Presentation to Wayne State University
H-1B and Permanent Residency Procedures
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I. Introduction

A. Does there continue to be a need for foreign national employees to work in the United States?

B. Immigrant status (permanent residency) versus nonimmigrant status.

C. Competing philosophies/interests in the development of immigration and nationality laws.

1. Most dramatic changes in all aspects of immigration and nationality law reflected in two major pieces of legislation in 1990 and 1996 that amended the Immigration and Nationality Act (INA) of 1952.


D. Different responsibilities/roles of various agencies: Citizenship and Immigration Services (CIS), Department of Labor (DOL), and Department of State (DOS).

II. Selected Nonimmigrant Categories Allowing Temporary Employment in United States

A. Brief descriptions.

1. H-1B, temporary worker.

2. H1B1--similar to H-1B but for citizens of Chile and Singapore only.

3. E-3--similar to H-1B but for citizens of Australia only.

4. TN (NAFTA)--for Canadian and Mexican citizens only.

5. O-1, extraordinary ability.

7. L-1, intracompany transferese.

III. H-1B, temporary worker (INA §101(a)(15)(H))

A. The American Competitiveness and Workforce Improvement Act (ACWIA) of 1998 required that U.S. Citizenship and Immigration Services report annually to Congress the countries of origin and occupations of, educational levels attained by, and compensation paid to, foreign nationals who were issued visas or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of the INA during the previous fiscal year. The following are the highlights for Fiscal Year 2009, October 1, 2008 to September 30, 2009.

1. The number of H-1B petitions filed decreased 15% from 288,764 in Fiscal Year 2008 to 246,647 in Fiscal Year 2009.

2. The number of H-1B petitions approved decreased 22% from 276,252 in Fiscal Year 2008 to 214,271 in Fiscal Year 2009.

3. Approximately 48% of all H-1B petitions approved in Fiscal Year 2009 were for workers born in India.

4. Two-thirds of H-1B petitions approved in Fiscal Year 2009 were for workers between the ages of 25 and 34.

5. Forty-one percent of H-1B petitions approved in Fiscal Year 2009 were for workers with a bachelor's degree, 40% had a master's degree, 13% had a doctorate, and 6% were for workers with a professional degree.

6. About 41% of H-1B petitions approved in Fiscal Year 2009 were for workers in computer-related occupations.

7. The median salary of beneficiaries of approved petitions increased to $64,000 in Fiscal Year 2009, $4,000 more than in Fiscal Year 2008.

B. In the past, for "aliens of distinguished merit and ability" coming to the United States to perform services of an exceptional nature requiring such merit and ability. Now, "an alien who is coming to perform services in a specialty occupation."

C. Degree requirement.
1. Generally, individual should have at least a Bachelor's degree in a specific discipline, and the position must require the specific degree. Most obvious example: Position requires individual with Bachelor's degree in Mechanical Engineering; prospective employee has at least a Bachelor's degree in Mechanical Engineering.

2. If the individual has earned a university degree from a non-U.S./Canadian university, the degree should be evaluated to determine that it is the equivalent of a U.S. degree. There are agencies that, for a fee, will provide a credential evaluation.

D. Extensive professional experience may compensate for lack of university degree.

1. There are agencies that, for a fee, will provide an evaluation of the prospective employee's experience. These evaluations vary in price from $500 to $5,000. This type of evaluation requires extensive documentation.

E. Status initially granted for up to three years with possibility of a three-year extension.

1. Possible to obtain H time after six-year maximum.
   a. Recapturing time spent physically out of the United States during approved H-1B time periods.
   b. If beneficiary is at certain stages in permanent residency procedures, may be able to obtain an additional one or three years of H-1B time after six-year cap.
   c. If beneficiary does not spend more than 180 days per year physically present in the United States or works part-time in the United States, six-year maximum does not apply.

F. Restricted to specific employer.

G. H-1B visas are limited in number. Currently, 65,000 per federal fiscal year plus additional 20,000 for U.S. advanced degree holders.

