

JoAnn Barten
Barten Law, P.C.
www.immigrationiowa.com

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Employment Based Permanent Residency

- ▶ Visa Bulletin
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- ▶ Avoiding PERM Recruitment
- ▶ Avoiding Perm Recruitment & Employer Sponsorship
- ▶ Stateside Process: Adjustment of Status
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Visa Bulletin

- ▶ Annual limit for employment based residency 140,000 each government fiscal year beginning October 1
- ▶ Per country limit of 7%
- ▶ Residency granted in chronological order - date assigned (Priority Date) is the earlier of the date the labor certification is filed with DOL or approvable petition is filed with CIS
- ▶ Informs applicants of when to file stateside adjustment of status
- ▶ Published approximately the 15th of each month
<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>

Visa Bulletin

Visa Bulletin - Categories and Allotments

▶ EMPLOYMENT-BASED PREFERENCES

- ▶ First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences. (40,040 total, 2,802 per country limit)
- ▶ Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.
- ▶ Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "*Other Workers".
- ▶ Fourth: Certain Special Immigrants: 7.1% of the worldwide level.
- ▶ Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of Pub. L. 102-395.

Visa Bulletin - Final Action Dates

May 1, 2018

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES	VIETNAM
	C	01JAN12	C	01JAN12	C	C	C
2nd	C	01SEP14	C	22DEC08	C	C	C
3rd	C	01JUN15	C	01MAY08	C	01JAN17	C
Other Workers	C	01MAY07	C	01MAY08	C	01JAN17	C
4th	C	C	15DEC15	C	22OCT16	C	C
Certain Religious Workers	C	C	15DEC15	C	22OCT16	C	C
5th Non-Regional Center (C5 and T5)	C	22JUL14	C	C	C	C	22JUL14
5th Regional Center (I5 and R5)	C	22JUL14	C	C	C	C	22JUL14

Visa Bulletin

- ▶ Priority Date Assignment
 - Earliest of date labor certification is accepted or properly filed immigrant visa petition
- ▶ Tracking Priority Dates
 - USCIS & USDOS Decide Whether Visa Bulletin Category Moves Forward or Backwards (Retrogresses)
- ▶ Final Action Dates
 - USCIS Application Support Center (ASC) or USDOS Consulate May Issue Residency Card or Immigrant Visa After Interview

EB-1 Category Criteria - 3 Types

NO Labor Certification

- ▶ Are a first preference immigrant worker, meaning you: Have extraordinary ability in the sciences, arts, education, business or athletics, or
- ▶ Are an outstanding professor or researcher, or
- ▶ Are a multinational manager or executive who meets certain criteria

EB-1 Category

EB-1A Persons with Extraordinary Ability

...in the sciences, arts, education, business, or athletics. Applicants in this category must have extensive documentation showing:

“Sustained national or international acclaim and recognition in their fields of expertise.”

Such applicants do not have to have specific job offers, so long as they are entering the U.S. to continue work in the fields in which they have extraordinary ability.

Such applicants can file their own Immigrant Petitions for Alien Worker, Form I-140, with the USCIS.

The individual is “one of a small percentage who have risen to the very top of a particular field in the sciences, arts, education, business, and athletics.”

EB-1A Criteria - Extraordinary Ability

- ▶ Either show receipt of national or international acclaim such as the Nobel Prize, or
- ▶ Three of the following:
 - ▶ Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.
 - ▶ Membership in an association that requires outstanding achievement as a condition of membership in the field for which the classification is sought
 - ▶ Published material about the foreign person or his or her work in professional, trade journals, or major media publications. (These items must include title, date, author, and must be translated into English)
 - ▶ The foreign person's participation, on a panel or individually, as a judge of the work of others in the same or a related field
 - ▶ Evidence of original contributions, usually through publication, of major significance in the foreign national's fields of science, scholastic, artistic, or athletic
 - ▶ Authorship of scholarly articles in the field, in professional journals, or other major media (national newspapers, magazines, etc.)
 - ▶ Display of the foreign national's work at significant exhibitions
 - ▶ Performance in a significant role for organizations or establishments that have a distinguished reputation
 - ▶ Receipt of a higher salary or remuneration than is usual in the field
 - ▶ Commercial success in the performing arts as shown by box office receipts or sales records, cassette, compact disk, or video sales, or
 - ▶ Other comparable evidence if the above types of evidence do not readily apply to the foreign national's occupations

EB-1B Outstanding Professors and Researchers

The prospective employer must provide a job offer and file an Immigrant Petition for Alien Worker, Form I-140, with the USCIS. Typically a US university or institute of higher learning or private employer with similar duties

- ▶ Recognition Internationally as outstanding in a specific academic field, and
- ▶ At least three years of teaching or research in the field and
- ▶ (a) the offer of a tenured or tenure-track teaching position or the offer a comparable research position with a private employer if the employer has at least three full-time researchers and documented accomplishments in the research field, OR (b) the offer of a research position having no fixed term and in which the employee will ordinarily have an expectation of permanent employment, OR (c) the offer of a comparable research position with a private employer if the employer has at least three full-time researchers and documented accomplishments in the research field.

