United States
Business Immigration Manual

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by

Baker & McKenzie LLP's
Global Migration and
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Unless otherwise indicated, the law is as stated on January 1, 2007.

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Preface

Thank you for reading our U.S. Business Immigration Manual. This Manual provides a general overview of: (i) the types of U.S. visas most commonly used by employers; (ii) methods for obtaining permanent residence through employer sponsorship; and (iii) important employer responsibilities under U.S. immigration law.

This Manual is not intended to be exhaustive, as U.S. immigration laws and policies are constantly changing. As we go to press, the content of this publication is accurate. Nonetheless, we encourage you to visit www.bakerimmigration.com for updates regarding changes to U.S. immigration law, and to subscribe to our quarterly Global Migration and Executive Transfers Update, and periodic Alerts by emailing betsy.morgan@bakernet.com.

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Introduction

International commerce depends on a fluid mobility of workers throughout the globe. U.S. employers' hire or transfer of an executive or other business professional from outside the United States involves a number of key issues, including business and tax analyses, global benefits offerings, and immigration. It is essential that the employer consider these issues as interdependent aspects of the relocation process. Our objective in this Manual is to highlight the critical aspects of the U.S. immigration laws that impact each new foreign hire or expatriate transfer.

Under U.S. immigration law, employers are responsible for verifying that all employees are authorized to work in the United States. Employers that hire or employ persons without authorization to work in the United States can be subject to civil and criminal sanctions. Additionally, employees who work without proper authorization can be subject to removal from the United States. Therefore, when hiring or transferring persons who are not U.S. citizens or lawful permanent residents, employers need to develop a management system to obtain the required visa and work authorization for each foreign worker, monitor the visa and work permit renewal needs for each such worker, and meet the compliance and verification obligations under U.S. immigration laws.

To determine the type of employment authorization appropriate for an executive or business professional, it is necessary to examine (i) the nature of the work to be performed in the United States, (ii) the expected length of stay, (iii) the person's educational and professional credentials, and (iv) the employer's long-term business plans. The immigration process will work most effectively when it is aligned with the realities of the business need and when it is analyzed in conjunction with the tax consequences of the particular situation.

Among the types of nonimmigrant visas available for executives and business professionals are: B (for business and pleasure visitors), E (for treaty traders, treaty investors, and Australian citizens in specialty occupations), F (for students), H (for temporary trainees or professional workers), J (for exchange visitors, including corporate trainees), L (for intracompany transferees), M (for vocational students), O (for aliens of extraordinary ability in the sciences, arts, education, business or athletics, or with a record of extraordinary achievement in the motion picture or television industry, and accompanying aliens providing essential support), and TN (for Canadian or Mexican business persons entering the United States pursuant to the work authorization provisions of the North

American Free Trade Agreement ("NAFTA")). These visas vary in terms of purpose, eligibility, permitted length of U.S. stay, and renewability. Additionally, all of these nonimmigrant visa categories, except the B category, provide for the issuance of dependent visas to the spouse and minor children of the nonimmigrant visa holder so that they may accompany the employee during the U.S. assignment. The E and L visa categories also allow the accompanying spouse to obtain work authorization; the other categories typically do not provide work authorization for trailing spouses.

The U.S. visa system thus includes a variety of visa options. However, the impact of quota limitations can impact certain categories, in particular the H category for specialty occupation professionals. In addition, the expectation of the U.S. immigration agencies for proof of eligibility vary at different times. A close evaluation of the specific facts and circumstances and the development of an effective immigration strategy at the initiation of the relocation will facilitate a seamless transfer to the U.S. employer.

***Note**: Although the F, J and M visa categories primarily accommodate students and trainees, a discussion of these categories is still relevant because these visa holders are often later hired by U.S. employers. We do not address here the types of nonimmigrant visas that are designed for the atypical business professional, including: A (for diplomatic or consular persons and other foreign government officials), D (for crewmen of vessels or aircraft), G (for persons working for certain international organizations designated by Presidential executive order that are entitled to benefits under the International Organizations Immunities Act), I (for foreign media representatives), P (for athletes and entertainers), and R (for ministers of religion, religious professionals and other religious workers).*

Nonimmigrant Visa Categories

B Visas: Business and Pleasure Visitors

The B visa category, which is the most widely used visa category, is intended for temporary visitors who are traveling to the United States for short trips and who have no intent of abandoning their foreign residence. 8 U.S.C. § 1101(a)(15)(B). This category encompasses two types of visas: B-1 for business visitors and B-2 for pleasure visitors.

The B-1 visa is the standard visa issued to persons who will be entering the United States temporarily to engage in business, but who will not be employed by a U.S. entity. B-1 visa holders may not be paid by a U.S. entity, nor may their activities in the United States "inure to the benefit" of a U.S. company. Immigration regulations indicate that "business" includes (i) conventions, (ii) meetings/conferences, (iii) consultations, and (iv) other legitimate activities of a commercial or professional nature on behalf of a non-U.S. employer. However, specifically excluded from the definition of "business" is any local employment or labor for hire. 22 C.F.R. § 41.31(b)(1). Because the B visa is easier to obtain than other nonimmigrant visas, it is a good choice for executives or business professionals traveling to the United States for certain specific but brief purposes.

The B-2 visa is solely for pleasure visitors and tourists. B-2 visa holders may not perform any labor or engage in any studies during their stay in the United States. 22 C.F.R. § 41.31(b)(2).

B-1 and B-2 visa holders are normally admitted for six months and can extend their stay for an additional six months. 8 C.F.R. § 214.2(b).

Example: A Brazilian company intends to set up a subsidiary in the United States. Alexandre, the COO of the Brazilian company, needs to make a series of trips to the United States to engage in start-up activities. With a B-1 visa, Alexandre may enter the United States to speak with real estate agents, look at potential manufacturing and/or office space, commence contract negotiations with regard to that space and meet with potential subcontractors. As long as Alexandre remains on the payroll of the Brazilian company, these activities would be consistent with the terms of the B-1 visa.

Alternatively, if Alexandre is sent to the United States by his Brazilian employer to provide services on-site at an established U.S. company, his activity may not be permitted under the B-1 visa. Even if the U.S. company were transferring funds to the Brazilian company for Alexandre's services, the B-1 visa would still not be appropriate. Alexandre would likely be deemed to be working for the U.S. company even if he continues to be paid by the Brazilian company. This second scenario would violate the terms of the B-1 visa. Alexandre's U.S. employer should, instead, obtain work authorization for this person under another visa category that authorizes employment.

Visa Waiver Program

Under the Visa Waiver Program, persons from certain countries may enter the United States for a period up to ninety days without first obtaining a B visa in their home country. 8 U.S.C. § 1187; 8 C.F.R. § 214.2(b)(2). The program includes countries which provide reciprocal benefits to U.S. citizens. Persons with passports issued by the following countries are presently qualified under this program:

Andorra	Belgium	Finland
Australia	Brunei	France
Austria	Denmark	Germany
Iceland	The Netherlands	Spain
Ireland	New Zealand	Sweden
Italy	Norway	Switzerland
Japan	Portugal	United Kingdom
Liechtenstein	San Marino	
Luxembourg	Singapore	
Monaco	Slovenia	

8 C.F.R. § 217.2

To benefit from the Visa Waiver Program, a person from a qualifying country must present his or her passport and a roundtrip ticket when entering the United States. Persons admitted under the Visa Waiver Program are authorized to stay

in the United States for up to ninety days and cannot extend or change their visa status in the United States. 8 C.F.R. § 217.3(a). Persons who overstay the ninety-day period will be permanently barred from using the Visa Waiver Program and thereafter must apply for a B visa to visit the United States.

***Practical Pointer**: A person entering the United States with a B-1 visa or under the Visa Waiver Program may wish to carry a letter from his or her non-U.S. employer which confirms: (i) the limited duration of the trip; (ii) the direct benefit of the trip to the non-U.S. employer; (iii) the continuation of the traveler's direct and indirect compensation from the employer abroad; and (iv) the traveler's other ties to the home country. A travel itinerary and the traveler's return ticket to his or her home country can also be helpful. If the traveler is questioned by a border officer, such a letter, showing the ties to the company abroad, can allay the officer's concerns and ease a difficult examination at the port of entry.*

All travelers seeking to enter the United States under the Visa Waiver Program must have a machine-readable passport. Passports issued on or after October 26, 2005, must have a digital photograph. Passports issued on or after October 26, 2006, must be "e-Passports" which include an integrated computer chip capable of storing biographic data and a digital photograph. Persons from Visa Waiver countries who do not have a passport meeting these requirements must apply for a B visa before visiting the United States.