These petitions will request an October 1, 2012 start date.

2. Numbers for fiscal year 2012 were exhausted on November 22, 2011.


   a. H-1B extension provided extension being filed by same non-exempt employer.
   b. Change of H-1B employer provided beneficiary already once was counted against cap.
   c. Petitioner is higher education institution and affiliated research institution or non-profit or government research institution.
   d. Employed at a non-exempt employer working for the benefit of an exempt employer.
   e. Those counted against the cap within the past six years even though the person does not currently hold an H-1B status, provided the individual has not resided outside of the United States for one year.
   f. If beneficiary is at certain stages in permanent residency procedures, may be able to obtain an additional one or three years of H-1B time after six-year cap.

H. Changing H-1B employers.

1. A person currently holds an H-1B status to work with one company. He/she does not have permission to join a new employer until the new employer files an I-129 petition for the foreign national.

2. The foreign national must be maintaining his/her current H-1B status in order for a new employer to request an extension of the H-1B status so the foreign national may join the new employer.

I. An H-1B employer is liable for the reasonable cost of return transportation of the foreign national abroad, if the foreign national is dismissed from employment by the employer before the end of the period of authorized admission.
J. Procedure for obtaining an H-1B visa status involves three steps: Prevailing wage determination, Labor Condition Application, and I-129 petition.

1. Prevailing wage determination.
   a. H-1B beneficiary must be paid prevailing wage or actual wage whichever is higher.
   b. Prevailing wage determinations by the United States Department of Labor.
   c. May also use private agencies, recognized surveys, or Online Wage Library.
   d. Prevailing wage determination is valid for finite period of time.

2. Petitioner must then file a Labor Condition Application (often abbreviated LCA) with the United States Department of Labor. LCA is filed electronically. Previously, LCA was approved instantly. Effective June 30, 2009, Department of Labor established a new system. Currently taking approximately seven days to receive approval of LCA.
   a. Petitioner is required by law to give the beneficiary a copy of the LCA.

3. Once Labor Condition Application is approved, employer files I-129 petition and H Classification Supplement with Citizenship and Immigration Services having jurisdiction over the area where the job is to be performed.

4. Type of action is requested on form I-129, e.g., change of status, consulate or port-of-entry notification, extension, or amendment.
   a. If requesting change of status, i.e., F-1 to H-1B, absolutely may not leave United States while petition is pending.

   a. Obtaining visa from United States Consulate, i.e., outside of the United States. Important to understand distinction between action taken
by Citizenship and Immigration Services and issuance of visa by United States Consulate.

6. Automatic visa revalidation available for citizens of all countries except Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. Very specific conditions must be met in order to use "automatic revalidation" provision to re-enter the United States without a valid visa from a trip to Canada or Mexico that lasted no more than 30 days.

   a. Must have passport with old visa (and new passport if old one has expired), original I-94 (small white card), and form I-797 showing new or extended status.

   b. Must have maintained nonimmigrant status.

   c. Did not apply for a U.S. visa while in Canada or Mexico.

7. Changes in conditions of employment require employer to obtain new LCA and file amended petition.

K. H-1B has dual intent.

L. If your I-129 petition is not selected, what to do?

1. If an F-1, student on optional practical training, consider requesting a 17-month STEM extension.

2. If Canadian citizen, consider TN-1; if Mexican citizen, consider TN-2; if Australian citizen, consider E-3; if Chilean or Singaporean citizen, consider H-1B1.

3. If job offer is with a multinational corporation and the multinational corporation assigns you to a related company outside of the U.S. to work abroad for at least one year, consider L-1, intracompany transferee visa.

4. If employer is owned by a "treaty" country and you have the same nationality as the employer, i.e., you are a German citizen and being offered a job by Volkswagen in the United States, consider E-1 or E-2.

5. If you are interested in returning to school full-time, consider obtaining a new F-1.
a. May be able to work using curricular practical training (CPT).

b. May also consider on-campus employment under collaborative agreement with private employer.

