reasons for not hiring the potential applicant.

The DOL will also determine if the employment of foreign nationals will adversely affect the wage rate and working conditions of similarly employed U.S. worker and if the nature of the job offered is temporary.

2. The Standard for Determining the Temporary Nature of the Job Offer
A temporary job opportunity is limited to one of the following types of labor:

- A one time occurrence. A one time occurrence is temporary employment for which the employer has not employed workers in the past and will not need to employ workers to perform the services in the future. A one time occurrence may also arise when an employer must temporarily fill a position that is otherwise permanent, but a temporary event of short duration has created the need for an H-2B worker.

- A seasonal need. A seasonal need for a temporary worker is traditionally tied to a season of the year and is of a recurring nature. Jobs available in the hospitality industry, such as resort workers, are often designated as “seasonal employment.”

- A peak load need. An employer with a peak load need must establish that it normally employs permanent workers to perform services and that it temporarily needs to supplement its staff with H-2B workers due to a short-term demand.

- An intermittent need. An intermittent need arises when an employer occasionally or intermittently requires temporary workers for services or labor for short periods of time. When hiring an H-2B worker, the employer must demonstrate that the request for labor is based on one of the above listed categories of temporary employment.

After the DOL makes its decision regarding the labor certification, the employer will file the approved labor certification with its petition to the USCIS.
3. The Numerical Cap

H-2B visas are subject to an annual numerical limit. The cap was reached for the first time during fiscal year 2004. Recent legislation has increased the numerical limit and exempts from the cap foreign nationals who have worked in the U.S. under the H-2B program during 2002 through 2004 and are returning to the U.S. to take up temporary employment during 2005 or 2006. In addition, recent legislation reserves half of the available visas for the first six months of the fiscal year (October - March), and the balance for the rest of the year.

C. H-2B Dependents

The spouse and children (under age 21) of an H-2B nonimmigrant may accompany their family member to the U.S. by obtaining H-4 status. H-4 status is granted for the duration of the principal H-2B’s stay. Dependents in H-4 status may not accept employment in the U.S.
L-1 CLASSIFICATION - INTRA-COMPANY TRANSFEREES

The L classification is available to foreign nationals seeking transfer from a firm overseas to its operations in the U.S. A key element to this category is that the U.S.-based company have an affiliate, parent, branch or subsidiary abroad. Foreign nationals in the L classification are commonly referred to as intra-company transferees. The L-1 visa classification may be less burdensome for an employer because it is not subject to a cap and the employer does not have to file an LCA with the DOL as in the H-1B category. In addition, the L-1 category does not require that the individual possess a degree. This is advantageous to a company which wants to transfer a key foreign national who has not graduated from college.

A. PROCEDURE FOR L-1 CLASSIFICATION

The first step in obtaining L-1 classification is for a U.S. employer to file a petition with the USCIS. The foreign national uses the approved petition to apply for an L-1 visa at a U.S. Consulate abroad. L-1 status may be granted for an initial period of three years with two possible two-year extensions for managers and executives (L-1A employees) and one possible two-year extension for specialized knowledge workers (L-1B employees).

B. CHARACTERISTICS SPECIFIC TO THE L-1 CLASSIFICATION

1. Qualifying Corporate Relationship

Before transferring to the U.S., the foreign national must have been continuously employed abroad for one out of the past three years by an affiliate, branch, parent or subsidiary of the petitioning U.S. company. Furthermore, the U.S. and foreign entities must continue to do business for the duration of the L-1 nonimmigrant’s stay in L-1 status.

2. One-Year Employment Requirement

Prior to the U.S. transfer, an L-1 beneficiary must have worked abroad for a qualifying entity for one continuous year within the preceding three years in a “managerial,” “executive” or “specialized knowledge” position. The position in the U.S. must also be in a “managerial,” “executive” or “specialized knowledge” capacity.

The term “executive capacity” is defined as an assignment with the organization in which the employee primarily directs the management of the organization or a major component or function of the organization; establishes goals or policies of the organization, component or function;
exercises wide latitude in discretionary decision making; and receives only
general supervision or direction from higher-level executives, directors or
stockholders.

The term “managerial capacity” means an assignment with the organi-
ization in which the employee primarily manages the organization, or a
department, subdivision, function or component; supervises and controls
the work of other supervisory, professional or managerial employees or
manages an essential function within the organization or subdivision of the
organization; has the authority to hire and fire, or recommend personnel
actions, and functions at a senior level within the organizational hierarchy;
and exercises discretion over day-to-day operations of the activity or func-
tion for which the employee has authority.

The term “specialized knowledge” is defined as either noteworthy or
uncommon knowledge possessed of the company’s product, service,
research and its application in international markets, or advanced knowl-
edge of a company’s internal processes and procedures. The beneficiary
should possess knowledge that is different from that common to a particu-
lar industry.

3. L-1 Blanket Program

The regulations allow an employer to file a preliminary petition,
requesting that the DHS approve a company’s corporate relationships (i.e.
subsidiaries, affiliates) as qualifying for L-1 treatment. Once its corporate
relationships are approved by DHS, a company is granted an “L-1 blan-
ket.” A company that is granted an L-1 blanket no longer needs to file
individual petitions with the USCIS; rather, its employees can apply direct-
ly to the U.S. Consulate abroad for an L-1 visa. A company is eligible for
an L-1 blanket if it can show that it has been doing business in the U.S. for
at least one year; it has three or more domestic and foreign branches, sub-
sidiaries or affiliates; qualifying relationships exist with all related entities;
and the petitioner meets one of the following tests: (i) obtained approval
of at least ten L-1 petitions during the previous twelve months; (ii) has
U.S. subsidiaries or affiliates with combined annual sales of at least $25
million; or (iii) has a U.S. workforce of at least 1,000.

C. L-1 DEPENDENTS

The spouse and children (under age 21) of an L-1 nonimmigrant may
accompany their family member to the U.S. by obtaining L-2 status. L-2
status is granted for the duration of the principal L-1’s stay.

Spouses in L-2 status may apply for permission to accept employment.
They must apply for an employment authorization document at a USCIS
Regional Service Center. The dependent spouse should include proof of
the marital relationship, authorized admission to the U.S. and his or her spouse’s status. Employment Authorization Documents (EADs) may be issued for up to two years, but not longer than the period of the principal L’s status.

D. RECENT L-1 LEGISLATION

In recent years, layoffs of American workers in the technology field and other perceived concerns in connection with the L-1 category have been widely reported. As a result, Congress passed the Consolidated Appropriations Act of 2005, limiting and restructuring the business activities of certain L-1 workers, effective June 28, 2005.

1. Changes Affecting L-1B Specialized Knowledge Category

The Act prohibits an employer from placing L-1B specialized knowledge employees at third party locations in certain instances. Specifically, this provision prohibits an L-1B employee from being primarily stationed at the worksite of a third party where:

- The L-1B employee will be supervised and controlled by a third party who is not affiliated with the employer for whom the petition was granted; and/or
- The L-1B employee will be placed with an unaffiliated employer to provide labor that does not involve the specialized knowledge of a product or service specific to the petitioning employer.

The Act also strikes an INA section permitting the qualifying employment abroad requirement to be satisfied by six months of employment for L blanket applicants, and restores the original one year requirement. As the one year experience requirement is only applicable to new blanket applicants, it will not affect those already admitted in L-1 status pursuant to the current six month requirement.

2. Anti-Fraud Fee

The Act also introduced a new $500 anti-fraud fee. The fee must be paid by the employer at the time of the filing of all initial L-1 visa petitions, including applications pursuant to L-1 blanket petitions at U.S. Consulates abroad. The fee applies only to the principal foreign national, not to his or her dependent family members, and is not required upon extension of the L-1 visa classification. However, the fee is required where a new petition is filed due to a change of employer. The revenue from the fee will be divided equally among the DOL, the DHS, and the DOS for use in anti-fraud activities, including the hiring of additional personnel.
O CLASSIFICATION - INDIVIDUALS OF EXTRAORDINARY ABILITY

The O-1 category is for nonimmigrants of extraordinary ability in the sciences, arts, education, business, or athletics. The O category is often used by artists, athletes, entertainers, world-renowned chefs, and extraordinary business people.

A. PROCEDURE FOR O CLASSIFICATION

An employer is generally required to file the O-1 petition with the USCIS on behalf of the nonimmigrant. However, in the case of artists, athletes and entertainers, the foreign national’s agent may be the petitioner for this classification. If an O-1 nonimmigrant’s services are to be rendered in more than one location, the employer or agent must include an itinerary in the petition with the dates and locations of work.

In approving an O-1 petition, an Immigration Officer should grant the petition with a length of status that coincides with the duration of the “event;” i.e. the proposed activities to be performed in the U.S. An initial period of stay may be granted for up to three years. Subsequent extensions in one year increments may be available.

If an O-1 nonimmigrant employee is terminated prior to the end of his or her authorized stay, the employer or agent will be held jointly and severally liable for the foreign national’s return transportation to his or her last residence abroad.

B. CHARACTERISTICS SPECIFIC TO THE O CLASSIFICATION

1. Proving Extraordinary Ability in Science, Education, Business, or Athletics

To obtain an O-1 visa to work in the sciences, education, business or athletics, a beneficiary must demonstrate that he or she possesses “a level of expertise indicating that the person is one of the small percentage who have risen to the top of the field of endeavor.” Evidence of the individual’s qualifications may include receipt of a major internationally recognized award, or documentation satisfying at least three of the following categories:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- Membership in associations in the field which require outstanding achievements of their members;
- Published material about the foreign national;
- Participation as a judge of the work of others in the same or allied fields;
Chapter 9

- Evidence of original contributions of significance in the field;
- Authorship of scholarly articles;
- Evidence of employment in a critical or essential capacity for organizations with a distinguished reputation; or
- Evidence that the foreign national commands a high salary.

These criteria are closely related to those applicable to employment-based first preference petitions for individuals of “extraordinary ability.”

2. Proving Extraordinary Ability in the Arts

Extraordinary ability in the arts implies that the foreign national has attained “distinction.” Distinction is defined as “a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered.” Distinction has also been defined as prominence in the field of endeavor and may be evidenced by nomination for, or receipt of, an important national or international prize or by producing at least three of the following:

- Evidence that the foreign national has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, press releases, publications contracts, or endorsements;
- Evidence that the foreign national has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
- Evidence that the foreign national has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
- Evidence that the foreign national has a record or major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion pictures or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;
- Evidence that the foreign national has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field, in which the foreign national is engaged. Such testimonials must be in a form which clearly indicates the author’s authority, expertise, and knowledge of the foreign national’s achievements; or
- Evidence that the foreign national has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or
other reliable evidence.
This category is interpreted broadly, encompassing occupations beyond just performers, such as choreographers, set designers, essential technical personnel, or music coaches.

3. Essential Support Personnel
In many cases, individuals in O-1 status require the assistance of specially trained support staff. O-2 foreign nationals accompany O-1 principals and must be petitioned for in conjunction with the services of the O-1 foreign national. O-2 foreign nationals must enter for the purpose of assisting the O-1’s performance and have critical skills and experience with the O-1 foreign national that cannot be performed by a U.S. worker. Individuals petitioning for O-2 status must have a foreign residence that they do not intend to abandon.

4. Consultation Requirement
Prior to adjudication of either an O-1 or O-2 petition, the USCIS requires a consultation with a U.S. organization, such as a labor union representing workers in the occupation or a peer group with expertise in the field. If there is no such organization the requirement may be waived. A consultation letter may state the opinion of the organization regarding the beneficiary’s qualifications or it may simply reflect no objection. Objection by the organization to the foreign national’s admission is not binding on the USCIS. Consultations for O-2 beneficiaries should outline the essential role to be played by the support personnel, as well as their relationship to the O-1 visa holder. They should also state whether there are available U.S. workers.

C. O DEPENDENTS
The spouse and children (under age 21) of an O nonimmigrant may accompany their family member to the U.S. by obtaining O-3 status. O-3 status is granted for the duration of the principal O’s stay. Dependents in O-3 status may not accept employment in the U.S.
TN CLASSIFICATION - NAFTA PROFESSIONAL WORKERS

In December 1993, the U.S., Canada and Mexico jointly enacted the North American Free-Trade Agreement (NAFTA). NAFTA established a singular, reciprocal trading relationship among the three nations and allowed nonimmigrant classes of admission exclusively for the following business people: temporary business visitors, treaty traders, investors, temporary workers, intra-company transferees and professionals. Entries under NAFTA began in February 1994. This section focuses on professional workers, the TN (Trade NAFTA) classification.

A. PROCEDURE FOR TN CLASSIFICATION

The TN classification is favored by U.S. companies for its expediency. A TN applicant does not need prior USCIS petition approval. TN applicants may present documentation showing eligibility directly at the U.S. Consulate for Mexican citizens, or at the port of entry or pre-flight inspection for Canadian citizens. Upon entry, a TN applicant must demonstrate his or her nonimmigrant intent to the CBP officer. The individual must demonstrate that he or she will remain in the U.S. for a finite period of time to engage in one of the professions listed under NAFTA. In order for a NAFTA professional to enter the U.S., he or she must have a job offer to perform temporary services for a U.S. employer. The foreign national must also prove that he or she has the relevant educational training or work experience to meet the job requirements.

B. CHARACTERISTICS SPECIFIC TO THE TN CLASSIFICATION

TN status is initially granted for up to one year, and may be extended in one year increments. TN status of both Canadian and Mexican nationals may be extended by having their U.S. employer file a petition with the USCIS. Canadian citizens may apply for an extension of TN status at a port of entry. Mexican citizens may apply for an extension of TN status at a port of entry after receiving a new TN visa at a U.S. Consulate.

1. Permissible TN Activities in the U.S.

TN status is available for professions specified in the NAFTA treaty. The foreign national must be seeking entry in the U.S. to work in one of the professions listed and possess the necessary degree and/or work experience for the occupation.
2. Entry Process Under NAFTA

TN application procedures are different for Canadian and Mexican nationals.

a. Canadian Nationals

A Canadian national applying for TN status may apply directly at certain ports of entry. At the port of entry, the foreign national must present the following documentation:

- proof of Canadian citizenship;
- a letter offering employment in a professional occupation listed in the NAFTA treaty;
- evidence of professional qualifications;
- confirmation of salary and its source; and
- a letter confirming the temporary length of employment (not to exceed one year).