Additionally, effective January 8, 2007, citizens of the United States, Canada, Mexico, and Bermuda must carry a passport when traveling within the western hemisphere by air or through commercial sea ports. It is anticipated that the passport requirement will extend to all land border crossings by January 1, 2008.

***Note**: A machine readable-passport has two lines of text as letters, numbers and chevrons (<<<) at the bottom of the personal information page. A digital photograph is one that is printed on the page rather than glued or laminated into the passport.*

E Visas: Treaty Traders, Treaty Investors, and Australian Citizens in Specialty Occupations

The E visa is for persons and the dependent family members of those who will be working in the United States pursuant to treaties of commerce and navigation between the United States and the persons' home country. 8 U.S.C. § 1101(a)(15)(E). Generally, these treaties provide reciprocal benefits to U.S. citizens in the other treaty country. Such treaties are currently in place between the United States and 122 countries. 9 FAM § 41.51, Exhibit 1.

E-1 and E-2 Visas for Treaty Traders and Treaty Investors

In order to qualify for an E-1 or E-2 visa, the following four requirements must be met:

A treaty of commerce and navigation must exist between the United States and the country in question.

The person or entity must qualify as either a "Treaty Trader" or "Treaty Investor." A Treaty Trader must demonstrate that it engages in "substantial" trade, principally between the United States and the treaty country. Under immigration regulations, "trade" is defined broadly to encompass the exchange, purchase, or sale of goods and/or services. Relevant "services" include banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism and technology transfer. 8 C.F.R. § 214.2(e)(1). Alternatively, a Treaty Investor is someone who has invested a substantial amount of capital in a U.S. enterprise which the investor develops and directs. There is no fixed amount of capital required to qualify. However, the investment must be considered "substantial" for the industry involved. In addition, the amount invested must be subject to some kind of risk. Because the investor must develop and direct the investment, the investment must be active, not passive. 8 C.F.R. § 214.2(e)(2).

The employee must either act in an executive or supervisory capacity, or have special, essential skills or qualifications.

The Treaty Trader or Treaty Investor must have the same nationality as the treaty country. If the Treaty Trader or Treaty Investor is a person, he or she cannot be a U.S. permanent resident alien. If the Treaty Trader or Treaty Investor is an organization, it must be at least fifty percent owned by those with the treaty nationality. 8 C.F.R. § 214.2(e)(3).

E visa holders are usually admitted to the United States for two years upon each entry, although the underlying E visa stamp may be valid for up to five years. There is no limit on the number of years that a person can hold E status.

Spouses and minor children of Treaty Investors and Treaty Traders may receive dependent E-1 or E-2 visas, even if they are not citizens of the treaty country. Additionally, spouses of Treaty Traders and Treaty Investors may apply for authorization to work in the United States. 8 C.F.R. § 274a.12(a)(17).

***Example**: A British company sets up a new enterprise in the United States by investing a substantial amount of money in the new enterprise (i.e., purchasing/renting warehouse and office space and hiring U.S. employees) and qualifies as a Treaty Investor. The investing British company wishes to send two of its employees, Eva, a German national, and Michael, a British national, to work at the U.S. enterprise as general managers. Both Eva and Michael have managerial qualifications which they obtained while working for the British company. Assuming the U.S. entity has been registered as a qualified supporting entity, Michael, as a British national, could qualify for an E visa to perform services as a general manager in the United States. However, Eva, who has the same professional qualifications as Michael, will not qualify for an E visa because she does not have the same nationality as that of the investing British company.*

E-3 Visas for Australian Citizens in Specialty Occupations

The E-3 visa is available solely to Australian citizens who will work in the United States in a specialty occupation. Currently, 10,500 E-3 visas may be issued each year. 8 U.S.C. § 1101(a)(15)(E)(iii).

The E-3 visa category is a hybrid of the H-1B and E-1/E-2 visa categories. Like the H-1B visa, the E-3 category is limited to occupations that require (i) the theoretical and practical application of a body of highly specialized knowledge, and (ii) the attainment of a bachelor's degree or higher (or the equivalent) in the specialty field. Additionally, the U.S. employer must make attestations about the wage and working conditions in a Labor Condition Application ("LCA") which is submitted to the Department of Labor. The certified LCA and other necessary evidence for the classification can be presented directly to a U.S. Consulate abroad for review and approval. 8 U.S.C. § 1184(e)(6).

Like other E visas, the E-3 category is a treaty-based visa that does not require a petition to be filed with and approved by the USCIS prior to visa issuance. Also, the E-3 visa is generally issued in two-year increments and can be renewed indefinitely. Spouses and minor children may receive dependent E-3 visas without counting toward the numerical limitation, even if they are not also Australian citizens, and E-3 spouses may apply for authorization to work in the United States.

F Visas: Academic Students

The F-1 visa is available to persons who will be in the United States temporarily to pursue a full-time course of study at an approved educational institution. 8 U.S.C. § 1101(a)(15)(F).

An F-1 visa holder is permitted to accept employment only under limited circumstances. The visa holder can work on-campus full-time during vacations and holidays, but no more than 20 hours per week during the academic year if the educational institution approves such employment. 8 C.F.R. § 214.2(f)(9)(i).

F-1 visa holders may also work off-campus pursuant to "Curricular Practical Training." In order to do so, the visa holder must be in good academic standing and obtain the approval of a school official designated by the government. As with on-campus employment, the visa holder can work no more than 20 hours per week during the academic year, but may work full-time during holidays and vacations. 8 C.F.R. §214.2(f)(9)(i).

Employment that qualifies as "Optional Practical Training" may also be permitted during the student's curricular program and immediately afterwards if approved by the educational institution. To qualify for Optional Practical

Training, the student must be enrolled full-time for at least nine months at an approved post-secondary institution, and the training position must be directly related to the student's major field of study. Optional Practical Training is limited to a maximum of twelve months and must be completed within fourteen months of completing the curricular program. 8 C.F.R. § 214.2(f)(10).

Spouses and minor children of F-1 visa holders may receive dependent F-2 visas. 8 C.F.R. § 214.2(f)(3).

***Practical Pointer**: Foreign nationals who decide to study at a U.S. institution after entering the United States as a visitor may not begin that course of study until the USCIS approves a change of status request from B-1 or B-2 to F-1. 8 C.F.R. § 248.1 (c)(3). The USCIS will deny a request to change status from B-1 or B-2 to F-1 unless the change of status applicant has advised the officers at the port of entry of his or her intention to begin a course of study in the United States. In this case, the officer should note that the alien is a prospective student on his or her I-94 card.*

H Visas: Temporary Workers

Visas under the H category are issued to persons who will work temporarily in the United States. 8 U.S.C. § 1101(a)(15)(H). Of the several categories of H visas issued, only three are pertinent to this discussion: (i) H-1B for persons employed in a "specialty occupation" and fashion models of distinguished merit or ability; (ii) H-2B for temporary nonagricultural workers; and (iii) H-3 for trainees.

Spouses and minor children of H visa holders may receive dependent H-4 visas. However, H-4 spouses and children are not authorized to work in the United States. 8 C.F.R. 214.2(h)(9)(iv).

H-1B Visas for Professionals in Specialty Occupations

The primary purpose of the H-1B visa is to admit persons employed in "specialty occupations" to perform services in the United States. In order to obtain an H-1B visa, a petition must be filed on behalf of the employee by the U.S. employer or the employer's agent. The employer must have an Federal

Employer Identification Number issued by the Internal Revenue Service, and must be a person, corporation, contractor, or other association or organization with a place of business in the United States. 8 C.F.R. § 214.2(h)(4)(ii).

The employer must show that the position which the person will fill is a "specialty occupation." A specialty occupation is one that requires: (i) the theoretical and practical application of a body of highly specialized knowledge; and (ii) a bachelor's degree or higher in the specialty (or its equivalent) as a minimum for entry into the occupation in the United States. Specialty occupations include those in the fields of (i) architecture, (ii) engineering, (iii) mathematics, (iv) physical sciences, (v) social sciences, (vi) medicine and health, (vii) education, (viii) business specialties, (ix) accounting, (x) law, (xi) theology, and (xii) the arts. 8 C.F.R. § 214.2(h)(4)(ii).