6. If you are able to obtain an H-1B for a cap-exempt employer, consider concurrent H-1B for a non-exempt employer.

7. If you are really special, consider O-1, alien of extraordinary ability.

** May also try again for H-1B in the next federal fiscal year.

IV. Family Dependents

A. F, J, H, TN, L, E, and O categories allow the principal visa holder's dependents to accompany the principal to the United States or change his/her status along with the principal.

B. Spouse and/or child are defined in the INA.

1. Spouse must be legally married.

2. Child is legally defined as unmarried and less than 21.

   a. The term "child" is specifically defined by INA and includes biological, adopted, and stepchildren.

      i. Adopted child definition can be problematic.


4. Spouses and minor children of TNs and Os may not work in the United States.

5. Spouses of Ls, Es, and Js may work in the U.S. when specifically granted permission by Citizenship and Immigration Services.

V. Employment-Based Permanent Residency (INA §203(b)(1))

Most Often Used Specific Preference Groups
A. Employment-based first preference (EB1): Employment-based first preference, also known as priority workers, is divided into three categories:

1. Aliens with extraordinary ability in the "sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." (EB11)

2. Outstanding professors and researchers. (EB12)

3. Certain multinational executives and managers. (EB13)

4. Obtaining permanent residency under EB1 is a two-step process.
   a. File I-140 petition with Citizenship and Immigration Services. Date petition is received gives the beneficiary a priority date.
   b. Second step is filing I-485 application with Citizenship and Immigration Services or immigrant visa application with U.S. Consulate.

** Employment-based first-preference category does not require labor certification.

B. Employment-based second preference (EB2): Professionals with advanced degrees or aliens of exceptional ability in the "sciences, arts, or business."

1. Foreign nationals who are members of the professions holding advanced degrees or their equivalent, or foreign nationals "who because of their exceptional ability in the sciences, art, or business will substantially benefit the national economy, cultural or educational interests, or welfare in the United States."

   a. With the exception of National Interest Waiver category discussed below, employment-based second preference is a three-step permanent residency process.
      i. Obtaining approval from Department of Labor, i.e., Program Electronic Review Management (PERM) application.
ii. When PERM application is approved, filing I-140 petition with Citizenship and Immigration Services.

iii. Filing I-485 application with Citizenship and Immigration Services or immigrant visa application with U.S. Consulate.

2. Labor certification required unless waived by Attorney General. This is known as a "National Interest Waiver (NIW)" case. During the 1990s, it had been extremely popular to attempt a "National Interest Waiver" case. As of September 1998, however, Citizenship and Immigration Services (then known as Immigration and Naturalization Service) began following a very restrictive case, Matter of New York Department of Transportation, making it very difficult to qualify for the "National Interest Waiver."

3. Obtaining permanent residency under National Interest Waiver case is a two-step process.

a. File I-140 petition with Citizenship and Immigration Services. Date petition is received gives the beneficiary a priority date.

b. Second step is filing I-485 application with Citizenship and Immigration Services or immigrant visa application with U.S. Consulate.


1. Employment-based third preference is a three-step permanent residency process.

a. Obtaining approval from Department of Labor, i.e., PERM application.

b. When PERM application is approved, filing I-140 petition with Citizenship and Immigration Services.

c. Filing I-485 application with Citizenship and Immigration Services or immigrant visa application with U.S. Consulate.

VI. Application for Permanent Employment Certification/Labor
Certification/PERM

A. The purpose of the PERM process is to show that the employer has conducted an extensive recruitment effort but was unable to find a minimally qualified U.S. worker to fill the position.

1. The foreign national must be offered a permanent, full-time position.

B. PERM is a function of the Department of Labor and has no direct relationship to Citizenship and Immigration Services.

1. PERM process became effective March 28, 2005.

2. Employer and position specific.

3. Filing of PERM application gives a person a "priority date." It is irrelevant how long it takes for application to be approved. Priority date is date of filing.