Once admitted to the U.S., the foreign national will receive an I-94 card that is valid for one year. The admission card will allow multiple entries.

b. Mexican Nationals

Mexican nationals may apply for a TN visa at a U.S. Consulate in Mexico before arriving at a U.S. port of entry. They must submit to the Consulate documentation similar to that submitted by Canadian nationals. Upon issuance of the visa, the TN visa holder may apply for admission to the U.S. The procedure after admission mirrors that for Canadians.

C. DEPENDENTS

The spouse and children (under age 21) of a TN nonimmigrant may accompany their family member to the U.S. by obtaining Trade Dependent (TD) status. TD status is granted for the duration of the principal TN’s stay. Dependents in TD status may not accept employment in the U.S.
F-1 CLASSIFICATION - STUDENTS

The F-1 classification consists of bona fide students admitted to pursue a full course of study in an educational program. These individuals seek to enter the U.S. temporarily and solely for the purpose of pursuing a course of study at an established institution of learning, approved by the USCIS. The F-1 category includes students in colleges, universities, seminaries, conservatories, academic high schools, and other academic institutions. Changes introduced shortly after September 11, 2001 involve extensive and ongoing review of student visa issuing practices, as well as the use of a computer database - Student and Exchange Visitor Information System (SEVIS) - to help immigration authorities track the activities and whereabouts of students in the U.S.

A. PROCEDURE FOR F-1 CLASSIFICATION

In all countries, student visa applicants are required to appear for an in-person interview at a U.S. Consulate with jurisdiction over the foreign national’s place of residence. The consular officer must verify the applicant’s data in an information database, as well as the student’s SEVIS Form I-20. The SEVIS Form I-20 is a document issued by the university or academic institution to the foreign national, which indicates the course of study, expected program duration and the amount of money the foreign national will need to pay for living expenses, as well as for his or her academic studies. The following are the most important documents that an F-1 student must present to the consular officer:

- The letter of admission from the school where the foreign national plans to study;
- The signed SEVIS Form I-20;
- A statement by the foreign national that he or she will leave the U.S. after the completion of his or her studies; and proof of permanent residence in the foreign national’s home country, which he or she does not intend to abandon; and
- Evidence that the student has sufficient funds for tuition and living expenses.

Students are generally admitted for “duration of status.” Duration of status is defined to include the program of study, any period of practical training authorized, plus an additional sixty day grace period. The SEVIS Form I-20 indicates the expected length of time the foreign national will need to finish his or her course of study. The U.S. government takes a generous position toward students who are enrolled full time in U.S. universities. An F-1 student is permitted to stay until he or she finishes his or
her studies, if granted permission by the school.

B. CHARACTERISTICS SPECIFIC TO THE F-1 CLASSIFICATION

1. SEVIS - Student and Exchange Visitor Information System

SEVIS is a computer database administered by the Student and Exchange Visitor Program, a division of ICE. SEVIS maintains information on international students and exchange visitors, and their family members. The program contains personal information on foreign nationals, such as current address and status at the academic institution. Pursuant to immigration regulations, institutions must inform ICE of the following changes in circumstances: a student begins with a full course of study and then drops below the required amount of credits to be considered for full-time enrollment; a student transfers schools; a student fails to report to school within 30 days of registration; and a student engages in off-campus employment.

2. Employment

F-1 students must obtain permission from a designated school official (DSO) before accepting employment. Authorization for part-time employment is issued in limited circumstances, either based upon unforeseen financial hardship or for practical training. A limited period of practical training authorization may also be obtained at the conclusion of a bona fide educational program and during the student’s course of study.

Students may be employed in the following circumstances:

a. On-Campus Employment

On-campus work must be performed on the school’s premises, including on-location commercial firms which provide services for students on campus, such as the school bookstore or cafeteria, or at an off-campus location which is educationally affiliated with the school and is associated with the school’s established curriculum or contractually funded research projects at the post-graduate level. Student employment may not displace any U.S. citizens or residents. Students may work up to 20 hours per week during the school term and full-time during vacation breaks. No special documentation is needed for employment, although authorization from the DSO is required.

b. Off-Campus Employment

To be eligible for off-campus employment, F-1 students must complete at least one academic year (usually 9 months) of study, be in good academic standing, and demonstrate that such work would not interfere
with their studies. Students may work up to 20 hours per week during the academic term and full-time during vacation breaks only with proper authorization from the DSO. Employment may be authorized in special circumstances, including economic hardship due to unforeseen circumstances. The DSO may authorize off-campus employment with a particular employer if the employer signs a wage and labor attestation verifying unavailability of other workers following a 60-day recruitment period. If approved, the DSO must note the authorization on the student’s copy of the I-20ID and notify SEVIS.

Students may also qualify for employment off-campus using practical training in a field related to the student’s course of study. There are two types of practical training:

(i) Curricular Practical Training (CPT) - also referred to as cooperative education, alternate work/study, internship, “or any other type of required internship or practicum which is offered by sponsoring employers through cooperative agreements with the school.” CPT is authorized by the DSO on the Form I-20.

(ii) Optional Training (OPT) - a student may choose to engage in OPT either prior to or upon completion of his or her academic program. The student must apply to and obtain permission from the DSO and the USCIS prior to commencing OPT. The student may request either full-time or part-time OPT employment. Employment must not interfere with student’s ability to carry a regular full course of study.

Students must complete at least one academic year before they are eligible to participate in either type of practical training, except for graduate students in programs which require immediate participation in CPT. Students who complete one or more years of full-time (or full-time equivalent) CPT are not eligible for post-completion OPT. However, if CPT was for less than one year, the student remains eligible for 12 months of OPT, at the discretion of the DSO. OPT is limited to a total of 12 months, whether used before or after completion of studies. Any OPT performed prior to completion of studies is subtracted from available post-completion OPT.

3. FICA - Federal Insurance Compensation Act

F-1 students are exempt from the Federal Insurance Compensation Act (FICA) as long as they are categorized as “non-residents” for purposes of U.S. tax regulations. Generally, F-1 students are considered “residents” for income tax purposes if they have resided in the U.S. for five years. Full-time students may retain non-resident status beyond five years in some circumstances. The designation of “resident” for tax purposes has no bearing on or relation to a foreign national’s immigration status as a lawful perma-
nent resident.

F-1 students may also be exempt from FICA if there exists an applicable tax treaty between the foreign national’s home country and the United States. FICA exemptions do not extend to F-2 dependents.

C. F-1 DEPENDENTS

The spouse and children (under age 21) of an F-1 nonimmigrant may accompany their family member to the U.S. by obtaining F-2 status. F-2 status is granted for the duration of the principal F-1’s stay. Dependents in F-2 status may not accept employment in the U.S.
H-3 CLASSIFICATION - TRAINEES

An H-3 trainee is a foreign national coming temporarily to the U.S. for training in any field of endeavor. The petitioner must describe the type of training to be given, the source of remuneration for the trainee and whether any benefit will accrue to the petitioner, and must demonstrate why it is necessary for the foreign national to be trained in the U.S. The trainee is not permitted to engage in productive employment unless it is incidental and necessary to the training, and may not accept employment that will displace a U.S. worker.

A. PROCEDURE FOR H-3 CLASSIFICATION

A sponsoring organization submits the H-3 visa petition to the USCIS Regional Service Center with jurisdiction over the location where the training will be conducted. Following petition approval, the foreign national applies for the H-3 visa at a U.S. Consulate abroad. The foreign national must show that:

- He or she is not receiving graduate medical education or training in the U.S.;
- He or she does not have the opportunity to receive similar training in his or her home country;
- He or she needs the training to advance his or her career outside the U.S.;
- He or she will not be productively employed unless it is necessary to the training; and
- The training offered does not displace U.S. citizens and resident workers.

An H-3 trainee’s duration of status is determined by the length of the program he or she is attending in the U.S. The period may not exceed two years. Extensions of stay may not exceed the program period. An H-3 trainee who has remained in H-3 status for two years is ineligible for H or L status unless he or she has left the U.S. following the training period.

B. H-3 DEPENDENTS

The spouse and children (under age 21) of an H-3 nonimmigrant may accompany their family member to the U.S. by obtaining H-4 status. H-4 status is granted for the duration of the principal H-3’s stay. Dependents in H-4 status may not accept employment in the U.S.
J-1 CLASSIFICATION - EXCHANGE VISITORS

The J-1 visa classification was implemented to promote educational and cultural exchange. A foreign national qualifies for J-1 classification if he or she is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, coming temporarily to participate in a program designated by the DOS’s Bureau of Educational and Cultural Exchange for the purpose of teaching, instructing, lecturing, studying, observing, conducting research or practical training, in an approved exchange program.

A. PROCEDURE FOR J-1 CLASSIFICATION

A foreign national may submit his or her J-1 visa application to a U.S. Consulate in his or her home country. As in the case of the F-1 student visa, the consular officer must verify the applicant’s data in the SEVIS database, as well as verify the information on the exchange visitor’s SEVIS Form DS-2019. (See Chapter 11 for a further discussion of SEVIS.) The DS-2019 is a certificate of eligibility for exchange visitor status issued by a DOS-designated sponsor. The DS-2019 contains information regarding the applicant, the program sponsor, and the dates authorized in the program.

The J-1 nonimmigrant is authorized to work incident to his or her status for either the exchange visitor program sponsor or appropriate designee and only for employment that is within the guidelines of the program as approved by the DOS.

The J-1 visa holder may enter the U.S. up to 30 days before the designated start date of the program. When the foreign national enters the U.S. on a J-1 visa, he or she will usually be admitted for the “duration of status.” That duration is determined by the parameters of the program, and a 30 day grace period following completion of the program. A foreign national may apply for a J-1 visa extension, which may be granted as long as is necessary to complete the program. In certain cases the DOS must approve an extension of a J-1 program.

B. CHARACTERISTICS SPECIFIC TO THE J-1 CLASSIFICATION

1. Eligibility Requirements

Applicants eligible for J-1 visas are:

- Students at all academic levels;
- Trainees obtaining on-the-job training with firms, institutions, and agencies;
Chapter 13

- Teachers of primary, secondary, and specialized schools;
- Professors coming to teach or perform research at institutions of higher learning;
- Research scholars;
- Professional trainees in the medical and allied fields;
- International visitors coming for the purpose of travel, observation, consultation, research, training, sharing, or demonstrating specialized knowledge or skills, or participating in organized people-to-people programs;
- Foreign medical graduates coming for post-graduate medical training;
- Government visitors;
- Au Pairs;
- Camp counselors; and
- Summer workers.

2. Two Year Foreign Residency Requirement

Some exchange visitors are subject to a two year foreign residence requirement that requires them to return to their home country or country of last residence for a period of two years before they may return to the U.S. as permanent residents or nonimmigrants in H or L classifications. This requirement extends to: a) foreign medical graduates entering the U.S. for training; b) those whose program was funded in whole or in part by the U.S. government or the foreign national’s government; and c) foreign nationals who possess skills determined by their government to be in short supply in their home country (“Skill’s List”). This requirement attaches to accompanying dependents as well as the primary J-1 holder.

Under certain limited circumstances, a foreign national may be able to obtain a waiver of the two year foreign residency requirement.

C. J-1 DEPENDENTS

The spouse and children (under age 21) of a J-1 nonimmigrant may accompany their family member to the U.S. by obtaining J-2 status. J-2 status is granted for the duration of the principal J-1’s stay.

Spouses and minor children in J-2 status may apply for permission to accept employment. They must apply for an employment authorization document at a USCIS Regional Service Center. The dependent spouse should include proof of the marital relationship, authorized admission to the U.S. and his or her spouse’s status. J-2 employment may be authorized for the duration of the J-1 principal’s stay, or four years, whichever is shorter. Income from the dependent’s employment may not be used to financially support the J-1 principal.
Part Three

**LAWFUL PERMANENT RESIDENCE—OBTAINING A GREEN CARD**
THE GREEN CARD PROCESS - GENERALLY

A. INTRODUCTION

A lawful permanent resident, commonly referred to as the holder of a “green card” (see above), is a non-citizen who intends to permanently reside in the U.S. and has obtained authorization to do so. There are two basic steps to obtaining permanent resident status under immigration law. First, a foreign national must establish a basis for the status; second, the foreign national must show that he or she is eligible.

A foreign national may seek permanent resident status in a number of categories; common categories that an employer will encounter include:

- Family-Based Immigration: Petition by a U.S. citizen or lawful permanent resident for certain relatives;
- Employment-Based Immigration: Petition by a sponsoring employer, certain religious workers, certain employees of international organizations or due to a major investment in the U.S.;
- Diversity Lottery Program: Application by a foreign national for enrollment in a computer-generated random lottery drawing for permanent residence. The Diversity Lottery Program is only available to individuals from specified countries.

Once the foreign national’s basis for permanent residence is established, the individual may apply for permanent residence status. To do so, the foreign national must not be barred by any of the inadmissibility categories specified in immigration law. These categories include criminal, health-related, financial, national security, public interest grounds and prior immigration violations.

This Guide concentrates on business-related immigration, and therefore the chapters that follow provide information only on employment-based immigration.

B. THE EMPLOYMENT-BASED PREFERENCE CATEGORIES

The Immigration Act defines five preference categories for employment-based (EB) immigration. The five EB preference categories are:
First Preference (EB1): foreign nationals with extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers.

Second Preference (EB2): foreign nationals who are members of the professions holding advanced degrees or their equivalent and foreign nationals 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 U.S.

Third Preference (EB3): foreign nationals filling skilled worker positions requiring at least two years of experience; professional positions requiring at least a Bachelor’s degree; and unskilled workers.

Fourth Preference (EB4): a host of “special immigrants,” of which the most common are certain religious workers and employees or former employees of international organizations.

Fifth Preference (EB5): foreign nationals who invest $1,000,000 (or under some circumstances $500,000) in a new commercial enterprise that employs ten U.S. citizens or authorized immigrant workers full-time and engage in the business through day-to-day management or policy formation.