The employer's petition must demonstrate why the position is a specialty occupation by submitting evidence that: (i) a bachelor's or higher degree is normally the minimum entry requirement, and that the degree is commonly required in the industry in parallel positions; (ii) the duties to be performed are so complex or unique that only a degree-holder can perform them, and that the employer normally requires a degree or equivalent for the position; or (iii) the specific duties are so specialized and complex that the knowledge required to perform them is usually associated with having attained a degree. 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, the employer must prove that the person is qualified to engage in that specialty occupation. This is done by demonstrating that the person is licensed in the state of employment, if necessary, and that he or she has obtained the required degree. Where the person lacks the required degree, the employer may show that he or she has obtained special training and/or experience in the specialty through progressively responsible positions directly related to the specialty. 8 C.F.R. § 214.2(h)(4)(iii)(C).

The employer may also demonstrate that the person's experience is equivalent to a required degree in several ways, such as providing: (i) an evaluation from an official at a college or university that normally grants credit based on such training or work experience; (ii) the results of a recognized college equivalency examination or certification; or (iii) registration from a nationally-recognized professional association that is known to grant certification or registration to persons qualified in the specialty. 8 C.F.R. § 214.2(h)(4)(iii)(D).

Before filing the petition with the USCIS, the employer must first receive an approved Labor Condition Application ("LCA"), Form ETA-9035, from the Department of Labor ("DOL") regarding the position to be filled. Employers file the Form ETA-9035 with the DOL via the Internet. On this form, the employer must provide, among other things, the job title, location, and salary offered. The employer must also make certain attestations regarding the wage and working conditions of the position. Notice of the filing must be made publicly available to the employees at the intended place of employment for at least ten business days. If the employer violates the terms of the LCA, the DOL may enforce civil monetary penalties against the employer, or temporarily or permanently bar the employer from applying for permission to hire other persons in H-1B status. 8 C.F.R. § 214.2(h)(4)(i)(B).

Additionally, the employer must certify that, if the person is dismissed before the expiration of his or her visa, the employer will be liable for the reasonable costs of the person's return transportation abroad. If the person terminates the employment relationship voluntarily, the employer is not obligated to pay the return transportation costs. 8 C.F.R. § 214.2(h)(4)(iii)(E).

The H-1B visa is subject to a maximum six-year duration, with some exceptions for persons for whom employment-based permanent residence applications are pending. Generally, once a person has been in the United States for six years in H-1B (or L) visa status, he or she must spend at least one year outside the United States before becoming eligible for a new H-1B visa. 8 C.F.R. § 214.2(h)(13)(iii)(A).

No more than 65,000 new H-1B visas may be issued annually. 8 C.F.R. § 214.2(h)(8)(i)(A). Generally, this cap applies to first-time H-1B visa holders, with some exceptions for (i) persons seeking employment with institutions of higher education, nonprofit research organizations, and governmental research organizations; and (ii) certain physicians changing from J-1 to H-1B Status.

Part of the 65,000 annual allotment is also set aside for citizens of Chile and Singapore pursuant to treaties between the United States and the respective countries.

An additional 20,000 new H-1B visas are available each fiscal year to persons who have a master's or higher degree from a U.S. institution of higher education. This 20,000 pool for advanced degree holders augments the annual cap of 65,000 H-1B visas.

***Note**: For the past few years, the annual H-1B cap has been reached on or before the beginning of the fiscal year (October 1), making employers scramble to find suitable visa options for new hires. Some alternatives may include (i) the O visa category for aliens with extraordinary ability, (ii) the TN visa category for certain Canadian and Mexican professionals, as discussed below, and (iii) the E-3 visa category for certain Australian professionals, as discussed above.*

***Example**: Hitomi, a Japanese biochemist, receives an offer from a U.S. pharmaceutical company to manage a research project relating to the development of new drugs. The position requires someone with a bachelor's degree in biochemistry, so it qualifies as a specialty occupation. Because Hitomi has a graduate degree in biochemistry, she is qualified for the position and should be eligible for an H-1B visa.*

H-2 Visas for Temporary Nonagricultural Workers

A second H visa is the H-2B visa, which is issued to temporary nonagricultural workers.

To obtain an H-2B visa, two documents must be submitted to the USCIS: (i) an employer petition; and (ii) a DOL certification. The petition must be prepared by the prospective U.S. employer or the authorized representative of a foreign employer with a U.S. location. 8 C.F.R. § 214.2(h)(6)(iii).

The petition must state that the person who will perform temporary services in the United States will not displace any U.S. workers capable of performing the same services, and that the employment of the person will not adversely affect the wages or working conditions of U.S. employees. 8 C.F.R. § 214.2(h)(6)(i). This must also be stated in the DOL certification.

H-2B visas are granted only to permit persons to work temporarily in the United States. Therefore, the employer must explain in the petition that the need for the person's services is "temporary." The regulations define "temporary" as a need for one year or less, including one-time occurrences, seasonal changes, or peakload needs. 8 C.F.R. § 214(h)(6)(ii)(B).

Although there are no special educational requirements to obtain an H-2B visa, the petition should explain what qualifications the person has which enable him or her to perform the services needed by the employer. The employer must also certify that it is liable for the person's transportation costs home if dismissed before the period of authorized stay has ended. The employer does not have this liability if the person terminates his or her employment voluntarily. 8 C.F.R. § 214.2(h)(6)(vi).

A maximum of 66,000 H-2B visas may be issued annually. Of the 66,000 H-2B visas available each year, only 33,000 may be used during the first six months of the fiscal year. The H-2B visa is issued for periods up to one year but extensions are available. However, no H-2B visa holder may remain in the United States for more than three years.

***Example**: A U.S. construction firm wishes to install a particular type of stained glass in a hotel it is constructing, but no one in the United States knows how to make it. The construction firm wishes to hire Bruno, an Italian glass maker who is an expert in crafting this particular kind of stained glass, to make the glass for the hotel. Assuming the other requirements are satisfied, Bruno should be eligible for the H-2B visa because he will not displace any U.S. workers in this job, and the construction firm needs his expertise for this one-time occurrence.*

H-3 Visas for Trainees

A third category of H visa is the H-3 visa issued to trainees. This category is designed to facilitate participation in training programs in any field, including agriculture, commerce, communications, finance, government, transportation or the professions, as well as training in an industrial establishment. The petition, which is submitted to the USCIS by the organization sponsoring the training program, must demonstrate that: (i) the training is unavailable in the person's home country; (ii) the person will not be placed in a position in which U.S. citizen and permanent resident workers are regularly employed; (iii) the training will include no productive employment unless it is incidental and necessary to the training; and (iv) the training will benefit the person in pursuing a career outside the United States. 8 C.F.R. § 214.2(h)(7)(ii). The maximum period stay in H-3 status is two years. C.F.R. § 214.2(h)(13)(iv).

J Visas: Exchange Visitors

Students, teachers, professors, research scholars, and other professionals may apply for the J visa in order to participate in U.S. government-approved educational exchange programs. 8 U.S.C. § 1101(a)(15)(J); 8 C.F.R. § 214.2(j).

J visa holders can engage in employment related to their programs with the approval of the program sponsor. 22 C.F.R. § 514.16.

Corporations frequently use the J visa for temporary business trainees. Some professional associations and third party organizations offer J-1 sponsorship programs specifically for this purpose. Corporations that routinely use the J visa to accommodate trainees may also register themselves as sponsoring organizations to facilitate the issuance of J visas to their trainees. The J-1 Program does not require employers to submit an application through the USCIS, as they would for most employment visas. Rather, the prospective trainee requests employment or training authorization directly from the sponsoring organization. This process is usually faster than the process for obtaining other work visas.

The primary drawback of the J visa is that the beneficiary, depending on his or her skill set and country of citizenship, may be required to return to his or her home country for two years after the program is completed. Although there are limited exceptions, persons subject to this "home stay" requirement may not change their visa status or return to the United States to work until the two-year period has elapsed.