4. PERM established streamlined attestation and audit system thereby replacing traditional and Reduction in Recruitment labor certification process that had been administered by the individual states.

   a. Application now filed electronically.

   b. Mandatory recruiting completed prior to filing application.

   c. Until June 1, 2008, PERM applications filed for jobs being performed in State of Michigan were adjudicated by Department of Labor office in Chicago. Cases were processed quickly -- in two to three weeks. Effective June 1, 2008, all permanent labor certification applications are being processed by Department of Labor in Atlanta. Currently cases being processed in 70 to 90 days.

      i. If case is selected for audit, currently taking 6 to 12 months to receive a decision.

C. "Special Handling" PERM process for college/university teachers. Under the special procedures for college and university teachers, the employer must document that the foreign national was selected for the job opportu-
nity in a competitive recruitment and selection process through which the foreign national was found to be more or equally qualified than any of the United States workers who applied for the job.

For purposes of this section, documentation of the "competitive recruitment and selection process" must include:

1. A statement, signed by an official who has actual hiring authority from the sponsoring Department outlining in detail the complete recruitment procedures undertaken.

2. A final report of faculty, student, and/or administrative body making the recommendation or selection of the foreign national, at the completion of the competitive recruitment and selection process.

3. A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of the publication; and which states the job title, duties, and requirements.
   a. Until recently, the advertisement must have appeared in a print journal appropriate to the field. A recent case allows an online advertisement under certain circumstances.

4. Evidence of all other recruitment sources utilized.

5. A written statement attesting to the foreign national's qualifications for the position.

** PERM applications utilizing the special handling procedures for college and university teachers must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

6. Department of Labor will either approve PERM application or select the case for audit.
   a. There have been a dramatic increase in the number of audits by the Department of Labor. Employers are cautioned to be very careful in maintaining documentation of recruitment efforts and results.

D. After approval of PERM application.
1. Filing I-140 visa petition with Citizenship and Immigration Services Regional Service Center in either Lincoln, Nebraska or Mesquite, Texas based on location where job will be performed.

2. Approved PERM application is valid for 180 days from date of approval. I-140 must be filed before PERM application expires.

3. Documentation.

   a. Adjustment of Status (I-485 application) versus consular processing.
   b. If priority date is current and beneficiary is in the United States, consider Adjustment of Status. (§245(c) is a major bar to Adjustment of Status.)
   c. Concurrent or simultaneous filing of I-140 petition and I-485 application.
   d. If ineligible for Adjustment of Status, must apply for immigrant visa abroad through consular processing.
   e. The spouse and any unmarried children less than 21 years of age may obtain lawful permanent resident status at the same time as the foreign national employee.
      i. Under the Child Status Protection Act, a child's age is "locked in" provided the I-140 petition is filed prior to the child's 21st birthday and other provisions of the Child Status Protection Act are met. Unfortunately, these other provisions are very strict and many children do not benefit under the Child Status Protection Act. If foreign national employee has a child who is in his/her late teens or 20, the case must be evaluated quickly in order to maximize chances of child being able to immigrate with his/her parents.
   f. If priority date is not current, must wait to apply for immigration/Adjustment of Status.
5. Grounds of exclusion.

VII. Aliens of Extraordinary Ability (INA §203(b)(1)(A)) --
Aliens of Extraordinary Ability are defined by statute as those who can show they have "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation."

A. No job offer or labor certification required.

B. Criteria for qualifying for extraordinary ability category -- petition must be accompanied by evidence of a major, internationally recognized award or evidence satisfying at least three of the following ten standards:

1. Receipt of a lesser nationally or internationally recognized prize or award for excellence;

2. Membership in associations in the field, which demand outstanding achievement of their members;

3. Published material about the alien;

4. Evidence that the alien is a judge of the work of others;

5. Evidence of the alien's original contributions of major significance to the field;

6. Authorship of scholarly articles;

7. Display of the alien's work at artistic exhibitions or showcases;

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

9. Evidence that the alien is paid a lot in relation to others in the field;

10. Evidence of commercial success in the performing arts; or

11. Other comparable evidence if the above standards do not readily apply to the field.
C. Major case Matter of Kazarian.