Employers typically use the EB1, EB2 and EB3 preference categories to sponsor foreign national employees for permanent residence. The EB4 and EB5 categories do not require employer sponsorship, and therefore will not be addressed in greater detail below.

C. STEPS IN THE PERMANENT RESIDENCE PROCESS

The steps required in an employer-sponsored permanent residence process depend on the position offered to or held by the foreign national, and the individual’s experience and/or education. In most cases, processing entails three distinct steps - labor certification, petition for the immigrant worker, and application for permanent residence status.
Below is an overview of an employer-sponsored permanent residence process.

**Labor Certification Application**
Following a period of recruitment testing the U.S. labor market for qualified, willing and able U.S. workers, a labor certification is filed with DOL.

**Petition for Immigrant Worker**
Filed with USCIS by sponsoring employer, with evidence of individual’s qualifications.

**Application for Permanent Residence**
Two options: Adjustment of Status, filed with USCIS, or Consular Processing, filed with a U.S. Consulate.

- **Work Authorization**
- **Travel Permission**

**First step for most employer-sponsored EB categories.**

**Second step for labor certification cases.**

**First step for non-labor certification cases, such as EB1.**

**Third step for labor certification cases.**

**Second step for non-labor certification cases.**
In some instances, an employee may qualify under a category permitting a two-step process, avoiding the initial labor certification application. Eliminating the labor certification process is important to an employer because, as set forth below, the process is time consuming and costly. Therefore, an employer seeking a “green card” for an employee should assess whether an employee can fit into the EB 1 categories shown in the chart below.

<table>
<thead>
<tr>
<th>Category</th>
<th>Labor Certification Application</th>
</tr>
</thead>
<tbody>
<tr>
<td>EB1 Extraordinary Ability</td>
<td>Not required</td>
</tr>
<tr>
<td>EB1 Outstanding Professors and Researchers</td>
<td>Not required</td>
</tr>
<tr>
<td>EB1 Multinational Executives and Managers</td>
<td>Not required</td>
</tr>
<tr>
<td>EB2 Advanced Degree Professionals</td>
<td>Required, unless National Interest Waiver requested</td>
</tr>
<tr>
<td>EB2 Exceptional Ability</td>
<td>Required, unless National Interest Waiver requested</td>
</tr>
<tr>
<td>EB3 Professionals</td>
<td>Required</td>
</tr>
<tr>
<td>EB3 Skilled Workers</td>
<td>Required</td>
</tr>
<tr>
<td>EB3 Other/Lesser Skilled Workers</td>
<td>Required</td>
</tr>
<tr>
<td>Other Schedule A: Group 1</td>
<td>Not required</td>
</tr>
<tr>
<td>(medical personnel, such as physical therapists and nurses)</td>
<td></td>
</tr>
<tr>
<td>Other Schedule A: Group 2</td>
<td>Not required</td>
</tr>
<tr>
<td>(“exceptional ability” in science or arts (except for university teachers))</td>
<td></td>
</tr>
<tr>
<td>Other Special Handling Cases:</td>
<td>Required (Special Handling)</td>
</tr>
<tr>
<td>College/university teachers, professional athletes, etc.</td>
<td></td>
</tr>
</tbody>
</table>

1. **Labor Certification Application**

The labor certification process formally begins with an application filed by an employer with the DOL. The application specifies the position offered to the foreign national employee and the terms of employment, such as work location, remuneration and work schedule. In the application, the employer attests that it has conducted a test of the labor market for the position through a recruitment campaign. The DOL is charged with certifying that there are not sufficient U.S. workers who are able, willing, qualified and available to fill the position, based on the employer’s recruitment results. In addition, the DOL must determine that the employment of the foreign national will not adversely affect the wages and
Chapter 14

working conditions of similarly employed U.S. workers. Once the DOL certification is made, the labor certification step is complete.

2. Petition for Immigrant Worker

The Petition for Immigrant Worker (Form I-140) is filed with USCIS by a sponsoring employer to establish the basis for its employee to obtain permanent resident status. The Petition is a statement of the employer’s intention to employ the foreign national when permanent residence is granted. It must be accompanied by evidence that the employee is qualified for the position offered. Once the Petition is approved by the USCIS, the foreign national may complete the permanent residence process. A foreign national may select between two methods for the final step: Adjustment of Status or Immigrant Visa Consular Processing.

3. Adjustment of Status

A foreign national may elect to complete the final step of permanent resident processing through an application to the USCIS requesting adjustment of his or her immigration status from nonimmigrant to permanent resident. This application must be accompanied by evidence that the foreign national is eligible for the adjustment of status. In some circumstances, the adjustment application may be filed concurrently with the employer’s Petition for Immigrant Worker. The employer’s Petition for Immigrant Worker must be approved before the individual’s adjustment may be granted. Adjustment applicants are eligible for interim work and travel documents.

4. Immigrant Visa Consular Processing

Alternatively, a foreign national may elect to complete the final step of processing at a U.S. consular post in his or her home country or country of last residence before coming to the U.S. The application must be accompanied by evidence that the foreign national is eligible for the status. The employer’s Petition for Immigrant Worker must be approved before the application may be submitted. The foreign national must personally appear for a final interview at the U.S. Consulate. The foreign national must maintain nonimmigrant status throughout the process.

D. PRIORITY DATES

Immigration law limits the number of green cards that may be issued each year in most family and employment preference categories. Allocation of the limited green cards available is based on the preference category and place of birth. Since every country is given the same maximum percentage of allocation of the world wide quota, backlogs may develop when more
foreign nationals apply for a green card in a category than are available for their country of birth. Therefore, foreign nationals from countries with large populations can be subject to significantly longer wait times before a visa is available.

The individual’s place on line for a green card is determined by his or her priority date. A priority date is assigned when the first step of the permanent residence process, whether it be the labor certification application or the Petition for Immigrant Worker, is filed with the DOL or the USCIS. The priority date must be current - meaning, a green card must be available for the individual - for a foreign national to complete the permanent residence process.
LABOR CERTIFICATION UNDER PROGRAM ELECTRONIC REVIEW MANAGEMENT (PERM)

A. INTRODUCTION TO PERM

Labor certification is a prerequisite for most employer-sponsored petitions. Applications for labor certification are reviewed and adjudicated by the DOL through a process called Program Electronic Review Management (PERM).

The labor certification process has been frustrating to many employers, foreign nationals, and even the DOL due to lengthy processing times and inconsistent review standards nationwide. In response, the DOL issued PERM regulations, which became effective March 28, 2005. PERM replaced both the traditional labor application and Reduction in Recruitment (RIR) processing models, and is now the sole avenue for labor certification.

PERM is intended to streamline and automate permanent labor certification. Labor certification applications (on Form ETA 9089) can be filed on-line at a dedicated DOL website (http://www.plc.doleta.gov) or mailed to one of two national processing centers.

Before the DOL will review a labor application, the employer is required to tender a wage offer for the position that meets the prevailing wage, as determined by the State Workforce Agencies (SWAs) with jurisdiction over the proposed area of employment. Under prior RIR and traditional labor certification application models, the SWAs not only played a key role in making Prevailing Wage Determinations (PWDs) but also in supervising and/or evaluating the sufficiency of an employer’s recruitment campaign and analyzing whether the employer’s job requirements were the minimum requirements for the job offered. PERM limits the role of the SWAs to making PWDs. Under PERM, the PWD must be issued before the labor certification application may be filed.

B. SETTING JOB REQUIREMENTS

1. Minimum Job Requirements

DOL regulations mandate that the education, training, experience and special skills requirements for the job offered on the labor application be the minimum requirements a prospective employee would normally need to perform the job. An employer may not list job requirements that are higher than the actual minimum requirements, simply because it prefers higher-qualified candidates. For example, if the position normally requires a bachelor’s degree and it is the employer’s normal practice to hire appli-
cants with bachelor’s degrees in the job, the minimum academic require-
ments should specify that a bachelor’s degree is required, despite the
employer’s preference for someone with a master’s degree. Similarly, the
employer may prefer four years experience, but if two years is standard for
the position and normal in the context of the employer’s business, then
only two years experience can be required. With limited exceptions, the
regulations also prohibit employers from requiring any experience, educa-
tion, or training that the foreign national gained with the employer. For
example, if the job offered is for a computer programmer and the employer
requires that all applicants for the position have experience with the C++
programming language, then the foreign national must have had experi-
ence with C++ prior to hire for the job offered.

Likewise, requirements for special skills (e.g., computer skills) must be
reasonable and in keeping with industry standards for the occupation. A
job offer for a computer programmer position using Java is expected to
require Java because it is necessary to perform the job duties. However,
nonessential skills that can be learned on the job within a reasonable period
of time should not be required. The meaning of “reasonable period of
time” will depend upon the industry and position.

The position may not be tailored to a particular foreign national’s
qualifications even if the foreign national is ideal for the position. The
benchmark for the employer’s job requirements is that they be reasonable
and in keeping with the employer’s past hiring practices and industry stan-
dards for the occupation.

To assist the employer in determining whether the job’s minimum
requirements are aligned with industry standards, PERM requires the use
of O*NET (Occupational Information Network, at http://online.onetcen-
ter.org), a DOL resource that categorizes all occupations into five Job
Zones. The O*NET replaces the Dictionary of Occupational Titles
(DOT), which was previously used for definitive information on the mini-
imum requirements for a particular position. The O*NET provides the fol-
lowing categories of information within each occupational group: Tasks,
Knowledge, Skills, Abilities, Work Activities, Work Context, Work Interests,
Work Values and Job Zone. The Job Zone section of the O*NET indi-
cates the amount of preparation needed to perform the job in a normal
manner and at an average skill level. The definition of preparation includes
the education normally required for the particular Job Zone level and the
assignment to the occupation of a Specific Vocational Preparation (SVP)
value, discussed below.

The SVP is the amount of education and/or experience required for
an individual to learn the skills needed to perform the job at an average
level. The SVP is expressed as a numerical value on an ascending scale.
Chapter 15

from one to nine, which defines the amount of education and/or experience that may be required for an occupation. Job zones were developed to transition from SVP as used in the DOT to the more functional O*NET units reflecting normal occupational requirements. The O*NET consists of only five Job Zones, each with a range of SVP values, for all occupations. Job Zone One, entitled Little or No Preparation Needed (e.g. Mail Clerks) carries an SVP range from 1 through 3 (denoted in the O*Net as Below 4.0), which equates to education and/or experience of a short demonstration through three months. Job Zone Two, entitled Some Preparation Needed (e.g. General Office Clerks) carries an SVP range of 4 through 5 (enumerated in the O*Net as 4.0 to < 6), which equates to education and/or experience of over three months up to and including one year. Job Zone Three, entitled Medium Preparation Needed (e.g. Paralegal) carries an SVP of 6 but less than 7 (enumerated in the O*Net as 6.0 to < 7), which equates to education and/or experience of over one year up to and including 2 years. Job Zone 4, entitled Considerable Preparation Needed (e.g. Computer Systems Analyst), carries an SVP of 7 but less than 8 (enumerated in the O*Net as 7.0 to < 8.0), which equates to education and/or experience of over two years up to and including four years. Job Zone Five, entitled Extensive Preparation Needed (e.g. Physicist), carries an SVP range of 8.0 and above (denoted in the O*Net as 8.0 and above), which equates to education and/or experience of more than four years up to and including ten years (SVP 8.0) and over ten years (SVP 9.0).

DOL regulations specify that job requirements cannot exceed the SVP level for the occupation as established by the O*NET. The only exception to this rule arises if the employer can demonstrate business necessity for the requirement, which is discussed later in this chapter.

2. Prevailing Wage Determinations and Alternative Wage Sources

The first steps for any employer intending to sponsor a foreign national for labor certification is to file a PWD request with the SWA having jurisdiction over the job location. PERM permits the employer to submit successive PWD requests for the same position. The employer is required to offer 100% of the prevailing wage. Bonuses, cost of living allowances, and commissions cannot be used as part of the wage offer unless they are guaranteed (not discretionary) by the employer and paid out as part of the wage on a weekly, biweekly, or monthly basis. In effect, this requirement excludes guaranteed bonuses given at year-end or commissions paid out quarterly from the calculation of the wage offer.

To assist employers with prevailing wage determinations, the DOL provides a range of acceptable governmental wage survey sources, such as
the Occupational Employment Statistics (OES), available on the DOL’s website, for comparison. Employers can also consult the Davis Bacon Act (DBA) wage data bank, which covers jobs on federal and state construction projects, or the McNamara-O’Hara Service Contract Act (SCA), which applies to employees of contractors and subcontractors on service contracts with the federal government. The SWAs will not contest an employer’s wage offer if either the DBA or SCA wage source is used and properly applied.

The employer may also use other independent surveys to determine the proper wage offer, so long as they comply with DOL regulations. Among many criteria, those regulations mandate that when the survey provides both an arithmetic mean and a median wage, the mean must be used. If a mean is not provided, the median is acceptable. The regulations provide guidance on the acceptable geographic area for a survey to encompass. If wage data is unavailable for a specific area, surveys that encompass larger areas, including statewide surveys, may be acceptable.

Government wage surveys, such as the OES, that previously only provided two wage levels, are now required to provide for four wage levels commensurate with education, experience and the level of supervision required for the position. If the survey only provides two levels, the employer can mathematically derive the other two levels. This is accomplished by subtracting the first level from the second, dividing the difference by three, then adding the quotient obtained to the first level and subtracting it from the second level. For example, if the first level wage is $20,000 and the second level wage is $80,000, the difference between them is $60,000, which divided by three provides a quotient of $20,000. By adding the $20,000 to the first wage level, we derive a wage level of $40,000. Then, by subtracting $20,000 from the $80,000, we derive another wage level of $60,000. This system is a significant improvement over the previous two-level OES usage system which often skewed the second level to unrealistically high wages for mid-level employees.

In the event the SWA disagrees with the wage offer, the employer may submit supplemental survey information for review only once. If the SWA still disagrees with the wage offer, the employer may file a new PWD request. A new request will be treated as a new application and will not be given processing priority. An employer can also appeal the SWA’s wage decision to the Certifying Officer (CO) of a PERM processing center. An appeal to the CO must be made within 30 days of the PWD. There is no specific time frame for the CO to decide the PWD appeal.