The duration of the J visa is normally the length of time needed to complete the program plus thirty days. However, there are general limitations on the duration of visas held by certain categories of persons such as (i) graduate nurses (two years); (ii) graduate medical professionals (seven years); (iii) teachers, professors and research scholars (three years); (iv) business and industrial trainees (18 months); and (vi) specialists (one year). These are maximum limitations only and do not extend the period for which the person's visa would otherwise be valid. 22 C.F.R. § 514.23.

Spouses and minor children of J visa holders may receive dependent J-2 visas. 8 C.F.R. § 214.2(j)(1)(i). J-2 spouses and minor children may also apply for employment authorization from the USCIS. However, the request for

employment authorization will not be approved if the income is needed to support the principal J-1 visa holder. 8 C.F.R. § 214.2(j)(1)(v)(B).

K Visas: Fiancé(e)s and Spouses of U.S. Citizens

The K-1/K-2 visa facilitates the admission into the United States of fiancé(e)s of U.S. citizens and their minor children prior to their marriage. The K-3/K-4 visa classifications are available to the spouse and unmarried minor children of U.S. citizens, enabling them to live and work in the United States while they are waiting to become U.S. permanent residents. 8 C.F.R. § 214.2(k).

The U.S. citizen must petition for K-1/K-2 or K-3/K-4 status on behalf of his or her fiancé(e) or spouse and their unmarried children under 21. A K-1/K-2 or K-3/K-4 visa holder is eligible for employment authorization incident to his or her status but must nevertheless apply for employment authorization with the USCIS. Although this is a family-based nonimmigrant visa, employers may need to consider this option when transferring U.S. citizen employees back to the United States after an assignment abroad.

L Visas: Intracompany Transferees

The purpose of the L visa is to permit a qualifying organization to transfer certain types of employees from a non-U.S. location to perform services in the United States for the same organization or its parent, branch, subsidiary, or affiliate. 8 U.S.C. § 1101(a)(15)(L). In order to qualify, the non-U.S. sending company and the U.S. receiving company must have at least 50% common ownership, or alternatively, one must effectively control the other.

To obtain an L-1 visa, a qualifying organization must submit a petition to the USCIS. Generally, a qualifying organization is any firm, corporation or legal entity (including a partnership) that continues to conduct business both in the United States and at least one other country during the L visa holder's entire U.S. assignment. However, the qualifying organization need not be a U.S. firm. 8 C.F.R. § 214.2(l)(1)(ii)(G).

The petition submitted on behalf of the employee must indicate that the employee has been employed with the organization abroad for at least one of the past three years as a manager, an executive, or in a position that requires specialized knowledge. It is not necessary that the employee perform the same

function while working in the United States, as long as the employee performs one of the above three permitted functions. 8 C.F.R. § 214.2(l)(1)(i).

Generally, a manager is defined as someone who: (i) manages the organization, a function, or some part thereof; (ii) supervises other managerial, supervisory or professional employees, or manages an essential function, department or subdivision; (iii) has the power to hire and fire employees; and (iv) has day-to-day discretion with respect to the operation of the organization or a part thereof. An executive is a person who: (i) directs the management of the organization; (ii) establishes policies and goals; (iii) has discretionary decision-making capacities; and (iv) is only supervised by higher level executives or the organization's board of directors. A person with specialized knowledge is someone who has: (i) uncommon knowledge of the organization's products, services, research, equipment, techniques, management or other interests and its application in international markets; or (ii) an advanced level of knowledge or expertise in the organization's processes and procedures. 8 C.F.R. § 214.2(l)(1)(ii)(B)-(D).

Generally, the L-1 visa is granted, at the outset, for a maximum of three years, and can be renewed in two-year increments. For persons who are transferred to the United States to work for a new entity, the USCIS will approve L-1 Status for only one year at the outset. The maximum duration of stay for specialized knowledge professionals is five years; the maximum duration permitted for executives and managers is seven years. 8 C.F.R. § 214.2(l)(12).

***Example**: A Mexican company and its wholly-owned U.S. subsidiary have been engaged in business for over ten years in each country. The Mexican company seeks to transfer one of its executives, Eduardo, to the United States to develop and direct the activities of the U.S. company. Eduardo has worked with the Mexican company for seventeen years and will hold executive positions in both Mexico and the United States during his U.S. stay. Because Eduardo has been employed as an executive by the Mexican company for at least one of the past three years and he will continue to perform as an executive in the United States, he should be eligible for an L visa.*

The Mexican company also has a manager, Francesca, who has worked with the Mexican company for only three months, although she had been an executive with another unrelated company for the prior ten years. The Mexican company wishes Francesca to hold an executive position at the U.S. company. Because Francesca does not have the sufficient length of qualifying experience with her Mexican employer, she will not qualify for an L visa. However, after she has been employed by the Mexican company for one year, she should qualify for an L visa.

A third Mexican employee, Oscar, has production responsibilities in Mexico, but his knowledge and experience do not qualify as "specialized knowledge." For this reason, Oscar will not be eligible for an L visa to perform services in the United States for the U.S. company.

***Note**: If the U.S. company is only 20% owned by the Mexican company and the Mexican company does not otherwise control the U.S. company, none of these persons would qualify for the L visa.*

In certain circumstances, a company may file an L-1 blanket petition seeking continual approval of itself, its parent, and some or all of its branches, subsidiaries, and affiliates as qualifying organizations for purposes of sponsoring persons for L-1 intracompany transferee status. To qualify, the company and each of its related entities must be engaged in commercial trade or services. Additionally, the company must have an office in the United States that has been doing business for more than one year, and at least three domestic and foreign branches, subsidiaries, and affiliates. The U.S. company must also have: (i) obtained approvals for at least ten "L" visa professionals in the previous twelve months; (ii) U.S. subsidiaries or affiliates with combined annual sales of at least US $25 million; or (iii) a U.S. workforce of at least 1,000 employees. 8 C.F.R. § 214.2(l)(4).

Once the L-1 blanket petition is approved, the company does not have to file individual petitions with the USCIS for each employee. Rather, a person who meets the requirements for intracompany transferee status may obtain an L-1 visa at the U.S. Consulate or Embassy with jurisdiction over his or her residence abroad. Once a person is admitted under an approved L-1 blanket petition, he or

she may be reassigned to any organization listed within the approved petition without notifying the USCIS, as long as the person is performing the same job duties.

Spouses and minor children of L-1 visa holders may receive L-2 dependent visas. L-2 spouses are eligible to apply for employment authorization; however, the grant of employment authorization is not automatic. Rather, a request must be submitted to the USCIS. The spouse cannot commence employment in the United States until the request is approved and an Employment Authorization Document is issued. Spousal employment authorization is generally issued in one-year increments and can be extended as long as the spouse remains in valid L-2 status. Additionally, spousal employment authorization does not carry any minimum education or experience requirements, and allows the spouse to work for any employer in the United States. 8 U.S.C. § 1184(c)(2)(E).

M Visas: Vocational Students

The M visa is issued to vocational or nonacademic students pursuing a full-time course of study in the United States that is unavailable in their home country. 8 U.S.C. § 1101(a)(15)(M). Generally, M visa holders cannot accept employment unless the employment qualifies as "Practical Training." However, any period of practical training must occur after completing the course of study and may not last more than six months. 8 C.F.R. § 214.2(m)(13-14). The length of permitted stay under the M visa is the lesser of (i) the length of the course of study plus 30 days, or (ii) one year. 8 C.F.R. § 214(m)(5).

Like intending F-1 students, foreign nationals that wish to study at a U.S. institution in M-1 status may not begin that course of study until the USCIS approves a change of status request from B-1 or B-2 to M-1. 8 C.F.R. § 248.1(c)(3). The USCIS will deny a request to change status from B-1 or B-2 to M-1 unless the change of status applicant has advised the USCIS at the port of entry of his or her intention to begin a course of study in the United States. In this case, the USCIS officer would have noted on the alien's I-94 card that he or she is a prospective student. Mexican and Canadian nationals who reside outside the United States and regularly commute across a land border to study may do so on a part-time basis within the M Nonimmigrant category.

O Visas: Aliens of Extraordinary Ability or Achievement and Accompanying Aliens Providing Essential Support

O-1 Visas for Aliens of Extraordinary Ability or Achievement

The O-1 visa category is reserved for persons who have (i) extraordinary ability in the fields of science, art, education, business, or athletics as demonstrated by sustained national or international acclaim; or (ii) a demonstrated record of extraordinary achievement in the motion picture or television industry. 8 U.S.C. § 1101(a)(15)(O).