EB-1B Outstanding Professor or Researcher

- ▶ Strong cases show:
 - ▶ Peer-reviewed presentations at academic symposia
 - ▶ Peer-reviewed articles in scholarly journals
 - ▶ Testimony from other scholars on the applicant's contribution to the field
 - ▶ A number of entries in a citation index citing the applicant's work as authoritative
 - ▶ Participation by the applicant as a reviewer for a peer-reviewed scholarly journal

EB-2 Category

EB-2 Category Criteria

Are a second preference immigrant worker, meaning you:

- ▶ Are a member of a profession that requires an advanced degree, or
- ▶ Have exceptional ability in the sciences, arts, or business, or

Schedule A Exceptional Ability

- ▶ Documentary evidence showing the widespread acclaim and international recognition accorded the individual by recognized experts in the beneficiary's field; and
- ▶ Documentation showing the individual's work in that field during the past year did, and the individual's intended work in the United States will, require exceptional ability; and
- ▶ Documentation about the individual from at least two of the following seven groups:
 - ▶ Receipt of internationally recognized prizes or awards for excellence their field;
 - ▶ Evidence of membership in associations in individual's field which require outstanding achievements of their members;
 - ▶ Copies of publications from professional publications relating to the individual and their work;
 - ▶ Evidence of the individual's participation as a judge of the work of others in the same field;
 - ▶ Evidence of the individual's original contributions of major significance to their field;
 - ▶ Evidence or authorship of published scientific or scholarly articles in international professional journals or professional journals with an international circulation; and
 - ▶ Evidence of display of the individual's work in artistic exhibitions and showcases in more than one country.

EB-2 Advanced Degree

- ▶ **Professionals holding an advanced degree** (beyond a baccalaureate degree), OR a baccalaureate degree and at least five years progressive experience in the profession. Must match the job offered.

EB-2 Persons with Exceptional Ability

- ▶ Expertise significantly above that ordinarily encountered in the sciences, arts, or business. Requires documenting at least three:
 - ▶ An official academic record showing that the foreign person has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
 - ▶ Evidence in the form of letters from current or former employers showing that the foreign person has at least 10 years of full-time experience in the occupation.
 - ▶ A license to practice the profession or certification for a particular profession or occupation.
 - ▶ Evidence that the foreign person has commanded a salary or other remuneration for services that demonstrate exceptional ability.
 - ▶ Evidence of membership in a professional association or
 - ▶ Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities or professional or business organizations.

EB-3 Category Criteria

- ▶ Are a third preference immigrant worker, meaning you are: A skilled worker (meaning your job requires a minimum of 2 years training or work experience), or
- ▶ A professional (meaning your job requires at least a U.S. bachelor's degree or a foreign equivalent and you are a member of the profession), or
- ▶ An unskilled worker (meaning you will perform unskilled labor requiring less than 2 years training or experience)

Avoiding PERM Recruitment

Avoiding Department of Labor Requirements of PERM Recruitment

- ▶ Schedule A Occupations 20 CFR 656.15 Require Employer Sponsor but Waives PERM Recruitment:
 - ▶ Nurse Practitioners, BSN Nurses, Physical Therapists; or
 - ▶ Exceptional Ability in the Sciences or Arts
(NOT to be Confused with USCIS EB-2 Exceptional Ability Criteria for Petitioning).

The background features abstract, overlapping green geometric shapes in various shades, including light lime green, medium green, and dark forest green, creating a modern, layered effect.

Avoiding Requirement of Employer Sponsor & PERM Recruitment

EB-2 National Interest Waiver

EB-2 Applicants may apply for an exemption, known as a National Interest Waiver from the job offer and labor certification if the exemption would be in the national interest. In this case, the applicant may self-petition by filing the Immigrant Petition for Alien Worker, Form I-140, along with evidence of the national interest.

3 Prong Test *Matter of Dhanasar* (December 27, 2016)

- ▶ The foreign national's proposed endeavor have both substantial merit and national importance (positive potential impact considered);
- ▶ The foreign national is well positioned to advance the proposed endeavor;
- ▶ On balance, it would be beneficial to the United States to waive the job offer and labor certification requirements
 - ▶ Publications & Citation Records, Letters of Recommendations, Government Funding & Grants, Elite Membership, Media Coverage, Patents, Contracts, Licenses and Technology Transfers, Evidence of Others Relying upon Work

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Processing in the U.S.

