Visas After Graduation

Miller Mayer Law firm

Handouts

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VISAS: AN OVERVIEW – 2010

A nonimmigrant is a foreign national seeking to enter the United States (U.S.) temporarily for a specific purpose. Nonimmigrants enter the U.S. for a temporary period of time, and once in the U.S. are restricted to the activity or reason for which their visa was issued. They may have more than one type of nonimmigrant visa but are admitted in only one status.

General requirements for foreign nationals seeking temporary admission include, but are not limited to, the following:

- The purpose of the visit must be temporary;
- The foreign national must agree to depart at the end of his/her authorized stay or extension;
- The foreign national must be in possession of a valid passport;
- A foreign residence must be maintained by the foreign national, in most instances;
- The foreign national may be required to show proof of financial support;
- The foreign national must be admissible or have obtained a waiver for any ground of inadmissibility;
- The foreign national must abide by the terms and conditions of admission.

For more information on visiting visas, see the USCIS website.

VISAS: AN OVERVIEW

A visa grants a foreign national permission to enter the United States. A "nonimmigrant visa" permits a foreign national to remain in the United States temporarily, usually to work, to visit relatives or to attend school. Most nonimmigrant visas are not subject to numerical caps.

An "immigrant visa" (also known as a "green" card or permanent resident status) permits a foreign national to remain in the United States permanently. A permanent resident has the right to become a naturalized U.S. citizen after three to five years. Immigrant visas are numerically limited by country and by class, e.g. family relationship or job skills.

To enter or to stay in the United States as a nonimmigrant or immigrant usually requires several steps. First, a foreign national or his or her employer or relative often files an application with the U.S. Immigration and Naturalization Service (INS) to be classified in one of the nonimmigrant or immigrant visa categories. If the INS approves the application, the foreign national may need to go to a U.S. embassy or consulate overseas to have a visa stamped in his or her passport. This stamp indicates the visa class and the date of issuance and expiration. At the border, an immigration inspector will review the visa stamp and issue an admission card (Form I-94 for nonimmigrants). The inspector can authorize admission for any length of time, up to the expiration date on the visa stamp. The INS also issues permanent resident alien cards to immigrants in the United States.

The following is a list of common nonimmigrant and immigrant visa categories.

NONIMMIGRANT Visa CATEGORIES

There are approximately 26 types of nonimmigrant visas, each authorizing a temporary stay in the United States. It is often possible to extend your stay and/or change from one nonimmigrant visa category to another.

A: Government Officials
This class includes ambassadors, public ministers, diplomats, consular officers and other officials assigned to represent their country to the United States. Spouses, children, servants, attendants and their families are also included in this class.

B-1: Visitors for Business
This class includes foreign nationals who intend to conduct business for a foreign employer. A B-1 visitor may not displace a U.S. worker, or receive compensation from a U.S. source. The initial maximum period of admission is one year, with renewals granted as necessary to complete the purposes of the trip.

B-2: Visitors for Pleasure
These are tourists and relatives visiting family members in the United States. B-2 nonimmigrants are not permitted to work in the United States. Persons coming primarily for the purpose of studying are not properly classifiable as B-2 nonimmigrants. The initial period of admission is usually six months, with a maximum total stay of one year.

Visitors – Visa Waiver Pilot Program
Nationals from a growing list of countries, designated based upon a historically low rate of non-immigrant visa refusals, are permitted to enter the United States as visitors for business or pleasure without first obtaining visas. Individuals entering under this program are permitted to remain in the United States for a maximum of 90 days, and are generally barred from extending their stay or changing status while in the United States.

C-1: Transit Aliens
A transit alien is someone passing through the United States on the way to a third country. A maximum period of 29 days is permitted.

D: Alien Crewmen
This class includes vessel or aircraft workers required for normal operation of the ship or plane. Crewmen are admitted to the United States for up to 29 days.

E-1: Treaty Traders
A treaty trader is someone who enters the United States primarily to carry on trade between the United States and a foreign country that has signed a treaty of commerce and navigation (or its equivalent) with the United States. The treaty trader must carry a passport from the country he is representing. The initial period of admission is one year. Extensions of stay are possible.