The O-1 visa petition must be filed by the person's employer. If the person will work for more than one employer, each employer must file a petition on his or her behalf. The petition must show that: (i) the person will work in the area of extraordinary ability while in the United States; and (ii) the person has extraordinary ability. 8 C.F.R. § 214.2(o)(3)(i).

To establish that a person has extraordinary ability in science, education, business, or athletics, the petition must provide evidence of: (i) the person's receipt of a major internationally recognized award, such as the Nobel Prize; or (ii) at least three of the following:

Documentation of the person's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

Documentation of the person's membership in associations in the field which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

Published materials in professional or major trade publications or major media about the person, relating to the person's work in the field;

Evidence of the person's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization;

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

Evidence of the person's authorship of scholarly articles in the field, in professional journals, or other major media;

Evidence that the person has been employed in a critical or essential capacity for organizations and establishments that have distinguished reputations; and

Evidence that the person has commanded and now commands a high salary or other remuneration for services evidenced by contracts or other reliable evidence. 8 C.F.R. § 214.2(o)(3)(iii).

The evidentiary standards for establishing extraordinary ability in the arts and extraordinary achievement in the motion picture or television industry are similar to those listed above. However, they are tailored to these particular fields. For example, extraordinary ability or achievement may be demonstrated by being nominated for or receiving an Academy Award, an Emmy, a Grammy, or a Director's Guild Award. 8 C.F.R. § 214.2(o)(3)(iii).

In addition to the petition, the employer must submit an advisory opinion from a "peer group" regarding the person's eligibility for the visa. 8 C.F.R. § 214.2(o)(5). The peer group can be a professional organization or association of persons in the same field. The advisory opinion should describe the person's ability and achievements in the field, describe the duties to be performed, and state whether the position requires the services of a person with extraordinary ability. 8 C.F.R. § 214.2(o)(5)(ii).

O-2 Visas for Accompanying Aliens Providing Essential Support

The O-2 visa category is designed to facilitate the admission of persons providing essential support to artists and athletes of extraordinary ability, and aliens of extraordinary achievement. Although a separate petition must be filed for a person seeking O-2 status, the classification does not allow the person to

work separate and apart from the O-1 alien to whom he or she provides support. 8 C.F.R. § 214.2(o)(4)(i).

To accompany an alien of extraordinary ability, the person must (i) assist in the performance of the O-1 alien, (ii) be an integral part of the actual performance, and (iii) have critical skills and experience with the O-1 alien which are not general in nature or possessed by a U.S. worker. To accompany an alien of extraordinary achievement, the person must have critical skills based on (i) a pre-existing longstanding working relationship with the O-1 alien, or (ii) continuing and essential participation in a significant production that will take place in and outside the United States. 8 C.F.R. § 214.2(o)(4)(ii). As with the O-1 category, the employer must submit an advisory opinion from a "peer group" regarding the person's eligibility for an O-2 visa. 8 C.F.R. § 214.2(o)(5)(iv).

The O-1 and O-2 visas are normally issued for the duration of the event or activity to be pursued in the United States, with a maximum length of three years. 8 C.F.R. § 214.2(o)(6)(iii). For purposes of the O visa, an "event" is defined as a science project, conference, convention, lecture series, tour, exhibit, business project, academic year or engagement. 8 C.F.R. § 214.2(o)(3)(ii).

Spouses and minor children of O-1 and O-2 visa holders may receive dependent O-3 visas. However, O-3 spouses and children are not authorized to work in the United States. 8 C.F.R. 214.2(o)(6).

TN Status: Certain Canadian and Mexican Business Travelers

Trade NAFTA or "TN" status is issued to Canadian and Mexican citizens who seek temporary entry into the United States to engage in professional business activities pursuant to the North American Free Trade Agreement. 8 C.F.R. § 214.6(a).

Mexican citizens may apply for TN status directly at a U.S. Consulate or Embassy in Mexico, and Canadian citizens may apply for TN status at a U.S. port of entry.

To qualify for TN status, the Canadian or Mexican national must be engaged in one of the following occupations or professions:

- Accountant
- Actuary
- Animal Breeder
- Architect
- Computer Systems Analyst
- Disaster Relief Insurance Claims Adjuster
- Economist
- Engineer
- Forester
- Graphic Designer
- Hotel Manager
- Industrial Designer
- Interior Designer
- Journalist
- Land Surveyor
- Landscape Architect
- Lawyer
- Librarian
- Management Consultant
- Mathematician
- Medical/Allied Professional:
  - Physician (teaching &/or research only)
  - Dentist
  - Clinical Lab Technologist
  - Medical Technologist
  - Veterinarian
  - Occupational Therapist
  - Recreational Therapist
  - Physiotherapist/Physical Therapist
  - Dietitian
  - Registered Nurse
  - Nutritionist
  - Psychologist
  - Pharmacist
- Range Manager (Conservationist)
- Research Assistant (working in post-secondary educational institution)
- Researcher (working in post-secondary educational institution)
- Scientific Technician/Technologist
- Scientist:
  - Agriculturist
  - Animal Breeder
  - Animal Scientist
  - Apiculturist
  - Astronomer
  - Biochemist
  - Biologist
  - Chemist
  - Dairy Scientist
  - Entomologist
  - Epidemiologist
  - Geneticist
  - Geochemist
  - Geophysicist
  - Geologist
  - Horticulturist
  - Meteorologist
  - Pharmacologist
  - Physicist
  - Plant Breeder
  - Plant Pathologist
  - Poultry Scientist
  - Soil Scientist

Zoologist
- Social Worker
- Sylviculturist
- Teacher:
  College
  University
  Seminary
- Technical Publications Writer
- Urban Planner
- Vocational Counselor

Most occupations on the above list require either a baccalaureate degree from a U.S. or Canadian University, or a Licenciatura degree from a Mexican University. For certain occupations, such as a Lawyer or a Teaching or Research Physician, a state license will be accepted in lieu of a degree. Additionally, some occupational categories permit a person to qualify on the basis of three years of experience and a two-year post-secondary degree, such as the Computer Systems Analyst, Graphic Designer, Industrial Designer, and Technical Publications Writer categories. Professionals in the Management Consultant and Scientific Technician/Technologist categories can qualify on the basis of experience alone. Professionals seeking to enter the U.S. as a healthcare worker, other than a physician, must obtain a credential certification.

***Note**: The above-listed categories do provide for some flexibility. For instance, most IT professionals may enter the United States under the TN categories of Computer Systems Analyst, Management Consultant, or Engineer.*

Immigrant Visa Categories

There are five employment-based immigrant visa preference categories under which a person may qualify for U.S. permanent resident status (*i.e.*, a "green card"). The most appropriate preference category for a person largely depends on (i) the requirements for the position sought in the United States, and (ii) the person's education and experience. A person's citizenship can also play an important factor in developing a permanent residence strategy. A limited number of green cards can be allocated to applicants in a particular preference category from each country per year. The quota for each preference category is filled on a first-come-first-served basis. Therefore, persons within certain categories from countries with high U.S. immigration rates may experience longer delays during the application process.

The procedure for obtaining a green card based on employment generally involves three steps: (i) testing the labor market to verify that there are no qualified and interested U.S. workers for the position offered; (ii) filing the Form I-140, Immigrant Petition, with the USCIS to request that the person be found qualified for U.S. permanent residence; and (iii) filing the Form I-485, Application to Adjust Status, or Form DS-230, Application for an Immigrant Visa or Alien Registration, to confirm that the person and his or her accompanying family members meet the minimum health, financial, and government-determined moral standards for obtaining U.S. permanent resident status. In certain circumstances, as outlined below, the employer may bypass the Labor Certification step and immediately proceed with the Immigration Petition. Additionally, if the applicant is not subject to a quota-based backlog, the Adjustment of Status Application can be submitted to the USCIS concurrently with the Immigrant Petition.

Labor Certifications

In March of 2005, the DOL implemented a new system for filing Labor Certification applications called PERM ("Program Electronic Review Management"). In the pre-PERM era, there were two methods of filing Labor Certification applications: (i) Traditional, and (ii) Reduction in Recruitment ("RIR"). Today, PERM is the only method for filing Labor Certification applications.