VIII. Outstanding Professors and Researchers (INA §203(b)(1)(B))

(EB12)

A. Basic requirements: To qualify as an outstanding professor or researcher, the foreign national must:

1. Be internationally recognized as outstanding in a specific academic field;

2. Have a minimum of three years of experience teaching and/or researching in that field; and

3. Be offered a tenured, tenure-track, or permanent research position at a university or with a non-university qualifying employer.

a. The non-university qualifying employer:
   A department, division, or institute of a private employer offering the foreign national a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full time in research positions and that it has achieved documented accomplishments in an academic field.

b. Definition of "permanent": When a research position is not tenured or tenure-track, "permanent" is defined as "for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination."

B. Three years of experience requirement:

1. The regulations clarify that the requisite three years of experience can include pre-degree experience, as long as the foreign national completed the degree.

2. Pre-degree teaching experience is acceptable if the foreign national had full responsibility for the course.

3. Pre-degree research experience must have been recognized as outstanding.

4. Experience may have been gained while the foreign
national was with the petitioning employer.

5. Any combination of teaching and/or research totaling three years will meet the experience requirement.

C. Criteria for qualifying: According to the regulations, petition must be accompanied by at least two of the following types of evidence showing that the work of the foreign national has been recognized internationally as outstanding:

1. Receipt of major prizes or awards;
2. Membership in associations, which require outstanding achievements;
3. Published materials in professional journals written by others about the alien's work;
4. Evidence that the alien participates as a judge of the work of others;
5. Original scientific or scholarly research contributions to the field; or
6. Authorship of scholarly books or articles in journals with international circulation in the field.

IX. Employment-Based Second Preference (INA §203(b)(2)) -- The employment-based second preference covers workers in two categories: 1) Foreign nationals who are "members of the professions holding advanced degrees or their equivalent"; and 2) Foreign nationals "who because of their exceptional abilities in the sciences, arts, or business will substantially benefit the national economy, cultural or educational interests, or welfare of the United States."

A. Though the regulations do not specify that an advanced degree must be at least a Master's degree, a Master's degree is the threshold educational requirement.

1. A Bachelor's degree plus five years of progressive (emphasis added) experience is deemed the equivalent of a Master's degree.

2. Experience may not substitute for a Bachelor's degree.

B. Criteria for "exceptional" ability:
1. An alien of exceptional ability in the sciences, arts, or business must be an individual with a degree of expertise significantly above the ordinary, as shown by evidence satisfying at least three of the following six criteria:

a. An official academic record showing a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning related to the field of learning;

b. At least ten years of full-time experience in the occupation, documented by letters from current or past employers;

c. A license to practice the profession or certification for a particular profession or occupation;

d. Evidence that the foreign national has commanded a salary or other remuneration for services, which demonstrates exceptional ability;

e. Membership in professional associations;

f. Recognition for achievements and significant contributions to the industry or field by peers, government entities, professional or business organizations; or

g. Other comparable evidence.

C. This category requires an individual labor certification from the United States Department of Labor unless the position has been designated by the United States Department of Labor as one on Schedule A, Group I (physical therapists and nurses) or Schedule A, Group II (aliens of exceptional ability).

1. Additionally, a petitioner may seek exemption from the individual labor certification by demonstrating that the foreign national's admission is in the "national interest."