Once the SWA issues a PWD, the employer is required to keep the original determination in the event the final labor application is selected for audit. A PWD is valid for at least 90 days, but not more than one year,
from the date of the determination. If an employer does not submit the final labor application while the PWD is valid, it will be required to obtain a new PWD before it can file the PERM labor application.

3. Alternate Job Requirements

The DOL regulations also permit an employer to specify alternate experience, job skills and/or academic requirements in lieu of the basic minimum requirements. The alternate requirements expand the pool of U.S. workers who might qualify for the position. The PERM rule indicates that if the foreign national qualifies for the position under the alternate requirements, but does not qualify under the primary requirements, the application will be considered tailored to the foreign national’s qualifications. In that case, the application will not be certified unless the employer indicates in the advertisement that applicants who have any reasonable combination of education and/or experience appropriate to the position will also qualify.

4. Business Necessity

PERM, like the traditional and RIR labor application models before it, recognizes that some U.S. businesses have positions with special requirements beyond those normally required. The rule permits an employer to require experience and/or education that exceed the SVP level for the job if the employer can show the requirements are a business necessity. Requirements such as foreign language fluency or unusual job skills, must also be justified by business necessity.

To show business necessity, an employer must demonstrate that the job requirements - including the special requirements - bear a reasonable relationship to the occupation in the context of the employer’s business, and are essential to perform the job duties described by the employer in a reasonable manner. The documentation to support a business necessity argument should be prepared before the labor application is filed because all applications with business necessity requirements will likely be audited by the DOL. The employer must also keep in mind that PERM applications audited by the DOL will not be adjudicated in the 45 to 60 day time frame.

In the specific context of foreign language requirements, PERM regulations provide factors that will be considered in determining whether the requirement is a business necessity. These include:

- The frequency of communication with clients or other employees who do not speak English;
- The percentage of work time spent by the employee using the foreign language; and
Chapter 15

- The percentage of the employer’s clients, employees, or contractors who do not speak English.

5. Combination of Occupations

PERM allows justification for jobs that combine the duties of several occupations (e.g., a vice president of finance who is also a systems analyst). Positions that combine occupations are often a business necessity for smaller companies. Or, it might be customary in certain industries to combine occupations under one job heading. Regardless of the reason, jobs that combine several occupations must be justified with a business necessity argument and/or an argument that the requirements are normal and standard for the occupation in the industry. A labor application with a combination of duties requirement is likely to be audited by the CO and will therefore likely delay the certification process.

6. Dissimilar Job Duties

PERM, like the traditional and RIR labor application models, does not permit an employer to state requirements that the foreign national did not meet prior to joining the current employer. However, PERM provides an exception to this rule if the experience the foreign national gained with the current employer is not “substantially comparable” to the job offered. Substantially comparable is defined in PERM as a position in which the duties and responsibilities are not the same as the job offered more than 50 percent of the time. Therefore, as long as the employer can show that there are substantive differences between the two positions (e.g., supervising twice the number of people as before; receiving a large salary increase over the prior position; personnel authority that the foreign national did not previously hold; or responsibility for a significantly larger budget), the foreign national may use his or her prior experience, with the same employer, to satisfy the experience requirement. This situation normally arises when a foreign national has worked for the same employer for many years and has been promoted to a more senior position. A dissimilar job duties argument by the employer means the application will likely be audited by the DOL and therefore delay the certification process.

C. NOTICE AND RECRUITMENT UNDER PERM

1. In-House Posted Job Notice and Use of Other Media

An internal printed posting notice regarding the filing of the application is required under PERM. The notice must be posted for at least 10 consecutive business days in a conspicuous location at the place of employment, and the notice period must occur between 30 and 180 days before filing the labor application. If the job offered is covered by a collective
bargaining agreement, notice must be provided to the union bargaining representative. The notice must contain the salary (a salary range is acceptable as long as the lowest part of the range meets prevailing wage), a job description, and the requirements for the position. In addition, the notice must state that any person may provide documentary evidence regarding the application to the CO. Although the primary purpose of the notice is to provide employees the opportunity to comment on the application to the CO, and not to recruit U.S. workers, if an employee applies for the position based on the notice, the employer should document the application and the lawful job-related reasons the employee was not qualified for the job. Documentation of the job order placement and results should be retained by the employer in the event the labor application is audited. The employer may retain the original posted notice on file with a note providing:

(a) the dates on which the notice was posted, (b) responses, if any, to the posting, and (c) how they were addressed.

Employers are also required to use all printed and electronic in-house media (email, flyers, intranet, and the like) to post notice of the job in accordance with the company’s normal procedures, for a duration used for similar positions within the company. If the employer does not have, or never uses, in-house media to recruit for similar positions, then a reasonable reading of this regulation would be that it is exempt from this requirement.

2. Basic Recruitment Requirements

PERM requires the employer to conduct recruitment for the job offered before filing the labor application. This recruitment is designed to test the labor market to determine whether there are any willing and qualified U.S. workers for the job. If there is even one qualified U.S. worker who wants the position, and is willing and able to take the job following an interview, the labor application cannot be filed. The only exception is if there are two or more openings for identical positions and the U.S. worker is hired to fill one while the other position remains open.

3. Job Order with the SWA

Employers are required to recruit for the position by placing a job order with the SWA for a period of 30 days. The job order must run from 30 to 180 days prior to filing the labor application. Documentation of the job order placement should be retained by the employer in the event the labor application is audited.

4. Print Advertising Requirements

PERM requires employers to recruit for the position by advertising in
a newspaper of general circulation in the area of employment. The advertisement must run in at least two Sunday editions of the newspaper. The ads may be placed on consecutive Sundays, and must appear between 30 and 180 days before the labor application is filed. If the newspaper does not run a Sunday edition, the advertisement can run on another day with the widest circulation. If the advertisement is run in a suburban newspaper, it may only be run on a Sunday.

The advertisement does not have to contain the salary, but must include:

• The name of the employer;
• The area of employment;
• The job title;
• A description of the job duties and requirements that reasonably defines the job; and
• Information on where to send resumes or contact the employer.

The employer may include the company’s physical address or direct résumés to a post office box or a central company office location. If a salary is included, it must meet the prevailing wage. If the employer places the advertisement under a section of the newspaper or heading inconsistent with the position, the DOL will view the recruitment as lacking in good faith, which could result in an audit and requirement to re-advertise under DOL supervision. For positions requiring advanced degrees (master’s degree or higher) and experience, the employer has the option to advertise the job opening in a professional journal in lieu of one of the Sunday newspaper advertisements.

5. Three Additional Recruitment Steps For Professional Positions

The employer must undertake three additional recruitment steps if the position offered is a professional one. A professional job is one requiring at least a bachelor’s degree. PERM provides a list of occupations classified as professional. The recruitment must take place no more than 180 days before the labor application is filed, and only one of the three additional recruitment steps can occur within 30 days of the filing.

These additional recruitment steps do not require the employer to advertise for the specific position, e.g. senior computer programmer. Instead, the employer need only advertise for openings in the occupations related to the position (e.g., multiple openings for computer programming positions ranging from entry to advanced). The employer must select the three additional recruitment steps for professional occupations from the following list:

• Job fairs
• Employer’s web site
Chapter 15

• Job search web site other than the employer’s (a web page posting of the position, even if posted in tandem with a print ad, qualifies under this step)
• On-campus recruitment
• Trade or professional organizations
• Private employment firms
• Employee referral programs (if they include specific incentives for the referral)
• Notice of the job opening at a college campus placement office (only if the job requires a degree but no experience)
• Local and/or ethnic newspapers if they are appropriate vehicles for the job opportunity
• Radio and television advertisements

6. Documentation of Recruitment Efforts

Following the recruitment, employers are required to prepare and sign a recruitment report describing the results of the recruitment campaign. The report will not be submitted to the DOL with the labor application, but must be retained in case of an audit. The recruitment report must indicate the total number of applicants and the lawful job-related reasons they were not deemed qualified. The employer is not required to name each job applicant, and may sort the applicants who were rejected into categories based upon like reasons for rejection.

If applicants fail to meet the minimum education, training, experience or special skill requirements for the job as set forth in the labor application, they may be lawfully rejected for the position.

7. Documentation Retention Requirements

The employer must retain the following documentation on file for a period of five years from the date of the filing of the labor application:
• Job posting (keep an original posted job notice and the results of the posting);
• Advertising (keep a copy of the entire page of the newspaper or professional journal where the job was advertised);
• Proof of the three additional steps for professional positions;
• Original recruitment report signed by the employer; and
• All of the applicant résumés.

Any and all of this documentation may be requested by the DOL in the event of an audit.
8. Optional Special Recruitment and Documentation Procedures for College and University Teachers

Employers filing labor applications for college and university teachers may utilize the basic recruitment process described above, or select a candidate for the job using a competitive recruitment and selection process through which the foreign national is found to be more qualified than any of the U.S. workers who applied for the job. Under the competitive recruitment and selection process, PERM requires the college or university to provide documentation of the recruitment efforts. These documentary requirements are set forth below:

- A statement signed by the hiring official to detail the recruitment efforts (this is virtually identical to regular PERM applications);
- A report from the committee or body making the selection of the foreign national for the position (note: the labor application must be filed within 18 months of the foreign national’s selection for the job offered);
- A copy of an advertisement for the job opportunity in a national professional journal;
- Evidence of all other recruitment sources utilized;
- A written statement specifying the foreign national’s professional qualifications and academic accomplishments; and
- A job-posting notice.

D. SUBSTITUTIONS AND SCHEDULE A APPLICATIONS

1. Substitution of Foreign National Using a Certified Labor Application

Once certified, a labor application may be used by an employer to sponsor the named beneficiary or, if certain conditions are met, substitute another foreign national beneficiary. For example, if the original foreign national decides to leave the U.S. permanently and abandon his or her employment with the employer, or if the foreign national’s employment is terminated, an employer may substitute another foreign national for the position if that foreign national met all of the job requirements as of the date the labor application was originally filed with the DOL. In addition, the foreign national being substituted will inherit the priority date established by the filing of the labor application for the original applicant.

2. Schedule A Labor Applications

Schedule A pre-certification applications are reserved for those occupations for which there are few qualified, willing, and able U.S. workers. These occupations are divided into Group I and Group II categories. Group I includes professional nurses and physical therapists. Group II includes aliens of exceptional ability in the sciences and arts, and based on
Chapter 15

PERM, performing artists of exceptional ability.

Schedule A applications are completed on Form ETA 9089, but filed directly with the USCIS together with the Petition for Immigrant Worker. Such applications must be accompanied by the following general supporting documentation:

- PWD from the SWA;
- Evidence, if applicable, that the union bargaining representative was provided with notification of the job opening or, if there is no bargaining representative, evidence that a job notice was posted in a conspicuous location at the intended place of employment for at least 10 consecutive business days; and
- Documentary evidence of recruitment for the job opening in all in-house media normally used for the recruitment of similar positions.

In addition to the general supporting documentation, each group has other special documentary requirements delimited under the Schedule A PERM regulations.

E. LABOR CERTIFICATION ISSUES UNDER PERM

1. Audits and Supervised Recruitment

Any case filed under PERM is subject to audit by the CO. There is no specific timetable for the CO to commence an audit. To initiate an audit, the CO sends a letter to the employer requesting additional documentation. The employer is given 30 days from the date of the letter to respond or withdraw the labor application. If the employer fails to respond, the CO has discretion to:

- Deny the application;
- Require the employer to conduct supervised recruitment for any future labor applications filed within a two-year period; or
- Grant an extension of the 30-day response period.

In the event the CO determines that supervised recruitment is warranted, the procedures are essentially the same as pre-PERM traditional labor application processing. The CO will mandate the recruitment means and schedule. Applicants will be instructed to send their résumés to the DOL, and the DOL will forward them to the employer after review. The employer will assess candidate qualifications and, if necessary, interview applicants. At the conclusion of the recruitment, the employer must provide a detailed recruitment report to the CO documenting the lawful job-related reasons for the rejection of each applicant. The employer will have 30 days in which to complete the report or to request a 30-day extension. The employer’s recruitment report must be accompanied by copies of the advertisement and proof of other recruitment as required; any résumés received by the employer for the job that were not sent to the employer by
Chapter 15

the CO (i.e., résumés that came from other sources); and, a job posting notice. The CO will notify the employer in writing, either electronically or by mail, whether the application is certified or denied. There is no set timetable for the CO to complete the process.

2. Denial of the Labor Application and Request for Review

If a labor application is denied by the CO, the employer may submit a Request for Review (RFR) of the denial by the Board of Alien Labor Certification Appeals (BALCA). The RFR must be submitted within 30 days of the denial to the CO who denied it. The CO will then develop an appeal file and forward it to BALCA, sending a copy to the employer. The employer may also submit evidence to accompany the RFR on condition that the information was provided to the CO prior to the denial determination. BALCA will give the employer and the DOL 30 days in which to submit or decline to submit a legal brief or Statement of Position outlining their positions. BALCA will either agree with the denial or direct the CO to certify the application. BALCA may also order a hearing regarding the case. There is no set time frame for BALCA to adjudicate a case on appeal.

3. Invalidation or Revocation of a Labor Certification

The CO may revoke the certification of an approved labor application if there is a finding that the certification was unjustified. The CO must provide the employer with a Notice of Intent to Revoke detailing the reasons for revocation. The employer must provide a rebuttal to the Notice within 30 days of its date, and the CO must notify the employer within 30 days of receiving the rebuttal whether the case will be revoked. If a revocation is issued, the employer may appeal. If the employer fails to provide a timely rebuttal, the revocation is final.

Invalidation of an already certified labor application by the DHS or by a Consular Officer might occur if a determination is made that willful misrepresentation or fraud occurred in the labor certification process. Invalidation can also occur if the CO becomes aware that willful misrepresentation or fraud occurred prior to the final adjudication of an application. In this instance, the CO must refer the case to the DHS for review and further action, including possible prosecution.