Note: *All Traditional Labor Certifications and RIRs that were filed before March 28, 2005, and are still pending have been transferred to a DOL Backlog Elimination Center for adjudication. The DOL hopes to have all backlog cases processed by September of 2007.*

PERM allows an employer to file Labor Certification applications via the Internet, after the employer has conducted a mandatory test of the labor market through "sources normal to the occupation and industry."

Prior to filing a PERM application, the employer must (i) obtain a prevailing wage determination from the appropriate State Workforce Agency, and (ii) conduct the necessary recruitment steps. The recruitment steps required for a position vary according to whether the occupation is classified as "professional" or "nonprofessional." For most occupations, the employer must (i) place a 30-day job order with the appropriate State Workforce Agency, (ii) place advertisements on two different Sundays in the newspaper with the largest circulation in the area, and (iii) post a notice of the job opportunity for ten consecutive business at the location where the person will be employed. For professional occupations (with some exceptions for certain college or university teachers), the employer must also select at least three of the following alternative recruitment methods:

- Job fairs;
- Employer's Website;
- Job Search Website;
- On-campus Recruiting;
- Trade or Professional Organizations;
- Private Employment Firms;
- Employee Referral Program;
- Campus Placement Offices;
- Local and Ethnic Newspapers; and
- Radio and Television Advertisements.

22 C.F.R. § 656.17

The recruitment efforts must be conducted no later than 180 days and no earlier than 30 days prior to filing the PERM application. For professional occupations,

one of the alternative recruitment methods may be completed within the 30-day period prior to filing the PERM application.

After the recruitment efforts are completed, the employer must evaluate all resumes received and determine whether applicants meet the minimum education and work experience requirements for the position offered. The employer must then prepare a recruitment report that includes the number of U.S. workers rejected, categorized by the lawful, job-related reasons for rejecting each applicant. 22 C.F.R. § 656.17(g).

The employer does not need to submit documentation of the recruitment efforts with the PERM application. However, the employer is required to retain documentation of its recruitment efforts, including all resumes received and the recruitment report, in an "audit file" to be kept on the employer's premises for five years from the date of filing the PERM application. The audit file must also contain the prevailing wage determination obtained from the State Workforce Agency and any other documentation verifying the information provided in the application. The audit file must be made available to the DOL upon request, if an audit request is triggered before reaching a decision on the PERM application, or at any time during an unannounced on-site visit. 22 C.F.R. § 656.17(e)(1).

The PERM application requires the employer to make numerous attestations regarding the status of the company, the specifics of the job offer, the details of the recruitment steps taken, and whether the employer has been able to find any interested and qualified applicants for the position. The DOL reviews an application based on various selection criteria, allowing more problematic applications to be identified for an in-depth audit.

If a PERM application is selected for an audit, the employer must submit documentation verifying the information on the application. The DOL will then either certify the application, deny the application, or require the employer to undergo supervised recruitment.

Since the PERM system was implemented, processing times have ranged from a few days to a few months – a significant improvement.

First Preference Immigrant Visa Categories

Employers may bypass the PERM application process if their foreign national employee can qualify in one of the first preference, employment-based immigrant visa categories. These categories include: (i) aliens of extraordinary ability; (ii) outstanding professors and researchers; and (iii) certain multinational managers and executives.

Aliens of Extraordinary Ability

The immigrant category for aliens of extraordinary ability is similar to the "O" nonimmigrant visa category. The person must have sustained national or international acclaim in the sciences, arts, education, business or athletics. Additionally, the person must seek to enter the United States to continue working in the area of extraordinary ability, and his or her entry must "substantially benefit prospectively" the United States. 8 U.S.C. § 1153(b)(1)(A).

The person's extraordinary ability and achievements must be extensively documented, and must indicate that he or she is one of a small percentage who have risen to the top of a field of endeavor. 8 C.F.R. § 204.5(h)(2). The person must provide evidence of at least three of the following: (i) receipt of major prizes or awards for outstanding achievement (e.g., the Nobel Prize); (ii) membership in an association which requires outstanding achievement as judged by recognized national or international experts; (iii) evidence of published material in professional publications written by others about the person's work; (iv) participation as a judge of the work of others; (v) original scientific research, scholastic, artistic, or business-related contributions of major significance; (vi) authorship of scholarly books or articles in the field; (vii) artistic exhibitions or showcases; (viii) performance in a leading or cultural role for organizations or establishments that have a distinguished reputation; (ix) high salary or remuneration in relation to others in the field; or (x) commercial success in the performing arts. 8 C.F.R. § 204.5(h)(3).

Outstanding Professors or Researchers

The requirements for qualification as an outstanding professor or researcher are slightly less rigorous than those for qualification as an alien of extraordinary ability. Outstanding professors are those who are internationally recognized in a

specific academic area, and who have at least three years of teaching or research experience in that area. Additionally, the person must seek entry to the United States to accept a tenure or tenure track position, or to conduct research at a university or private employer for an indefinite period. Private employers must employ at least three individuals in full-time research activities, and must have achieved documented accomplishments in an academic field. Additionally, the person must provide evidence of at least two of the following: (i) receipt of major prizes or awards for outstanding achievement; (ii) membership in an association which requires outstanding achievement; (iii) published material in professional publications written by others about the person's work; (iv) evidence of original scientific research; or (v) authorship of scholarly books or articles in the field.

Certain Multinational Managers and Executives

The immigrant category for certain multinational managers and executives is comparable to the "L-1A" nonimmigrant visa classification. The person must have been employed outside of the United States (i) for at least one continuous year during the three-year period prior to being transferred to the United States, (ii) in an executive or managerial capacity, (iii) by a firm, corporation or other legal entity, or an affiliate or subsidiary thereof. Additionally, the person must be seeking entry to the United States in order to work for the same employer (or its affiliate or subsidiary) in a managerial or executive capacity. 8 U.S.C. § 1153(b)(1)(C). The prospective U.S. employer must also have been doing business for at least one year. 8 C.F.R. § 204.5(j).

Second Preference Immigrant Visa Categories

Aliens of Exceptional Ability and Professionals with Advanced Degrees

Persons who fall within the second preference employment-based category include members of the professions who (i) hold advanced degrees, or (ii) because of their exceptional ability in the sciences, arts or business, will substantially benefit the national economy, cultural or educational interests, or the welfare of the United States. Additionally, a U.S. employer must be seeking the person's services in the sciences, arts, professions, or business. 8 U.S.C. § 1153(b)(2). To qualify as a member of the professions with an advanced degree,

the position offered must require (and the person must have) either (i) a master's degree in a specialty area; or (ii) a bachelor's degree or the foreign equivalent, plus five years of progressively responsible experience in the area of specialty. 8 C.F.R. § 204.5(k)(3)(i). To qualify as an alien of exceptional ability, the person must be able to prove his or her rare or unusual talents by providing at least three of the following: (i) a degree relating to the area of exceptional ability; (ii) a letter from a current or former employer showing at least ten years of experience; (iii) a license to practice a given profession; (iv) evidence that the person has commanded a high salary or remuneration demonstrating exceptional ability; (v) membership in a professional organization; or (vi) recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. 8. C.F.R. § 204.5(k)(3)(ii).

Aliens Whose Work is in the National Interest

Aliens of exceptional ability and professionals with advanced degrees may receive a waiver of the job offer and the PERM application requirements if the USCIS deems such action to be in the national interest. 8 U.S.C. § 1153(b)(2)(B). Although Congress has not officially defined the term "national interest," on August 7, 1998, the first precedent decision to examine the national interest waiver was published - In Re New York State Department of Transportation ("NYSDOT").

The NYSDOT decision raised the bar for petition approval by specifying several factors that must be considered when the USCIS evaluates a request for a national interest waiver. A person seeking to meet the "national interest" standard must provide a list of accomplishments that make a strong showing of prospective national benefit to the United States. The decision lists three factors which must be considered in determining whether an employer has made such a showing: (i) the person must seek to work in an area of "substantial intrinsic merit"; (ii) the person's work must have a benefit which "will be national in scope"; and (iii) if the person's qualifications, without more, are insufficient to establish that a waiver of the PERM application requirement is in the national interest, then the person must "serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications."