2. Furthermore, a job offer is not required and a foreign national may self-petition if he/she can obtain a national interest waiver.
D. Employment-based second preference petitioners may seek an exemption from the requirement of a job offer and the individual labor certification by demonstrating that admission is in the national interest. (INA §203(b)(2)(B)). Initially, Citizenship and Immigration Services refused to offer a definition of "national interest." Citizenship and Immigration Services believed it more appropriate to leave the application of this test as flexible as possible. Decisions had been quite inconsistent. In 1993, Citizenship and Immigration Services Regional Service directors were advised that petitions involving the national interest issue should be decided on a "case-by-case basis." Due to erratic decision-making, however, in 1998, the Administrative Appeals Unit (AAU) designated Matter of New York Department of Transportation as a precedent decision.

1. In Matter of New York Department of Transportation, the AAU set forth seven factors for consideration in determining whether a waiver of the job offer is in the national interest:

   a. Evidence the benefits of the foreign national's proposed employment will be national in scope.

   b. Evidence that the foreign national seeks employment in an area of substantial intrinsic merit and that his/her employment will be important to the national interest of the United States. Additionally, the benefits of his/her employment must be "immediately apparent" to the national interest of the United States.

   c. Evidence related to the foreign national's ability to perform the duties of the proposed employment position.

   d. Petitioner, i.e., prospective employer, must persuasively demonstrate that the national interest would be adversely affected if a labor certification were required.

   e. Petitioner must establish that he/she is not seeking a National Interest Waiver based on a shortage of qualified workers in a given field, regardless of the nature of the occupation.

   f. If the foreign national holds a patent or is responsible for an innovation, evidence that
the specific innovation serves the national interest.

g. Evidence of the foreign national's past record of specific prior achievement, which justifies projection of future benefit to the national interest. The petitioner must establish, in some capacity, the foreign national's ability to serve the national interest with substantially greater extent than the majority of his/her colleagues. Evidence that to some degree the foreign national will influence the particular field of employment as a whole.

X. Employment-Based Third Preference (INA §203(b)(3)) -- The employment-based third preference covers workers in three categories: 1) Skilled workers (at least two years of higher education, training, or experience required); 2) Professional (at least a Bachelor's degree is required for the position and the foreign national must possess the degree); and 3) Other workers (less than two years of experience required for the position).

A. Skilled workers are those in positions, which require a minimum of two years of training or experience. The requirements of the job offer as stated on the PERM application, will determine whether a job is skilled or unskilled.

B. Professionals:

1. Professionals must possess at least a Bachelor's degree or foreign equivalent, and the petitioner must demonstrate that such a degree is the normal requirement for entry into the profession.

C. Other workers:

1. Positions require less than two years of higher education, training, or experience.

2. Current backlog in this category makes prospects for immigration dim.

   a. Projections for waiting time are between 10 and 20 years to obtain a visa in this category.

XI. Retrogression of Immigrant Visa Waiting List

A. A priority date must be current in order to submit an application for Adjustment of Status. Additionally, a
case will not be approved unless the priority date is current.

1. It often happens that a priority date is current and an individual submits an application for Adjustment of Status but while the application is pending, the priority date moves backwards or "retrogresses." Citizenship and Immigration Services will continue to process any employment authorization document or parole (travel) document requests. The application for Adjustment of Status, however, will not be approved until the priority date is again current. This "regression or retrogression" has been a problem for beneficiaries born in China and India under EB2 and all beneficiaries under EB3.

XII. Possible To Pursue Multiple Employment-Based Preference Categories

A. “Upgrading” from employment-based third preference to employment-based second preference.

XIII. Changing Jobs and/or Employers While I-485 Application Pending

A. When I-485 based on EB11 or NIW possible to change jobs and/or employers at anytime.

1. Because categories do not require a job offer applicant may change jobs and/or employers at anytime.

B. When I-485 based on EB12, EB13, EB2, and EB3 possible to change jobs and/or employers provided:

1. I-140 petition has been approved.

2. I-485 application pending with Citizenship and Immigration Services more than 180 days.

3. Applicant for Adjustment of Status will work in same or similar occupation that was basis of I-140 petition.

C. Cannot change employers if pursuing consular processing rather than Adjustment of Status.
### IMMIGRANT VISA BULLETIN
#### March 2012

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