4. Layoffs and Employer Responsibilities

Prior to filing a PERM labor application with the DOL, employers must notify and consider for the job opening any employees who were laid off within the prior six months due to downsizing, corporate restructuring, reduction in force, or any other involuntary departure from the position without cause or prejudice. The employer is only required to consider
those employees who were previously employed in the same occupation as the job offered in the labor application, or in a related occupation performing the same duties as apply to the job opening. PERM requires the employer to retain documentation that those former employees were contacted and, if qualified, willing, and able, were offered the position. If the laid-off employee was not hired, the employer must document the lawful job-related reasons for not rehiring the former employee.

5. Labor Applications Pending Under Traditional or RIR Processing Model

Cases filed with the DOL before March 28, 2005 will continue to be processed under regulations governing traditional labor certification or RIR methods. These applications have been transferred to one of two DOL backlog reduction centers. The backlog reduction centers have assumed the role previously played by the SWAs and Regional Certifying Officers.

Employers also have the option to convert these applications to PERM while retaining the foreign national’s priority date as long as certain conditions are met. First, the application must not have reached the stage where the SWA has assigned it a job order. Second, the application must meet all the requirements of PERM, including job requirements, business necessity (if applicable), SVP, and prevailing wage. Third, the pending application must be withdrawn prior to a job order placement by the SWA and refiled under PERM rules. Fourth, the job offer for the PERM application must be identical to the withdrawn application inclusive of any amendments either made by the employer or requested by the SWA in an assessment notice. “Identical” is defined in the final rule as an application having the same employer, same foreign national, identical job title, location and description, as well as minimum requirements. Fifth, the employer must refile the new application under PERM procedures within 210 days of withdrawing the prior application.

An employer should be aware of priority dates when evaluating PERM conversion. Since priority dates might impact the timing of a foreign national’s permanent residence process, the employer must take the following into account before considering a PERM conversion:

• Conversion of a traditional or RIR application to PERM will retain the priority date of the traditional or RIR application only if the PERM application meets PERM conversion requirements.
• If the conversion is denied because it does not meet the requirements of PERM, the PERM conversion application is treated as a new application with a current priority date (i.e., the priority date of the withdrawn RIR or traditional application is lost and replaced with a current
F. THE IMPACT OF CHANGES IN EMPLOYMENT

In most cases, changes in the foreign national’s position or prospective position with the employer may impact the viability of the labor certification as a basis of the employer’s Petition for Immigrant Worker. As explained above, the purpose of the labor certification step is to test the labor market for the availability of U.S. workers who are willing, able and qualified to take the position offered to the foreign national. If the nature of the job offered to the foreign national changes to the extent that the employer’s recruitment campaign does not cover the new position or job location, the labor certification may not be used to support the employer’s petition for the individual. A new labor application, based upon a recruitment campaign for the new position and/or job location, must be certified before the employer’s sponsorship may continue.
EMPLOYMENT-BASED IMMIGRATION WITHOUT LABOR CERTIFICATION

A. RELEVANT EB CATEGORIES

The employment-based categories discussed in this chapter do not require a labor certification by the DOL. In establishing these categories, Congress reflected a belief that the interests of the U.S. are served by admitting superlative foreign talent and therefore their employment should not be subject to certification by the DOL. The categories are:

1. EB1: Extraordinary Ability

The regulations define individuals with “extraordinary ability” as those who possess 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.” Employers petitioning for foreign nationals with extraordinary ability in the sciences, arts, education, business, and athletics must demonstrate such ability by presenting evidence that their achievements have been recognized in the field of expertise and that they have sustained national or international acclaim in their fields. Because Congress intended the extraordinary ability subcategory to be restrictive, it is reserved for a select group of foreign nationals.

To qualify an individual as one of extraordinary ability, an employer must provide evidence that the foreign national has sustained national or international acclaim, and that his or her achievements have been recognized in the field of expertise. The employer must also be able to demonstrate that the foreign national’s contributions in the field will “substantially benefit” the U.S. in the future. Unlike the other EB1 categories, a foreign national who qualifies as an individual of extraordinary ability may self-petition and is not required to have sponsorship by a specific employer.

In submitting evidence of extraordinary ability, the petitioner must demonstrate either receipt of a major international prize, or at least three of the following:

- Documentation of the foreign national’s receipt of lesser-known prizes or awards for excellence in the field;
- Documentation of the foreign national’s membership in associations in the field that require outstanding achievements of their members;
- Published material in professional publications written by others about the foreign national’s work in the field;
- Evidence of the foreign national’s participation, either individually or on a panel, as judge of the work of others in the same or an allied field;
- Evidence of the foreign national’s original scientific, scholarly, artistic,
athletic, or business-related contributions to the field;
• Evidence of the foreign national’s authorship of scholarly books or articles in professional or major trade publications or other major media;
• Evidence that the individual’s work has been displayed at artistic exhibitions or showcases;
• Evidence of the individual’s performance in a leading or critical role for organizations with a distinguished reputation;
• Evidence that the foreign national has commanded a high salary or significant remuneration compared to others in the field; or
• Evidence of commercial successes in the performing arts.

Immigration regulations permit submission of other comparable evidence if the criteria do not apply to the field. The USCIS will assess the value and quality of the evidence submitted and make a determination on the individual’s qualifications based on whether the evidence, taken together, shows the foreign national’s extraordinary ability, and not simply whether the evidence meets at least three of the criteria. Extraordinary ability petitions do not necessarily need to demonstrate the individual’s international acclaim; rather, a record of national achievements may satisfy the requirements.

2. EB1: Outstanding Professors and Researchers

Professors and researchers may qualify for the EB1 category if it can be demonstrated that they are outstanding. In addition to outstanding ability, this category requires that the researchers and professors possess at least three years of experience in teaching or research in their academic field and have received international recognition for their work. The regulations define “academic field” as a body of specialized knowledge offered for study at an accredited U.S. institution of higher learning.

To be eligible for classification as an outstanding professor or researcher, the foreign national must be sponsored by an employer offering one of the following types of positions:
1) A permanent, tenured or tenure-track teaching position with a U.S. institution of higher learning;
2) A research position with a U.S. institution of higher learning; or
3) A research position with a private employer that employs at least three full-time researchers and has documented achievements in an academic field.

The employment offered must be for an indefinite period of time. Thus, a grant-based teaching or research position with a specific end date would not meet the regulatory requirements.

To show that a foreign national is recognized internationally as out-
standing the foreign national must submit evidence of meeting at least two of the following six criteria:

• Documentation of the foreign national’s receipt of major prizes or awards for outstanding achievement in the field;

• Documentation of the foreign national’s membership in associations in the field that require outstanding achievements of their members;

• Published material in professional publications written by others about the foreign national’s work in the field. Published material must include the title, date, and author and be translated, if necessary;

• Evidence of the foreign national’s participation, either on a panel or individually, as a judge of the work of others in the same or an allied field;

• Evidence of the foreign national’s original scientific or scholarly research contributions to the field; or

• Evidence of the foreign national’s authorship of scholarly books or articles in scholarly journals with international circulation in the field.

3. EB1: Certain Multinational Executives and Managers

The final category of individuals eligible for EB1 classification are internationally transferred executives and managers.

The requirements for classification in this category are as follows:

1) Employment abroad with the same employer, or an affiliate or subsidiary;

2) For one year out of the previous three years, or the three years prior to the individual’s transfer to the U.S.;

3) In an executive or managerial capacity; and

4) An offer of employment in the U.S. in an executive or managerial position.

These are very similar to the criteria necessary to qualify a foreign worker as an L-1 nonimmigrant intra-company executive or manager.

The terms “manager” and “executive” are defined in the immigration regulations. The definition of manager includes those whose duties involve either the management of a function of the organization or the supervision of professional employees. Executive is defined as one who directs the management of the organization or a component of the organization, establishes company goals and policies, exercises a high level of discretion in executing his or her duties, and receives only general supervision from higher level executives.

Petitions to classify an individual eligible under this category must be filed by a sponsoring employer.
4. EB2: Request For National Interest Waiver of the Labor Certification Requirement

A foreign national qualifying under the EB2 category as an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business, may request a waiver of the job offer requirement. The request to the USCIS seeks a waiver of a specific job offer, and thus a labor certification, if the waiver is in the “national interest” of the U.S. Immigration regulations do not define the term “national interest,” leaving interpretation of evidence sufficiency to individual USCIS officers in reviewing cases.

A successful request for a national interest waiver should contain the following elements:

- Evidence that the individual is seeking employment in an area of substantial intrinsic merit. An area of substantial intrinsic merit is defined as employment that benefits the national interest of the U.S. Such areas include healthcare, housing, the environment, and the U.S. economy. In addition, intrinsic merit includes situations where the employment of the foreign national serves to improve wages and working conditions of U.S. workers, or where the foreign national’s employment is requested by an interested U.S. government agency;
- Evidence that the proposed benefit will be national in scope; and
- Evidence that the national interest would be adversely affected if a labor certification were required for the individual. That is, evidence must be presented that shows it would be contrary to the national interest to potentially deprive the prospective employer of the foreign national’s services by making the position available to U.S. workers.

The final prong goes to the foreign national’s contributions to the field of endeavor, and may be met through evidence demonstrating a track record of the individual’s accomplishments. These include peer-reviewed publications in the field, conference or seminar presentations of the individual’s work, publications about the individual, awards and prizes won by the individual in the field, as well as letters of reference by industry and academic experts in the field.
Part Four

EMPLOYMENT
ELIGIBILITY
VERIFICATION
OVERVIEW OF EMPLOYER OBLIGATIONS UNDER IRCA

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA) to combat the increasing rate of illegal immigration in the U.S. Congress believed that the most effective way to deter illegal immigrants from entering the U.S. was to impose obligations and sanctions on the employers hiring them. It reasoned that if employers did not hire illegal workers, primarily entering the U.S. in search of employment, the large influx of illegal immigration would decrease.

IRCA prohibits employers from knowingly hiring or continuing to employ an individual not authorized to work in the U.S. The law requires that the employer verify and attest to an employee’s identity and authorization to work in the U.S. The attestation is made under penalty of perjury on the Employment Eligibility Verification Form, Form I-9. Fear that the verification requirements would result in privacy violations and discrimination against persons who appear or sound foreign led Congress to include an antidiscrimination provision in IRCA.

Every employer must verify both the identity and work eligibility of each employee it hires after November 7, 1986, the effective date of the law. The Form I-9 must also be completed for each individual referred or recruited for a fee. The Form I-9 must be completed regardless of an employee’s citizenship. Relevant regulations define the term “employee” as an individual who provides services or labor for an employer for wages or other remuneration, and define the term “refer for a fee” as the referral of a potential applicant to an employer to obtain employment in the U.S. When hiring, recruiting, or referring a new employee, employers must comply with the Form I-9 requirement at the time of the employee’s actual commencement of employment for wages or remuneration. Although IRCA requires that all U.S. employers possess and maintain a Form I-9 for each employee, it provides exemptions in the following limited instances:

- The employee was hired before November 7, 1986 and has been continuously employed by the same employer;
- The individual is providing sporadic, irregular, or intermittent domestic services in a private household;
- The individual is providing services for the employer as an independent contractor; or
- The individual is providing services to the employer through entities supplying contract services, such as temporary employment agencies.

In those cases, the contractor is the employer for Form I-9 purposes. On occasion, a U.S. employer hires a new employee who completes the Form I-9 at an off-site location and is never physically present at the
employer’s facilities. Because IRCA requires that the employer review original documentation to complete the Form I-9, the employer may designate an agent to execute the Form I-9 and fulfill all related responsibilities. Agents may include notaries public, accountants, attorneys, personnel officers, foremen, and the like. The law mandates that an employer be held liable for the actions of the agent. Thus, the employer should select an agent carefully. If an agent fails to fully comply with IRCA requirements in the completion of the Form I-9, the employer will be subject to all penalties related to the violations.

An employer violates IRCA if it employs a foreign national knowing that he or she is not authorized to be employed in the U.S. or continues to employ a foreign national that the employer knows has become unauthorized during employment. The “knowing” requirement for this violation encompasses constructive knowledge that, based on the circumstances, the employer has reason to know that a foreign national is not authorized to work. An employer is also held accountable for a knowing hire even if it contracts, rather than directly employs, for the labor of an individual who it knows is not authorized for employment in the U.S.
EMPLOYMENT ELIGIBILITY VERIFICATION REQUIREMENTS

The Form I-9 contains three sections that require accurate completion to ensure compliance with IRCA. Proper completion of this form requires attestations by the employee and employer, as well as the employer’s review of specific documentation.

A. SECTION 1 OF THE FORM I-9 - EMPLOYEE INFORMATION AND VERIFICATION

Section 1 must be completed by the employee no later than the close of business on his or her first day of employment. The employer is responsible for ensuring that the employee completes Section 1 in full, signs, and dates the form. Although the employee’s attestations regarding his or her employment status are made under penalty of perjury, it is the employer that is held liable when the employee fails to properly complete Section 1 of the Form I-9.

Section 1 of the Form I-9

B. SECTION 2 OF THE FORM I-9 - EMPLOYER REVIEW AND VERIFICATION

In completing Section 2 of the Form I-9, the employer must review original documents, not photocopies, which establish the employee’s identity and employment eligibility. The Form I-9 provides three lists of acceptable documents from which the employee may select to establish his or her identity and authorization to work in the U.S. The employer may accept any List A document that establishes an individual’s identity and work eligibility. Alternatively, if a List A document is not presented, the employer may accept a List B document that establishes identity and a List
Chapter 18

C document that establishes work eligibility. The list of acceptable documents has been amended by statute and regulation, however, the Form I-9 has never been updated. DHS has announced its intention to update the Form I-9 in the future to reflect regulatory changes. A list reflecting the amendments is included in the Appendix to this Guide. Employers should train Human Resources personnel responsible for executing duties related to Form I-9s to ensure their knowledge is current and the proper documents are accepted.

The employer may not dictate which documents an employee should present; such a specification is deemed to be “document abuse.” The employer should present the list of acceptable documentation to the employee and allow the employee to choose which documents to present.