Third Preference Immigrant Visa Categories

Professionals, Skilled Workers, and Other Workers

The third preference category includes professionals, skilled workers, and other workers. 8 U.S.C. § 1153(b)(3). A person may qualify as a "Professional" if the position offered requires (and the person has) at least a bachelor's degree (or the foreign educational equivalent). A person may qualify as a "skilled worker" if the position requires (and the person has) two years of experience or education in a field which requires two years of training. "Other workers" are those with less than two years of education or expertise. PERM applications are required for persons in the third preference category. 8 C.F.R. § 204.5(1).

Fourth and Fifth Preference Immigrant Visa Categories

The fourth and fifth preference categories provide immigrant visas for: (i) special immigrants (religious workers, among others); and (ii) investors who make investments of $500,000 to $1,000,000 or more and create at least ten jobs. 8 U.S.C. § 1153(b)(4) and (5). Historically, the use of the fifth category has been closely scrutinized, as some applicants have been accused of manipulating this category for their benefit.

Diversity Visa Program

The Diversity Visa Program makes 55,000 immigrant visas available annually to persons from countries with low rates of immigration to the United States during the previous five years. This program is commonly referred to as the "visa lottery" because applicants for diversity visas are chosen by a computer-generated random lottery drawing. Anyone selected by the lottery will be given the opportunity to apply for U.S. permanent residence. Each year (usually in early October), the Department of State announces the instructions and deadline for submitting applications under the program. All applications must be submitted via the Internet at www.travel.state.gov. Any person who meets the filing requirements should consider submitting an application in the next available lottery.

Retention of Permanent Residence Status

Once granted, permanent residence status can be lost in several ways. A U.S. permanent resident can be deemed to have "abandoned" his or her permanent resident status by remaining outside of the United States for six months or longer without maintaining adequate ties to the United States. U.S. Permanent residents anticipating an extended absence from the United States should seek to establish and maintain ties to the United States, and take actions to protect his or her permanent residence status, including filing an application for a Reentry Permit.

Preservation of Residence for Naturalization Purposes

A U.S. permanent resident may be eligible to apply for naturalization after having resided continuously in the United States for at least five years after obtaining permanent residence. For permanent residents who have been married to and living in marital union with a U.S. citizen leading up to the application for naturalization, the U.S. continuous residence requirement is only three years. An absence of one year or more breaks this continuous residence, unless the permanent resident has obtained approval of an Application to Preserve Residence for Naturalization Purposes. Those whose extended absence is for the purpose of employment with a qualifying U.S. business abroad, and who later intend to file for naturalization, may wish to apply for this benefit.

Employer Responsibilities and Liabilities Under U.S. Immigration Law

Introduction

In April of 2006, the Department of Homeland Security announced that it will focus immigration law enforcement on employers who violate criminal statutes and will target industries such as meat packing, construction, restaurants, hotels, retailers and related service industries. An expansion to other industries is certainly possible.

The proper completion of Form I-9 may not be enough to protect the company from enforcement actions, but it is an absolute minimum. Recent actions have been taken against employers who have enrolled voluntarily in employment verification systems such as Basic Pilot. Thus, an employer should create a full scale compliance program with regard to employment verification. The immigration service's enforcement bureau ("ICE") has introduced a new employment verification program called IMAGE which entails an affirmative duty to report non-authorized workers to immigration authorities. The proper compliance program depends on the company's industry.

It is imperative for employers to understand their responsibilities and potential liabilities under U.S. immigration law while also recognizing the limitations imposed by the anti-discrimination laws.

Employment Eligibility Verification (I-9) Requirements

Employers are required to verify the employment eligibility of all employees within three days of hire. The mechanism for doing this is the I-9 (Employment Eligibility Verification) Form.

***Note**: A new I-9 Form and related instructions have been anticipated for several years. The I-9 Form was updated on May 31, 2005, to eliminate outdated references to the Immigration and Naturalization Service and the Department of Justice. However, no other substantive changes were made. Employers may use any I-9 Form with the edition date of "(Rev. 5/31/05)Y", "(Rev. 5/31/05)N" or (Rev. 11/21/91)N" in the lower right corner.*

Each employee hired on or after November 7, 1986, must complete the designated portion of the I-9 Form. At the time of hire, the employee must attest, under penalty of perjury, that he or she is authorized to work in the United States as a U.S. citizen, lawful permanent resident, or nonimmigrant with a time-limited form of work authorization. 8 U.S.C. § 1324a(b)(2). Within three business days of hire, the employee must also submit certain original documents that establish identity and employment authorization to the employer for review.

Once the employer has reviewed the employee's documents, it must complete the second portion of the I-9 Form by registering the type of documentation provided, the document number, and the expiration date (if any). 8 C.F.R. § 274a.2(b)(1)(v). If the employee has provided a document expiration date in the employee's section of the I-9 Form, the employer also must re-verify the employee's employment eligibility before that date has passed. The employer must retain the completed I-9 Form for at least three years or one year after employment terminates, whichever is later. 8 U.S.C. § 1324a(b)(3)(B); 8 C.F.R. § 274a.2(b)(2).

The ICE may impose civil sanctions on employers who fail to comply with the employment eligibility verification requirement. Employers who do not complete and retain I-9 Forms for every employee hired on or after November 7, 1986, may face civil fines of $110 to $1,100 for each "paperwork" violation. The severity of the penalty will be determined by: (i) the size of the business; (ii) the employer's good faith efforts to comply with the law; (iii) the number of unauthorized employees; and (iv) whether the employer has a history of violations. 8 U.S.C. § 274A(e)(5). In addition, if the ICE determines that an employer has knowingly hired an unauthorized worker, the employer may face civil sanctions from $275 to $2,200 for each unauthorized alien employee. Fines for this type of violation increase with each offense, ranging from $2,200 to $5,500 for a second violation to $3,300 to $11,000 for subsequent violations involving the same employee. 8 U.S.C.§ 1324a(e)(4)(A). Employers are liable

for both actual and "constructive" knowledge that an employee is not authorized to work. 8 C.F.R. § 274a.1(l)(1).

Employers who employ unauthorized aliens may also face criminal sanctions. Any person who engages in a "pattern or practice" of employing unauthorized aliens may be fined up to $3,000 for each unauthorized alien, and the responsible executive who condones the practice may be imprisoned for up to six months. INA § 274A(f)(1). Additionally, any employer who knowingly hires ten or more unauthorized aliens during a twelve-month period can be fined under Title 18 of the United States Code, or imprisoned for up to five years, or both. INA § 274(a)(3).

***Note**: Employers who have technical or procedural errors in their I-9 records may be considered to be in compliance if they have otherwise made a good faith attempt to comply with the employment verification requirements. INA § 274A(b)(6). Unfortunately, the terms "technical or procedural failure" and "good faith attempt" have not been statutorily defined, and the ICE has yet to issue regulations regarding these terms. However, it is clear that the ICE will not apply this "good faith" provision to employers who have either engaged in a pattern of violating employment verification requirements or who fail to correct errors within ten business days after being notified of being out of compliance.*

Employment Discrimination Based on Citizenship or National Origin

When Congress enacted the employment eligibility verification provisions, it was concerned that some employers would unfairly target certain persons in their compliance efforts. As a result, Congress added the anti-discrimination provisions that generally prohibit employers from discriminating against certain protected classes with respect to hiring, recruiting, and discharging from employment because of national origin or citizenship status. 8 U.S.C. § 1324b(a)(1).

The national origin discrimination provisions contained in the Immigration and Nationality Act apply to all persons who are currently authorized to work in the United States. In contrast, citizenship status discrimination provisions only apply to U.S. citizens, lawful permanent residents, temporary residents, asylees and refugees. This means that most nonimmigrants (*e.g.*, H-1B or L-1 visa

holders) are not covered by the citizenship status discrimination provisions. 28 C.F.R. § 44.101(c).

Although a finding of discrimination under U.S. immigration law requires a finding of the employer's discriminatory intent which can be a difficult burden to meet, employers should not disregard the importance of these anti-discrimination provisions. Activities such as (i) specifying documents that an employee must present during the verification process, or (ii) inquiring about an applicant's immigration status during an interview, can give rise to discrimination claims. Employers can face civil fines and other penalties for committing unfair immigration-related employment practices. 8 U.S.C. § 1324b(g)(2).