E-2: Treaty Investors
A treaty investor is also a national of a foreign country with which the United States has signed a treaty of commerce and navigation, or its equivalent. However, a treaty investor is someone directing and developing a business in which he or she has invested a substantial amount of capital. Top managers and executives of firms that have made substantial investments in qualifying enterprises may also qualify, as may "essential" employees. A one year initial period of admission is permitted, with extensions available.

F: Academic Students
An F-1 student is admitted to pursue a full course of study at a school or institution approved by the INS to accept foreign students. An F-1 student must maintain a home in a foreign country to which he or she will return upon completion of studies. This category also includes the student's spouse and unmarried children under 21 years old (known as "F-2" s).

With permission, F-1 students may work on-campus, and off-campus after the first academic year part-time during the semester and full-time during vacations, and after graduation, for a period of up to one year for "practical training." F-1 students are admitted for "duration of status," which is defined as the length of time necessary to complete a particular degree program, plus a period of authorized practical training.

G: Representatives to International Organization
This class includes persons accredited by their governments to represent it to an international organization such as the United Nations, World Bank, or Red Cross.

H-1A: Registered Nurses
Special rules govern institutions petitioning for the admission of temporary foreign nurses.

H-1B: Temporary Professional Workers
H-1B's are persons coming to the United States to engage in "specialty occupations." This includes all professionals holding bachelor's degrees and some persons who can show professionalism based on a combination of schooling and appropriate work experience. This class requires a prearranged job, which may be temporary or permanent in nature, in a professional field. The employer must also file an "attestation" with the U.S. Department of Labor that it will pay the foreign national the higher of the prevailing or actual wage for the job, and provide adequate working conditions, among other things. The initial period of admission is three years, with a second three-year period available. After remaining in the United States for six years on an H-1B visa, a foreign national must live abroad for one year before re-entering the United States in H or L visa status. The H-1B class is subject to an annual cap of 65,000.

H-2A: Temporary Agricultural Workers
H-2B: Temporary Non-Professional Workers
These classes include skilled and unskilled workers who lack bachelor's degrees who are coming to the United States temporarily to perform jobs that are temporary or seasonal in nature. This class requires prearranged employment and a certification from the U.S. Labor Department that U.S. workers are unavailable for the job. The initial period of admission is authorized by the Labor Department and INS, and is not to exceed one year. Extensions are available in limited circumstances for a maximum period of three years.

H-3: Trainees
An H-3 trainee is a foreign national coming temporarily to the United States to engage in training not available in his or her home country, who intends to use this training outside of the United States. A trainee may not engage in productive employment if a U.S. resident would be displaced.

H-4: Spouses and Children
Spouses and children of H-1, H-2 or H-3 nonimmigrants are generally admitted for the duration of the status of the primary visa holder. H-4's are not permitted to work in the United States.

I: Journalists
This category allows foreign nationals to be admitted to the United States, upon a basis of reciprocity, as a bona fide representative of a foreign press, radio, film or other foreign information media, for a period of one year. Spouses and unmarried children under 21 are included in this class.

J: Exchange Aliens
This category includes foreign nationals who will participate in a program approved by the U.S. Information Agency. Participants include students, scholars, trainees, teachers, professors, research assistants, specialists, au pairs, or leaders in a field of specialized knowledge. Certain exchange visitors are required by law to return to their home country for a period of two years to impart the knowledge they gained in the United States before they may re-apply to enter the United States. Waivers of this requirement are sometimes available. Spouses of J-1 nonimmigrants are issued J-2 visas and are sometimes permitted to work in the United States.

K: Fiances or Fiancées of U.S. Citizens
This class covers those engaged to be married to U.S. citizens who are coming to the United States solely to conclude a valid marriage with the petitioner within 90 days after entry, and the minor children of such persons. The period of admission is 90 days, and is not subject to extension.

L: Intra-company Transferees
The L-1 category is for persons coming to the United States to work temporarily for the U.S. branch, subsidiary or affiliate of their foreign employer. To qualify for this category, a person must have worked for the foreign affiliate for at least one year immediately prior to transfer to the United States. This class includes only executives,
managers and employers with "specialized knowledge" who will fill a position in one of these categories in the United States. The initial period of admission is three years. Extensions are possible up to a total of five years for specialized knowledge personnel and seven years for managers or executives. The spouse and children of L-1's may obtain derivative status as L-2's for the duration of the principal L-1 alien's status.