Section 2 of the Form I-9 must be fully completed by the employer within three business days of the employee commencing employment. If the employee does not present the required documentation within three business days, the employer is required to terminate the employment. The employer may later rehire the individual if he or she presents proper documentation. Section 2 of the Form I-9 requires that the employer or its agent attest, under penalty of perjury, that he or she has physically examined the employee’s original documents, and that the documents appear to be genuine and relate to the employee.

Section 2 of the Form I-9

1. Reviewing Documents Presented by Employee

IRCA does not mandate that an employer independently verify the authenticity of the documentation presented by an employee. Rather, IRCA requires that the employer review and accept documentation presented by the employee as long as the documents reasonably appear to be
genuine on their face and to relate to the person presenting them.

Given this standard of review, it is possible that an employer will inadvertently accept a document that is not in fact genuine, or is genuine, but does not relate to the person who presented it. In such situations, as long as the documents reasonably appear to be genuine and relate to the person presenting them, the employer is not in violation of IRCA’s provisions. However, if the employer later discovers that the documents presented were either not genuine, or did not relate to the employee, it must terminate the employment relationship.

2. Immigration Documents That Satisfy Form I-9 Requirements
   (And Those That Don’t)

Several issues relating to the Form I-9 documents require special consideration by employers. One issue involves foreign workers who present USCIS receipt notices as employment authorization during the I-9 employment eligibility process. Receipt notices are only acceptable for the replacement of lost, stolen, or misplaced Employment Authorization Documents (EADs). A receipt notice indicating an application has been filed for an individual’s initial work authorization or extension of work authorization is not acceptable for the Form I-9 employment eligibility verification purposes. A receipt notice indicating that the issuing authority has received an application to replace a List A, B or C document that has been lost, damaged or stolen is acceptable in place of the original document. However, the employee must present the actual replacement document within 90 days of hire. Of course, should the employee choose, he or she may present a different acceptable document from List A, B, or C within 90 days of hire.

Another issue commonly faced by employers when complying with the Form I-9 requirements involves examining documentation relating to a nonimmigrant employee. As discussed in Part Two, there are several types of nonimmigrant visa statuses that allow a foreign national to work in the U.S. on a temporary basis. Employers should be aware that the status of a foreign worker in the U.S. is never governed by a consular visa stamp. Instead, the Form I-94 (Arrival and Departure Record), EAD, or other government-issued documents are appropriate evidence of lawful employment status.

If an employee chooses to present his or her unexpired foreign passport as an identification document, he or she must also produce the white Form I-94 evidencing admission after inspection at a U.S. port of entry, or change of status by the USCIS. The Form I-94 must have a future expiration date and indicate an immigration status authorizing employment with the employer in order to be acceptable as proof of valid work authoriza-
Chapter 18

As discussed above, nonimmigrant visa statuses that authorize employment include H-1B, L-1A, L-1B, E-1, E-2, O-1, and TN.

The Form I-94 may show a validity of “D/S” (Duration of Status) for nonimmigrants in F-1 or J-1 status. These employees must also produce evidence that they are authorized to work in the U.S. for the employer.

Special rules apply for hiring certain H-1B nonimmigrants. Immigration law permits an employer to hire an H-1B worker once it files with the USCIS an H-1B petition for the individual changing employers. To complete the Form I-9 before the H-1B petition is approved, the employer may accept the H-1B approval of the previous employer, or Form I-94 showing H-1B status, and a receipt notice for the new petition. The employment eligibility must be reverified once the employer’s H-1B petition is approved. Reverification is discussed below.

3. Special Considerations Concerning Social Security Numbers
   a. Social Security Cards

   The most common List C document presented to show employment eligibility is a Social Security card. The issuance of a Social Security card is closely controlled by the Social Security Administration (SSA). The SSA will not issue Social Security cards to non-U.S. citizens without independent verification by the DHS of the foreign national’s immigration status. Depending on immigration status, a foreign national’s Social Security card might be endorsed with limitations on the use of the document for Form I-9 verification.

   Lawful permanent residents, refugees, and asylees are issued unrestricted Social Security cards that are indistinguishable from those issued to U.S. citizens. The SSA also issues restricted Social Security cards. One is a Social Security card that states “NOT VALID FOR WORK AUTHORIZATION” on its face. The second restricted card states “VALID FOR WORK ONLY WITH DHS AUTHORIZATION.” Neither of these cards may be accepted as evidence of employment eligibility for Form I-9.

   b. Mismatch of Employees’ Names and Social Security Numbers

   The SSA annually reviews W-2 forms and credits social security earnings to workers. If the name and Social Security number on the Form W-2 do not match, the SSA sends a letter to the employer notifying them of the mismatch. The letters sent by SSA are known as “mismatch letters.” SSA mismatch letters warn that employers should not use a mismatch letter, in and of itself, as the basis for termination or suspension of an employee.

   Should an employer receive a mismatch letter concerning an employee, the USCIS has advised employers to confirm the accuracy of the name and Social Security number. The employer may do this by reviewing its records.
to determine if a typographical error was made on the Form W-2. If no error was made, the employer should review the Form I-9 to determine if a Social Security card was presented as a List C document verifying employment eligibility. If so, the employer should inform the employee of the mismatch letter, and request verification of the correct Social Security number. If, in response, the employee presents a list A or other list C document, verifying employment eligibility, the employer must update Form I-9, and the inquiry is then completed. If the employee does not present an acceptable document showing employment eligibility, the employer should not continue the employment relationship.

C. SECTION 3 OF THE FORM I-9 - UPDATING AND REVERIFICATION

If an employee has temporary work authorization, the employer must timely reverify employment eligibility. Reverification is completed in Section 3 of the Form I-9, by the employer’s review and certification of an original document from List A or List C confirming employment eligibility.

Section 3 of the Form I-9

1. Rehire of an Employee

When a former employee is rehired by the employer, the original Form I-9 may be used if the new employment begins within three years of the initial execution of the Form I-9. If the employer uses the original Form I-9, it must determine if the employment eligibility remains valid. If not, the employer must review an original List A or List C document showing employment eligibility, and complete Section 3. Reverification must take place within three days of rehire.

2. Reverification of U.S. Permanent Residents

Reverification is generally unnecessary for lawful permanent residents, regardless of the expiration date on the Permanent Resident Card. Although an expired card cannot be used to satisfy Form I-9 requirements for new employment, the employer is neither required nor permitted to
Chapter 18

reverify the employment authorization of a foreign worker who has presented a valid, unexpired Permanent Resident Card to satisfy Form I-9 requirements. Employers should note that this is true for conditional as well as permanent residents.

However, there is an exception for lawful permanent residents involving temporary I-551 stamps. An “I-551 stamp” is placed in a foreign national’s passport as temporary evidence of his or her lawful permanent resident status until he or she receives the Permanent Resident Card in the mail. If the employee presents an unexpired foreign passport containing a temporary I-551 stamp, reverification of his or her employment eligibility must be done before the expiration date of the I-551 stamp.

3. Reverification of Employees in a Nonimmigrant Status

Nonimmigrant statuses such as H-1B, L-1A, L-1B, E-1, E-2, O-1 or TN confer temporary work authorization for varying periods. Where an employee is authorized to work because of his or her nonimmigrant status, the individual’s employment eligibility will need to be reverified before the expiration of their work authorization period. This may require the sponsoring employer to file a petition with the USCIS to extend status. The petition must be filed prior to the expiration of the nonimmigrant status to avoid disruption of the employee’s work authorization in the U.S. Immigration regulations automatically extend an individual’s status and work authorization while a timely nonimmigrant extension petition is pending, up to 240 days after expiration of the original status.

If the extension petition is approved before the expiration of the original status, the employer must complete Section 3 after reviewing the original extension approval notice with the employee’s new Form I-94, noting the extended validity period. If the extension petition is not approved before the original status expiration, the employer should attach a copy of the USCIS receipt notice showing that the extension petition was timely filed to establish employment eligibility under the USCIS automatic extension rule for 240 days. The employer must complete full reverification once the extension petition has been approved.


An EAD grants work authorization for a temporary period. An employer must reverify employment eligibility before expiration of the current EAD. The employee must be able to present an actual, unexpired EAD card at the time of reverification. A receipt notice for an EAD renewal application is not acceptable interim work authorization and does not permit an automatic extension of an employee’s permission to accept or continue employment in the U.S. Rather, if the USCIS fails to adjudi-
cate the EAD application within 90 days, regulations permit the individual to apply for an interim EAD card.

5. Organizing an Employer’s Form I-9 Records - Tickler Systems
To facilitate the proper reverification of Form I-9 documentation, it is extremely important for employers to implement a tickler system that reminds them well in advance of the expiration of an employee’s employment authorization. Advance warning protects both the employee and the employer. The tickler system provides the employee and the employer with ample time to seek renewal of an expiring work authorization, and minimize disruptions in employment.
I-9 RECORDKEEPING

A. PHOTOCOPYING FORM I-9 DOCUMENTATION

IRCA permits, but does not mandate, that employers maintain photocopies of identity and employment eligibility documentation. If the employer elects to make copies, it must do so for all employees, and must retain the copies with the Form I-9. Furthermore, merely photocopying the documents does not relieve the employer from completing Section 2 in full on the Form I-9.

B. RETENTION REQUIREMENTS RELATED TO THE FORM I-9

Employers are required to maintain Form I-9 records for each employee for the longer of the following: (1) three years from the date of an employee’s hire; or (2) one year after the employee’s termination, whichever is later. The Form I-9 must be retained for all current employees, as well as terminated employees whose records fall within the retention period.

There are several affirmative steps the employer can take to facilitate proper Form I-9 retention and compliance, and to limit liability. The employer should maintain Form I-9 records separately from other Human Resources or employee files to facilitate review and audit of the forms, and to safeguard the privacy of its employees. Maintaining separate Form I-9 records also assists in reverification of employment eligibility and the timely purging of Form I-9 records.

Recent legislation permits employers to complete, sign and store the Form I-9 electronically. Prior to the passage of this law, employers were required to retain completed Forms I-9 on original paper, microfilm or microfiche for the required retention period.

C. THE FORM I-9 AND CORPORATE RESTRUCTURING

If a company acquires an existing business as a result of corporate reorganization, merger, or purchase of stock or assets, it may elect to retain the predecessor employer’s Form I-9 records rather than complete new Forms I-9 for existing employees. As successor in interest, the new employer assumes liability for all Form I-9 violations. To limit liability, the new employer may choose to either conduct a thorough audit of existing Form I-9 records or complete new Forms I-9 for each acquired employee and attach them to the employee’s original Form I-9. Election to complete new Forms I-9 should be applied consistently to all acquired employees.
IRCA’s antidiscrimination provisions are intended to protect U.S. workers and foreign nationals authorized for employment in the U.S. from work-related discrimination by the employer. To enforce these provisions of IRCA, Congress created the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) as a part of the Civil Rights Division of the DOJ. OSC also enforces prohibitions against unfair documentary practices by employers in the verification of employment eligibility of employees.

OSC has jurisdiction over claims alleging individual acts, and patterns or practices, of discrimination against an individual based on his or her national origin or citizenship status. In addition, the law prohibits the employer from engaging in certain forms of retaliation and intimidation. A representative sampling of unfair immigration-related employment practices follows:

- The employer refuses to hire a protected individual due to his or her national origin or citizenship status.
- The employer requests specific documentation in completing the Form I-9 for the purpose of discriminating or with the intent to discriminate against an individual due to his or her national origin or citizenship status.
- The employer refuses to recruit a protected individual due to his or her national origin or citizenship status.
- The employer retaliates against and/or intimidates a protected individual due to a discrimination claim he or she has made against the employer.

Under IRCA, unfair documentary practices, or “document abuse,” is considered an unlawful immigration-related employment practice, which may render the employer subject to penalties. Document abuse may occur during the completion of the Form I-9 when an employer demands that an employee produce a specific document, or more or different documents than are required, to establish employment eligibility. It may also occur if an employer rejects valid documents that reasonably appear genuine on their face.

The Form I-9 cannot be used to prescreen potential applicants. The regulations implementing IRCA clearly indicate that the Form I-9 should be completed at the time of hire. “Hire” is defined as the actual commencement of employment for wages or other remuneration as opposed to during the interview or recruitment process.

During an employment interview or on an employment application, the employer may inquire as to whether the applicant is eligible to work...
and whether he or she will require immediate or future sponsorship for an employment visa. The OSC has advised that employment applicants should not be questioned about their citizenship status. The OSC has sanctioned the following inquiries as acceptable:

- “Are you legally authorized to work in the U.S.?” Yes or No
- “Will you now or in the future require sponsorship for employment visa status (e.g. H-1B visa status)?” Yes or No
ENFORCEMENT AND PENALTIES

Principal authority for enforcement of IRCA’s employment eligibility verification requirements lies with ICE. ICE is authorized to conduct all investigations and audits to determine if an employer has knowingly hired or continued to employ an unauthorized worker, or has violated the Form I-9 verification provisions.

Employers found liable for knowingly violating the provisions of IRCA will receive a cease and desist order, and may be barred from securing government contracts for one year. Furthermore, the employer found to have knowingly hired or continued to employ unauthorized foreign workers in the U.S. will be subject to the following:

- First offense: civil fine of $275 to $2,200 for each unauthorized worker
- Second offense: civil fine of $2,200 to $5,500 for each unauthorized worker
- Every offense thereafter: civil fine of $3,300 to $11,000 for each unauthorized worker

Employers found to have engaged in a “pattern or practice” of knowingly hiring or continuing to employ unauthorized workers are subject to enhanced civil and possible criminal penalties. Penalties include fines of up to $3,000 per unauthorized worker and/or imprisonment for not more than six months for the entire pattern or practice.

In addition to imposing liability for violations involving the knowing employment of unauthorized foreign workers, IRCA also imposes penalties for “paperwork violations.” This term refers to violations committed by employers for not properly completing, maintaining and/or presenting for inspection Form I-9 records for some or all of their employees. Penalties for paperwork violations involve civil fines ranging from $110 to $1,100 for each violation on a Form I-9. In determining the amount of civil penalties that might be levied against the employer, the following factors are typically considered by ICE: the size of the employer; good faith efforts of the employer to comply; whether the employer failed to correct mistakes and/or engaged in a pattern of Form I-9 violations; and the seriousness of the violations.