***Note**: Title VII of the Civil Rights Act of 1964 also contains a national origin discrimination provision that protects persons regardless of employment authorization status. Therefore, potential national origin discrimination claims should be analyzed from both an immigration and employment law perspective.*

Civil and Criminal Sanctions for Document Fraud

Under U.S. immigration law, it is unlawful for a person to prepare, file, or assist another in the preparation or filing of any application or document for immigration benefits with knowledge or reckless disregard of the falsity of the application or document. INA § 274C(a). Theoretically, this provision applies to employers who assist their employees in creating "falsely made" I-9 Forms, nonimmigrant or immigrant visa applications filed with the USCIS, or LCAs filed with the DOL.

Furthermore, an employer can face criminal penalties for failing to disclose its role as a document preparer when sponsoring an employee for immigration benefits. Specifically, a person who knowingly fails to disclose, conceals, or covers up the fact that they have assisted in preparing a falsely made application for immigration benefits may be fined under Title 18 of the United States Code, imprisoned for up to five years, or both. INA § 274C(e)(1). A person who receives a second conviction under this provision may be fined under Title 18 of the United States Code, imprisoned for up to fifteen years, or both. INA § 274C(e)(2). In light of these harsh provisions, it is imperative that all documents filed by employers to procure immigration benefits for current or

prospective employees should be thoroughly reviewed and signed only after careful scrutiny.

Liabilities of Employers of Foreign Nationals under Export Control Laws

Transfers of technology to a foreign national are subject to U.S. export controls. Employers should consider export licensing requirements whenever they obtain a visa for a foreign national who will have access to a controlled U.S. technology. Under this "deemed export" rule, an export of technology is deemed to occur when technology is released to a foreign national in the United States, whether through visual inspection of facilities and equipment, or oral communications. If an export license is required for the disclosure of the technology, an employer failing to obtain a license may be subject to civil and criminal liabilities. Moreover, the foreign national accessing the controlled technology without an export license may be subject to removal from the United States.

Liabilities and Penalties for Employers of H-1B Workers

Penalties for Failure to Comply with LCA Requirements

Since 1990, all employers filing H-1B visa applications must first have a Labor Condition Application ("LCA") certified by the DOL's Employment and Training Administration. The LCA requires employers to attest that: (i) the H-1B nonimmigrant will be paid at least the local prevailing wage or the employer's actual wage, whichever is higher, and paid for non-productive time; (ii) the H-1B nonimmigrant will be offered benefits on the same basis as U.S. workers; (iii) employment of H-1B nonimmigrants will not adversely affect the working conditions of similarly employed workers; (iv) there is no strike, lockout, or work stoppage; and (v) notice of the LCA filing has either been posted for at least ten days or provided to the bargaining representative, if one exists.

The DOL's Wage and Hour Division ("WHD") receives complaints regarding LCA violations, and, in response, may conduct investigations, enforcement

proceedings, and impose sanctions on employers that violate the LCA provisions. Violations may include: (i) making a material representation on an LCA; (ii) willful failure to pay the required wage or to provide the required working conditions; (iii) filing an LCA during a strike; (iv) failing to provide notice of the LCA filing; (v) substantial failure to be specific on the application; (vii) charging an employee an "early-termination penalty"; and (viii) failing to post notice of the filing of the LCA for at least ten days.

In response to any of these violations, the WHD may: (i) assess civil monetary penalties up to $35,000 per violation; (ii) require the employer to pay back wages to aggrieved workers; and/or (iii) bar the employer from filing LCAs, employment-based immigrant petitions, and H, L, O, or P Nonimmigrant petitions for up to three year. 20 C.F.R. § 655.810(a)-(d). The DOL may impose other administrative remedies including, but not limited to, reinstatement of workers who were discriminated against in violation of § 655.805(a), and reinstatement of displaced U.S. workers back wages to workers who have been displaced for whose employment has been terminated in violation of these provisions. 20 C.F.R. § 655.810(e).

Additionally, criminal sanctions of $10,000 and imprisonment for up to five years, or both, may be imposed for the knowing submission of false statements to the Federal Government, 20 C.F.R. § 655.805(a)(2)(i).

"Roving" H-1B Employees

H-1B workers are permitted to work only in U.S. locations listed on an LCA. When an employer transfers one of its H-1B employees to a new location not listed on the LCA, a new LCA should be filed. There are limited exceptions for short-term placements. 20 C.F.R. § 655.735. If the transfer to the new location also involves a change in job duties, then the employer may also need to file an amended H-1B petition with the USCIS.

Payment for Transportation Costs for Discharged H-1B Employees

An employer who terminates an H-1B nonimmigrant employee for any reason before the end of the period of authorized stay is required to pay the "reasonable costs of return transportation" to the terminated employee. 8 C.F.R. § 214.2(h)(4)(iii)(E). This regulation requires that the employer pay the cost of an airplane ticket home for the employee. Employers are not statutorily required to pay for the return transportation of the alien's family or their household goods.

Payment of Salary to H-1B Employees in "Inactive Status"

Non-terminated H-1B employees who are placed in "nonproductive" or inactive status by the employer are entitled to receive their full, pro-rata salary as listed on the approved LCA until their date of termination. 20 C.F.R. § 655.731(c)(5)(i). This regulation applies even if the employee is not working because he or she needs training, lacks the proper license, is not assigned work, or for any other reason. Employers who do not pay non-terminated H-1B employees may face civil penalties of up to $1,000 per employee. 20 C.F.R. §§ 655.805 and 655.810. Employers are therefore advised to pay an H-1B employee his or her salary as listed on the LCA until that employee has been terminated and the USCIS has been notified of the request to withdraw the H-1B Petition.

General Notification Requirements

Employers are required to notify the USCIS in writing of any material change in the employment of its nonimmigrant foreign national employees. 8 C.F.R. § 214.2(h)(11)(i)(A). A "material change" in a nonimmigrant employee's employment relationship may include a promotion, change of location, or termination of employment. The USCIS will revoke a nonimmigrant visa as soon as an employer files a written withdrawal of the nonimmigrant petition. 8 C.F.R. § 214.2(h)(11)(i)(B)(ii).

Employee Responsibilities and Liabilities Under U.S. Immigration Law

Compliance with Entry and Exit Requirements

The Homeland Security Act of 2002 mandated the development of better systems to track and monitor the entry and exit of all nonimmigrants, including business travelers, to and from the United States. Two of these systems include (i) the National Security Entry Exit Registration System ("NSEERS"), and (ii) the United States Visitor and Immigrant Status Indicator Technology ("US-VISIT").

Under NSEERS, border officers are required to register nonimmigrant aliens applying for admission to the United States who are citizens or nationals of Iran, Iraq, Sudan, Libya, or Syria. A nonimmigrant alien who is not a citizen or national of the five designated countries may be specially registered when the border officer determines or has reason to believe that a nonimmigrant meets pre-existing criteria as determined by the Attorney General, that would indicate that such alien's presence in the United States warrants monitoring in the interest of national security. An NSEERS registrant must also register his or her departure at a designated port of entry. Failure to do so may render the NSEERS registrant inadmissible upon the next application for admission to the United States.

US-VISIT is a system which processes all visitors holding nonimmigrant visas as they enter the United States. This technology uses scanning and photographic equipment to collect biometric identifiers (fingerprints and digital photographs) to verify the visitor's identity and his or her compliance with U.S. visa requirements and immigration policies.

Change of Address Notification

Aliens residing in the United States are required to notify the USCIS in writing within 10 days of any change of address. This requirement applies to permanent residents and most nonimmigrants. Only A and G nonimmigrant visa holders are exempt. Failure to comply a misdemeanor that can result in fines or imprisonment, and can also serve as a basis for deportation from the United States. Address changes should be submitted to the USCIS on the Form AR-11 (or AR-11SR for nationals of certain countries). This form and filing instructions can be obtained online at www.uscis.gov.

Conclusion

As illustrated above, Congress has created harsh sanctions for employers that violate U.S. immigration and employment laws. We urge employers to give a high priority to compliance with immigration provisions. Due to the higher level of scrutiny and the additional immigration and criminal background checks mandated by the Homeland Security Act of 2002, the adjudications of immigration benefits by the USCIS and subsequent visa processing abroad often take months to complete. It is critical for the employers to plan potential transfers well in advance and start the visa application process early to avoid government processing delays. Should you require additional information regarding U.S. employment-based immigration issues, please do not hesitate to contact us through our Website at www.bakerimmigration.com.

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