Stateside Process

- ▶ If Labor Certification Required: (1) Request and Receive Prevailing Wage from DOL 80 - 90 Days (2) Employer Advertising of Position 45 - 60 Days (3) Request and Receive Labor Certification 150 - 250 Days
- ▶ Petition (and Schedule A or NIW) Filed with USCIS within 180 Days of Date of Labor Certification 5.5 - 7.5 Months (Premium Processing Available for EB-1 - EB-3, NOT for EB-1 Executives or EB-2 NIW)
- ▶ Priority Date Current on Visa Bulletin
- ▶ Adjustment of Status Application Filed with USCIS Service Center, Sent to ASC after 5.5 - 8.5 Months
- ▶ Biometrics Appointment held 30 days after filing Adjustment of Status
- ▶ Temporary Work and Travel Issued 70 - 150 Days after filing Adjustment of Status (Renewals Likely Needed)
- ▶ Interview with USCIS Application Support Center DSM office 11.5 to 23 Months after receipt from Service Center
- ▶ If Priority Date Still Current, Approval Results in 10 Year Residency Card

Processing Abroad

Consular Process

- ▶ If Labor Certification Required: (1) Request and Receive Wage Survey from DOL (2) Employer Advertising of Position (3) Request and Receive Labor Certification
- ▶ Petition (and Schedule A or NIW) Filed with USCIS within 180 Days of Date of Labor Certification
- ▶ Petition Sent to the DOS National Visa Center - Typically Received 60 Days after approval
- ▶ Visa Bulletin Filing Date Current, Visa Fee Bills Sent and Submission of Visa Application upon Notification by the National Visa Center - Depending upon Consulate Typically 4-8 months
- ▶ Final Action Date Current on Visa Bulletin
- ▶ Interview with US Consulate with jurisdiction over the case
- ▶ Approval results in instruction to pick up passport with Immigrant Visa sticker, upon entry to the U.S., 10 Year Residency Card mailed to resident

Interviews

Interviews

- ▶ Forms Review - Old Forms May Request Updated Biographic Form
- ▶ Medical Exam Expiration (Don't file with Application, Bring to Interview)
- ▶ J-1 Home Country Requirement Reviewed Likely at Filing, But Also Here
- ▶ Illegal Work While Student or Employee Reviewed
- ▶ Police Stops or Arrests
- ▶ Biometrics Expiration
- ▶ Employer Support Letter Updated
- ▶ Different Employer with Same or Similar Occupation - Requires Approved Form I-485 Supplement J
- ▶ Bona Fide Marriage Evidence for Derivative Spouse
- ▶ ASC Interviews 20 - 60 minutes, Consulate Interviews 5 - 15 minutes

Maintaining Non-immigrant Status

H-1B Non-Immigrant Visa Issues

- ▶ Employee attempting to switch from cap-exempt H-1B (university) to cap-subject (private) should wait until cap-subject H-1B is selected and approved before starting, otherwise if switch made and not selected, H-1B status would end October 1 of the same year, *See Letter, Hernandez III, Chief, business and Trade Services, USCIS (May 23, 2007).*
- ▶ INA Section 106(a) allows extensions beyond 6 years if a labor certification, I-140 Petition, or employment based Adjustment of Status filed at least 365 days prior to expiration of 6th year H-1B status. INA Section 104(c) allows extensions beyond 6 years for beneficiaries of EB-1, EB-2, and EB-3 petitions due to per country limitations are unable to file for Adjustment of Status or an Immigrant Visa. *See AC21*
- ▶ H-4 spouse may apply for work permit if the H-1B has had his or her status extended under 106(a), (b) or already has an approved I-140 petition.
- ▶ An H-1B who re-enters on advance parole and has a valid and approved H-1B may apply for extension of the H-1B and CIS will terminate parole and admit as an H-1B. *AFM, Appendix 23-4, memo, Cronin (May 16, 2000).*

J-1 2 Year Home Residency Requirement

J-1 2 Year Home Residency Requirement

- ▶ Typically one of three scenarios
 - ▶ Financed in whole or in part, directly or indirectly, by an agency of the government of U.S. or by the government of nationality or last residence; or
 - ▶ Engage in a field on the DOS Exchange Visitor List (74 FR 20107-31); or
 - ▶ Received medical school training in the U.S. after January 10, 1977.
- ▶ Check first to see if a J-1 waiver is required
- ▶ If required, the J-1 waiver must be approved before filing K-1, H-1, L-1 or dependents, or adjustment of status or immigrant visa applications (can file an I-140 petition)

J-1 Waiver Types

- ▶ No Objection - generally not granted for U.S. funding
- ▶ Exceptional Hardship - departure for 2 years would impose exceptional hardship on USC/LPR spouse or child
- ▶ Persecution - on account of race, religion, or political opinion - (asylum grant however may apply for adjustment of status without waiver under INA § 209.
- ▶ Interested Government Agency - U.S. agency files the request directly