OSC has the authority to enforce IRCA’s antidiscrimination provisions. Employers found liable for discrimination under IRCA, or found to have committed document abuse, may be subject to fines and other penalties. Fines may be assessed as follows:

- First offense: civil fine of $250 to $2,000 for each individual discriminated against;
- Second offense: civil fine of $2,000 to $5,000 for each individual dis-
• Every offense thereafter: civil fine of $3,000 to $10,000 for each individual discriminated against.

A finding that an employer has committed document abuse may result in a fine of between $100 and $1,000 for each individual discriminated against.
Part Five

Appendices
GLOSSARY OF TERMS

Adjustment of Status (AOS): The process of obtaining permanent resident status in the U.S. without having to leave the U.S.

Actual Wage: The wage paid by an employer to employees in the same occupation with similar qualifications.

Admission: Lawful entry into the U.S. after inspection and authorization by a CBP officer.

Alien: An individual who is not a citizen or national of the U.S.

Applicant: An individual who applies for a benefit.

Beneficiary: An individual who is the subject of an immigration petition.

Bureau of Consular Affairs (BCA): An agency within the DOS, responsible for the oversight and management of U.S. Consulates.

Certifying Officer (CO): An employee of the DOL with final authority for reviewing and approving labor certification applications.

Change of Status (COS): An application by a petitioner or individual to change nonimmigrant status (e.g., from student to employee).

Consular Processing: The process of applying for a visa at a U.S. consular post outside the U.S. Application may be for either a nonimmigrant (temporary) visa or an immigrant (permanent resident) visa.

Curricular Practical Training (CPT): A type of employment authorization granted to F-1 students. CPT includes required cooperative education, alternate work/study, internship, and other types of internships offered by a school. CPT may be authorized by the DSO.

Designated School Official (DSO): For schools authorized to admit F-1 and/or M-1 students, a regularly employed member of the school administration whose office is located at the school and whose compensation does not derive from commissions for recruitment of foreign students. The DSO must be a U.S. citizen or lawful permanent resident of the U.S. The DSO is the principal point of contact on campus for foreign students, and is responsible for updating SEVIS.
Appendices

Duration of Status (D/S): The period of stay typically granted to students and trainees, in lieu of a set expiration date. Determination of the date the individual’s stay actually expires depends on status authorization documents issued by the school or program administrators: Form I-20 for F-1 and M-1 Student, and Form DS-2019 for J-1 Exchange Visitors.

Employer Sanctions: Civil and criminal penalties imposed on employers who, subsequent to the effective date of the Immigration Reform and Control Act (IRCA), on November 6, 1986, hire, continue to employ, or refer or recruit for a fee, foreign nationals who are not authorized to work in the U.S.

Employer Verification: An employer’s obligation to verify the identity and eligibility of all employees hired or referred for a fee after November 6, 1986, on Form I-9 as required by IRCA.

Employment and Training Administration (ETA): An agency within the DOL, responsible for the administration of benefits programs for the employment of foreign workers.

Employment Authorization Document (EAD): USCIS issued document permitting the holder to be employed in the U.S.

Exchange Visitor: A foreign national coming to the U.S. on a temporary basis to participate in an Exchange Visitor program designated by the United States Information Agency (USIA) for the purpose of teaching, instructing, lecturing, studying, observing, conducting research or receiving training.

Extension of Status (EOS): An application by a petitioner or individual to extend existing nonimmigrant status.

Foreign Affairs Manual (FAM): Manual that contains the regulations, policies, and procedures for DOS’s operations.

Green Card: Term commonly used to describe evidence of immigrant or lawful permanent resident status.

Immigrant Visa: A document issued by a consular officer at a U.S. post abroad to an eligible individual permitting him or her to be admitted to the U.S. as an immigrant.
Appendices

Immigrant: An individual possessing a Permanent Resident Card, Form I-551, thus, having the right to reside and work permanently in the U.S. Also known as a “green card” holder or lawful permanent resident.

Inadmissible: A foreign national seeking admission to the U.S. who does not meet the criteria for admission. The individual will be barred from entering the U.S., may be placed in removal proceedings, or may be permitted to withdraw his or her application for admission.

Intracompany Transferee: An individual employed for at least one continuous year out of the last three by a company abroad, and who seeks to enter the U.S. temporarily to continue to work for the same employer, or a subsidiary or affiliate, in a managerial, executive or specialized knowledge capacity.

Labor Certification: Certification by the DOL that an insufficient number of U.S. workers are able, willing, qualified and available to fill a position offered to a foreign national in the geographic area for which the labor certification is sought. In addition, the DOL must make a determination that the employment of the foreign national will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Labor Condition Application (LCA): Application made to the DOL, in which the employer makes four attestations regarding the proposed employment of an H-1B nonimmigrant. The LCA must be certified before the employer files the H-1B petition.

Lawful Permanent Resident (LPR): An individual with the intention to live permanently in the U.S., also known as an immigrant or a “green card” holder.

National Visa Center (NVC): An office of the DOS’s BCA, the NVC is a clearinghouse between all USCIS offices in the U.S. and all U.S. Consulates.

Naturalization: The conferring of U.S. citizenship upon an individual after birth.

Nonimmigrant Visa: A document issued by a consular officer at a U.S. post abroad to an eligible individual permitting him or her to be admitted to the U.S. for a temporary period of time.
Nonimmigrant: An individual seeking to enter the U.S. temporarily.

Occupational Employment Statistics (OES): A comprehensive prevailing wage survey maintained by the DOL.

Optional Practical Training (OPT): A form of employment authorization granted to F-1 students for employment that is not a required part of a student’s academic program. Available either prior to or upon completion of the student’s academic program, or a combination thereof.

Passport: Any travel document issued by a competent authority showing the bearer’s origin, identity and nationality, if any, valid for the admission of the bearer into a foreign country.

Petitioner: An individual or entity filing a petition for a benefit on behalf of a foreign national.

Port of Entry (POE): Any location in the U.S. or its territories that is designated as a point of entry to U.S. territory for foreign nationals and U.S. citizens.

Pre-Flight Inspection (PFI): Complete inspection by a CBP officer at an airport in a foreign country, prior to a foreign national’s travel to the U.S. No further inspection is necessary upon arrival in the U.S.

Prevailing Wage: The average rate of wages paid to workers similarly employed in the geographic area of the beneficiary’s intended employment. A Prevailing Wage Determination (PWD) issued by a DOL State Workforce Agency (SWA) is required before filing a labor certification application. Employer attestations regarding prevailing wages are required in the LCA program, and in the permanent labor certification application.

Program Electronic Review Management System (PERM): The program used to process permanent labor certification applications. The program is intended to streamline and automate the process of labor certification through the use of an attestation-based questionnaire filed electronically on-line or via mail. The certified labor application is supported by a required documentation retention program. A standard PERM labor application is designed to be certified (approved) within 45 to 60 days of receipt.

Reduction in Recruitment (RIR): A fast-track method of permanent

**Request for Evidence (RFE):** Request by a USCIS office for additional evidence on a pending application or petition.

**Specialty Occupation:** An occupation requiring theoretical and practical application of a body of highly specialized knowledge. To qualify for an H-1B visa a foreign national must have the equivalent of a bachelor’s degree or higher in a specific area related to the occupation.

**Specific Vocational Preparation (SVP):** Amount of time prescribed by the DOL for an individual to acquire, through education, training or experience, the minimum skills necessary to perform an occupation. Used by the DOL to determine normal minimum requirements for occupations.

**State Workforce Agency (SWA):** The generic name for the state DOL offices responsible for processing matters relating to the employment of foreign nationals, including prevailing wage requests and labor certification applications.

**Student and Exchange Visitor Information System (SEVIS):** A web-based system for the maintenance of information on international students (F-1, M-1) and exchange visitors (J-1) in the U.S. Administered by the Student and Exchange Visitor Program (SEVP), a division of ICE.

**Temporary Worker:** A foreign national with permission to work in the U.S. for a temporary period of time. Work authorization is limited in duration, and typically limited in scope. Most nonimmigrant classifications permitting employment require sponsorship by an employer for specific terms and conditions of employment.

**USCIS Service Center:** Regional USCIS office established to handle the filing, data entry, and adjudication of certain petitions and applications for immigration services and benefits. There are five service centers in the U.S.: 1) California Service Center (CSC); 2) Nebraska Service Center (NSC); 3) Texas Service Center (TSC); 4) Vermont Service Center (VSC); and 5) National Benefits Center (NBC).

**Visa:** A document issued by a U.S. Consulate that allows the bearer to apply for entry to the U.S. in a certain nonimmigrant classification (e.g., student (F), visitor (B), or temporary worker (H)), or as an immigrant. Issuance of a visa does not guarantee admission to the U.S.
USEFUL IMMIGRATION WEBSITES

APPLYING FOR A DRIVER’S LICENSE:
• Private site providing links and information to all states: http://www.dmv.org

BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE):
• ICE: http://www.ice.gov/graphics/index.htm
• SEVIS: http://www.ice.gov/graphics/sevis/index.htm

DEPARTMENT OF COMMERCE:
• Deemed Export Questions and Answers: http://www.bxa.doc.gov/DeemedExports/DeemedExportsFAQs.html

DEPARTMENT OF HOMELAND SECURITY (DHS):
• DHS: www.dhs.gov
• DHS, Immigration and Borders: http://www.dhs.gov/dhspublic/theme_home4.jsp

DEPARTMENT OF LABOR (DOL):
• DOL: www.dol.gov
• Foreign Labor Certification: http://atlas.doleta.gov/foreign
• Regional and State Office Information: http://www.doleta.gov/regions/
• Online Wage Library: http://www.flcdatacenter.com/
• O*Net Online: http://online.onetcenter.org/
• Dictionary of Occupational Titles: http://www.oalj.dol.gov/libdot.htm

DEPARTMENT OF STATE (DOS):
• DOS: http://www.state.gov
• Bureau of Consular Affairs: travel.state.gov
Appendices

- Destination USA: http://unitedstatesvisas.gov/index.html
- DOS Travel Warnings: http://www.travel.state.gov/travel/warnings.html
- Visa Policy Telegrams: http://travel.state.gov/visa/laws_telegrams.html
- Foreign Consular Offices in the U.S.: http://www.state.gov/s/cpr/rls/fco/
- All embassies around the world: http://www.embassyworld.com/embassy/directory.htm
- Visa fees and reciprocity tables: http://www.travel.state.gov/visa/reciprocity/index.htm
- US Citizen Foreign Entry Requirements to Other Countries: http://travel.state.gov/visa/americans1.html

EMPLOYMENT ELIGIBILITY VERIFICATION AND ANTIDISCRIMINATION:
- About Form I-9, Employment Eligibility Verification: http://uscis.gov/graphics/howdoi/faqeev.htm

INTERNAL REVENUE SERVICE (IRS):
- IRS: www.irs.gov
PROSKAUER ROSE LLP:
- www.proskauer.com (for helpful information on a variety of subjects)
- http://immigration.proskauer.com (for immigration specific information)

SOCIAL SECURITY:
- Social Security Administration: http://www.ssa.gov/
- Social Security and Immigration (including application procedures): http://www.socialsecurity.gov/immigration/

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICE (USCIS):
- USCIS: http://uscis.gov/graphics/index.htm
- How to Report a Change of Address: http://uscis.gov/graphics/howdoi/address.htm
- Immigration Forms and Fees: http://uscis.gov/graphics/formsfee/index.htm
- Infopass Scheduler: http://infopass.uscis.gov/
- Photograph specifications: http://uscis.gov/graphics/publicaffairs/newsrels/04_08_02Photo_flyer.pdf
U.S. CUSTOMS AND BORDER PROTECTION (CBP):
- CBP: http://www.cbp.gov/
- Travel spotlight: http://www.cbp.gov/xp/cgov/travel/
- Border Wait Times: http://apps.cbp.gov/bwt/
- U.S. VISIT: http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml

MISCELLANEOUS:
- U.S. Congress: http://thomas.loc.gov/
- U.S. Senate: www.senate.gov
- American Immigration Lawyers Association: www.aila.org
## QUICK REFERENCE CHART OF NONIMMIGRANT CLASSIFICATIONS COMMONLY ENCOUNTERED BY BUSINESS

<table>
<thead>
<tr>
<th>VISA CATEGORY</th>
<th>ELIGIBILITY CRITERIA</th>
<th>MAXIMUM LENGTH OF STAY</th>
<th>PROCEDURE</th>
</tr>
</thead>
<tbody>
<tr>
<td>B-1 Visitor for Business</td>
<td>Must demonstrate temporary activity in U.S. will benefit foreign employer and not be considered productive employment for U.S. company. Must be on foreign payroll. Must show ties to home country and intent to return abroad.</td>
<td>6 months, but not guaranteed at entry. Possible extensions.</td>
<td>Apply for visa stamp directly at U.S. Consulate</td>
</tr>
<tr>
<td>Visa Waiver Program Visitor for Business</td>
<td>Must demonstrate temporary activity in U.S. will benefit foreign employer and not be considered productive employment for U.S. company. Must be on foreign payroll. Must show ties to home country and intent to return abroad.</td>
<td>90 days only with no possible extension of stay or change of status.</td>
<td>Nationals of 27 authorized countries are visa exempt.</td>
</tr>
<tr>
<td>E-1/ E-2 Treaty Trader/ Treaty Investor</td>
<td>Must show nationality of US employer is a country with which there is a Treaty of Friendship, Commerce &amp; Navigation or Bilateral Investment Treaty, that the employee has the same nationality as the US employer, that the employee is offered a position as an executive, manager or essential skills employee, and that the US company engages in substantial trade with the treaty country (E-1) or that a substantial investment has been made in the US employer by an investor of the treaty country (E-2).</td>
<td>2 years at entry. No fixed limit on number of extensions.</td>
<td>Apply for visa stamp directly at U.S. Consulate.</td>
</tr>
<tr>
<td>H-1B Temporary Worker in Specialty Occupation</td>
<td>Position must require at least Bachelor’s Degree in relevant field and employee must have relevant degree (or equivalent experience).</td>
<td>3 years at entry, with extensions for a total stay of 6 years. Extensions beyond 6 years available in limited circumstances involving concurrent green card processing.</td>
<td>File LCA with DOL and then USCIS petition. If abroad, must then apply for visa stamp at U.S. Consulate. Nationals of some countries are visa exempt.</td>
</tr>
<tr>
<td>H-2B Temporary or Seasonal Workers</td>
<td>Temporary skilled or unskilled labor for a position that is usually seasonal, intermittent or a one-time occurrence. May not displace a US worker.</td>
<td>1 year at entry. Extensions possible for a total of 3 years</td>
<td>File labor certification with Department of Labor and then USCIS petition. If abroad, must then apply for visa stamp at U.S. Consulate. Nationals of some countries are visa exempt.</td>
</tr>
<tr>
<td>L-1 Intra-Company Transferee</td>
<td>Must have been employed abroad continuously for 1 year during last 3 years with parent, branch, affiliate, or subsidiary of U.S. employer. Position abroad and in U.S. must involve managerial or executive (L1A) or specialized knowledge (L1-B) capacity.</td>
<td>3 years at entry with extensions in 2-year increments for a total of 7 years for managers and executives, or for a total of 5 years for specialized knowledge personnel.</td>
<td>If Blanket L visa, may apply for visa directly at U.S. Consulate. If not Blanket L, must file USCIS petition. If abroad, then must then apply for visa stamp at U.S. Consulate. Nationals of some countries are visa exempt.</td>
</tr>
<tr>
<td>VISA CATEGORY</td>
<td>ELIGIBILITY CRITERIA</td>
<td>MAXIMUM LENGTH OF STAY</td>
<td>PROCEDURE</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------</td>
<td>------------------------</td>
<td>-----------</td>
</tr>
<tr>
<td><strong>O-1</strong></td>
<td>Must document a high level of achievement and recognition, showing that employee is at the top of his/her field. Requires evidence establishing at least 3 statutory criteria for demonstrating extraordinary ability or extraordinary achievement in the motion picture industry.</td>
<td>3 years at entry, with no fixed limit on 1 year extensions.</td>
<td>File USCIS petition. If abroad, must then apply for visa stamp at U.S. Consulate overseas. Nationals of some countries are visa exempt.</td>
</tr>
<tr>
<td><strong>TN</strong></td>
<td>Occupation must be designated under NAFTA and employee must satisfy qualifications as required under NAFTA. Must demonstrate ties to home country and intent to return abroad.</td>
<td>1 year at entry. No fixed limit on number of extensions. USCIS may limit entry where nonimmigrant intent is questioned.</td>
<td>Canadians may apply directly at major U.S./Canada border crossings, or at Pre-Flight Inspection at certain airports in Canada. Mexicans must apply for a TN visa at the Consulate. If in the U.S., extension or change of employer may be filed with USCIS.</td>
</tr>
<tr>
<td><strong>F-1</strong></td>
<td>Admission to a qualified academic institution/program, and sufficient funds to pay tuition and costs and support oneself without need for employment. Must show ties to home country and intent to return abroad. Entry and update of information in SEVIS.</td>
<td>Varies with academic program. Admitted for “duration of status.” Granted 60-day grace period at the conclusion of stay.</td>
<td>After I-20 issuance by academic institution, apply for visa stamp directly at U.S. Consulate.</td>
</tr>
<tr>
<td><strong>H-3</strong></td>
<td>Training offered must not be available in the foreign national’s home country, and the training must not involve productive employment. The benefit of the training must accrue to an overseas employer, and not to the US organization.</td>
<td>Varies with length of training program, up to a maximum of 2 years.</td>
<td>File USCIS petition. If abroad, must then apply for visa stamp at U.S. Consulate overseas. Nationals of some countries are visa exempt.</td>
</tr>
<tr>
<td><strong>J-1</strong></td>
<td>Sponsorship by a qualified organization for participation in an authorized program of training or cultural exchange, as a student, trainee, teacher, professor, research scholar, visitor, specialist, alien physician, au pair, camp counselor, or summer work/travel. Entry and update of information in SEVIS.</td>
<td>Varies with program. Admitted for “duration of status.” Granted 30-day grace period at the conclusion of stay.</td>
<td>After DS-2019 issuance by authorized program, apply for visa stamp directly at Consulate.</td>
</tr>
</tbody>
</table>
## TN PROFESSIONS AND REQUIREMENTS UNDER NAFTA

### North American Free Trade Act (NAFTA) Professional Job Series List
Under Appendix 1603.D.1 to Annex 1603 of NAFTA

<table>
<thead>
<tr>
<th>PROFESSION</th>
<th>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accountant</td>
<td>Baccalaureate or Licenciatura Degree; or C.P.A, C.A., C.G.A., or C.M.A.</td>
</tr>
<tr>
<td>Architect</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Computer Systems Analyst</td>
<td>Baccalaureate or Licenciatura Degree; or Postsecondary Diploma or Post Secondary Certificate and three years experience</td>
</tr>
<tr>
<td>Disaster Relief Insurance Claims Adjuster (Claims Adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)</td>
<td>Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims</td>
</tr>
<tr>
<td>Economist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Engineer</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Forester</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Graphic Designer</td>
<td>Baccalaureate or Licenciatura Degree; or postsecondary diploma and three years experience</td>
</tr>
<tr>
<td>Hotel Manager</td>
<td>Baccalaureate or Licenciatura Degree in hotel/restaurant management; or postsecondary diploma or postsecondary certificate in hotel/restaurant management and three years experience in hotel/restaurant management</td>
</tr>
</tbody>
</table>
## Appendices

### PROFESSION

<table>
<thead>
<tr>
<th>PROFESSION</th>
<th>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial Designer</td>
<td>Baccalaureate or Licenciatura Degree; or postsecondary diploma or postsecondary certificate, and three years experience</td>
</tr>
<tr>
<td>Interior Designer</td>
<td>Baccalaureate or Licenciatura Degree; or postsecondary diploma or postsecondary certificate, and three years experience</td>
</tr>
<tr>
<td>Land Surveyor</td>
<td>Baccalaureate or Licenciatura Degree or state/provincial/federal license</td>
</tr>
<tr>
<td>Landscape Architect</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Lawyer (including Notary in the province of Quebec)</td>
<td>L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar</td>
</tr>
<tr>
<td>Librarian</td>
<td>M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura degree was prerequisite)</td>
</tr>
<tr>
<td>Management Consultant</td>
<td>Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement</td>
</tr>
<tr>
<td>Mathematician (including statistician and including Actuary)</td>
<td>Baccalaureate or Licenciatura Degree. An Actuary must satisfy the necessary requirements to be recognized as an actuary by a professional actuarial association or society.</td>
</tr>
<tr>
<td>Range Manager/Range Conservationist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Research Assistant (working in a postsecondary educational institution)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Scientific Technician/Technologist</td>
<td>Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research</td>
</tr>
<tr>
<td>Social Worker</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Sylviculturist (including forestry)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>PROFESSION</td>
<td>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>-------------------------------------------------------------</td>
</tr>
<tr>
<td>Technical Publications Writer</td>
<td>Baccalaureate or Licenciatura Degree, or postsecondary diploma or postsecondary certificate, and three years experience</td>
</tr>
<tr>
<td>Urban Planner (including Geographer)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Vocational Counselor</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
</tbody>
</table>

### MEDICAL/ALLIED PROFESSIONALS

<table>
<thead>
<tr>
<th>PROFESSION</th>
<th>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dentist</td>
<td>D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license</td>
</tr>
<tr>
<td>Dietitian</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Medical Laboratory Technologist</td>
<td>Baccalaureate or Licenciatura Degree; or postsecondary diploma or post secondary certificate, and three years experience</td>
</tr>
<tr>
<td>(Canada)/Medical Technologist (Mexico and the United States)</td>
<td>Baccalaureate or Licenciatura Degree; or postsecondary diploma or post secondary certificate, and three years experience</td>
</tr>
<tr>
<td>Nutritionist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Occupational Therapist</td>
<td>Baccalaureate or Licenciatura Degree; or state provincial license</td>
</tr>
<tr>
<td>Pharmacist</td>
<td>Baccalaureate or Licenciatura Degree; or state provincial license</td>
</tr>
<tr>
<td>Physician (teaching or research only)</td>
<td>M.D., Doctor en Medicina; or state/provincial license</td>
</tr>
<tr>
<td>Physiotherapist/Physical Therapist</td>
<td>Baccalaureate or Licenciatura Degree; or state/provincial license</td>
</tr>
<tr>
<td>Psychologist</td>
<td>State/provincial license; or Licenciatura degree</td>
</tr>
<tr>
<td>Recreational Therapist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Registered Nurse</td>
<td>State/provincial license or Licenciatura degree</td>
</tr>
<tr>
<td>Veterinarian</td>
<td>D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license</td>
</tr>
</tbody>
</table>

### SCIENTIST

<table>
<thead>
<tr>
<th>PROFESSION</th>
<th>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural (Agronomist)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Animal Breeder</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
</tbody>
</table>
## Appendices

### PROFESSION

<table>
<thead>
<tr>
<th>PROFESSION</th>
<th>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Animal Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Apiculturist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Astronomer</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Biochemist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Biologist (including Plant Pathologist)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Chemist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Dairy Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Entomologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Epidemiologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geneticist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geochemist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Geophysicist (including Oceanographer in Mexico and the United States)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Horticulturist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Meteorologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Pharmacologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Physicist (including Oceanographer in Canada)</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Plant Breeder</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Poultry Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Soil Scientist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Zoologist</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
</tbody>
</table>

### TEACHER

<table>
<thead>
<tr>
<th>TEACHER</th>
<th>MINIMUM EDUCATION REQUIREMENTS AND ALTERNATIVE CREDENTIALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>College</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>Seminary</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
<tr>
<td>University</td>
<td>Baccalaureate or Licenciatura Degree</td>
</tr>
</tbody>
</table>
# Form I-9 and Revised List of Acceptable Documents

---

**Section 1. Employee Information and Verification.** To be completed and signed by employee at the time employment begins.

<table>
<thead>
<tr>
<th>Field Name</th>
<th>First</th>
<th>Middle</th>
<th>Last</th>
<th>Social Security #</th>
</tr>
</thead>
<tbody>
<tr>
<td>Address (Street Name and Number)</td>
<td>First Name</td>
<td>State</td>
<td>Zip Code</td>
<td>Social Security #</td>
</tr>
<tr>
<td>City</td>
<td>State</td>
<td>Zip Code</td>
<td>Social Security #</td>
<td></td>
</tr>
</tbody>
</table>

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

Employee's Signature

Preparer and/or Translator Certification. (To be completed and signed if Section 1 is prepared by a person other than the employee.) Under penalties of perjury, that I have completed the completion of this form and that the best of my knowledge the information in true and correct.

Preparer's/Translator's Signature

<table>
<thead>
<tr>
<th>Address (Street Name and Number)</th>
<th>City</th>
<th>State</th>
<th>Zip Code</th>
<th>Client Name</th>
<th>Date (month/day/year)</th>
</tr>
</thead>
</table>

**Section 2. Employer Review and Verification.** To be completed and signed by employer. Examine one document from List A OR one from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

<table>
<thead>
<tr>
<th>Document Type</th>
<th>List A</th>
<th>List B</th>
<th>AND</th>
<th>List C</th>
</tr>
</thead>
<tbody>
<tr>
<td>Document #</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expiration Date (MM/YY)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Certification** - I, attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)

<table>
<thead>
<tr>
<th>Signature of Employee of Authorized Representative</th>
<th>Print Name</th>
<th>Date (month/day/year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business or Organization Name</td>
<td>Address (Street Name and Number, City, State, Zip Code)</td>
<td>Data (month/day/year)</td>
</tr>
</tbody>
</table>

**Section 3. Updating and Reverification.** To be completed and signed by employer.

A. New Name (if applicable) | Date of Change (month/day/year) (if applicable) |
|----------------------------|-----------------------------------------------|

B. If employee's previous grant of work authorization has expired, provide the information below for the document that would reflect current employment eligibility.

<table>
<thead>
<tr>
<th>Document Title</th>
<th>Document #</th>
<th>Expiration Date (MM/YY)</th>
</tr>
</thead>
</table>

I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employee of Authorized Representative | Date (month/day/year) |
|-------------------------------------------------|----------------------|

NOTE: This is the 1986 version of the Form I-9 that has been referenced with a current printing date to reflect the recent transition from the INS to DHS and its components.
### LISTS OF ACCEPTABLE DOCUMENTS

#### LIST A
**Documents that Establish Both Identity and Employment Eligibility**

1. U.S. Passport (unexpired or expired)
2. Certificate of U.S. Citizenship (Form N 560 or N 551)
3. Certificate of Naturalization (Form N-550 or N-550)
4. Unexpired foreign passport, with I-94 stamp or attached Form I-94 indicating unexpired employment authorization
5. Permanent Resident Card or Alien Registration Receipt Card with photograph (Form I-551 or I 552)
6. Unexpired Temporary Resident Card (Form I-899)
7. Unexpired Employment Authorization Card (Form I-766A)
8. Unexpired Reentry Permit (Form I-1397)
9. Unexpired Refugee Travel Document (Form I-571)
10. Unexpired Employment Authorization Document issued by DMH that contains a photograph (Form I-868D)

#### LIST B
**Documents that Establish Identity**

1. Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address
2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color and address
3. School ID card with a photograph
4. Voter's registration card
5. U.S. Military card or draft record
6. Military dependent's ID card
7. U.S. Coast Guard Merchant Seaman Card
8. Native American tribal document
9. Driver's license issued by a Canadian government authority
10. School record or report card
11. Clinic, doctor or hospital record
12. Day-care or nursery school record

#### LIST C
**Documents that Establish Employment Eligibility**

1. U.S. social security card issued by the Social Security Administration (other than a card stating it is not valid for employment)
2. Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)
3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal
4. Native American tribal document
5. U.S. Citizen ID Card (Form I-197)
6. ID Card for use of Resident Citizen in the United States (Form I-770)
7. Unexpired employment authorization document issued by INS (other than those listed under List A)

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)