M: Vocational Students
The M-1 category includes persons coming to the United States to study at a vocational or other non-academic school, other than a language training program, that has been authorized by INS to allow foreign students to attend. M-1 students are generally not permitted to work, but may obtain a limited period of "practical training." Spouses and minor children are classified in the M-2 category.

N: Relatives of United Nations Employees
This class includes certain parents and children of foreign nationals who have worked for international organizations in the United States.

O: Aliens of Extraordinary Ability
The O-1 visa category is for foreign nationals of "extraordinary ability" in the sciences, arts, education, business and athletics, as demonstrated by "sustained national or international acclaim." This class requires prior consultation with unions, management groups and other outside sources. Assistants to the principal nonimmigrant are admissible as O-2's. Spouses and minor children of O-1 and O-2 nonimmigrants are admissible in the O-3 class.

P: Performing Athletes and Entertainers
This visa category includes three subcategories of persons coming to perform in athletic or entertainment events. The P-1 class includes athletes performing as individuals, or groups and entertainers performing as a group recognized at an international level. The P-2 class includes athletes and entertainers entering to perform under reciprocal exchange programs. The P-3 class includes those entering to perform in a culturally unique program. The P-1 and P-3 classes require consultation with U.S. unions to determine eligibility. Spouses and minor children of P-1, P-2 and P-3's are admissible as P-4's.

Q: Cultural Exchange Visitors
This class includes persons participating in designated international cultural exchange programs. Sponsors of such programs must employ at least five persons, including the foreign national. The maximum admission period permitted is fifteen months.

R: Religious Workers
This class includes ministers, professional religious workers and other religious workers entering the United States to work at an affiliated U.S. entity, and who have worked for the religious organization abroad for at least two years prior to application. The initial period of admission is three years.

S: Aliens who Assist with Law Enforcement and Anti-Terrorism Efforts
This class allows certain aliens to be admitted to the United States to testify in criminal cases. This category also authorizes the admission of a limited number of alien informants. The period of admission is limited to three years.

IMMIGRANT VISA CATEGORIES
An immigrant or legal permanent resident ("LPR") is someone admitted to the United States permanently. To obtain immigrant status, an applicant must meet both the substantive and numerical requirements of the law. Substantively, one must qualify as a specified close relative of a U.S. citizen or another LPR, as an employee of a sponsoring employer or prospective employer, or as a "diversity immigrant" under a visa "lottery" program. Further, the potential immigrant must not fall within any of the general categories of inadmissible aliens specified in the law, such as criminality, mental defect, Communist party affiliation, drug trafficking, or terrorism.
In addition to substantive requirements, there are also country-specific and world-wide statutory quota limits imposed on most categories of family and employment-based immigrant visas. These quota limitations often can result in extended waiting periods before immigrant status may be obtained.

Currently, about 670,000 immigrant visas are available each year.

A. EMPLOYMENT-BASED IMMIGRANTS

There are five employment-based immigrant visa categories (of which three have additional sub-categories of their own). They are as follows:

Employment-Based Category 1 (EB-1) 
PRIORITY WORKERS

The first employment-based category covers "priority workers." No labor certification is required in this category. Roughly 40,000 visas are allocated annually to this group. This category has three subcategories.

Category 1 - Sub-category A
Alleged "extraordinary ability" in arts, sciences, education, business or athletics - To qualify in this sub-category, the applicant must show sustained national or international acclaim and achievements recognized through extensive public documentation, and must be able to demonstrate that his or her contribution would "substantially benefit" the United States prospectively.

Category 1 - Sub-category B
Outstanding professors and researchers - To qualify in this sub-category, the applicant must establish international recognition or acclaim, must have at least three years' experience in teaching and research in the field, and must have an offer of employment for a tenured or tenured-track teaching position at a U.S. university or college, or a comparable research position in private industry.

Category 1 - Sub-category C
Certain multinational executives and managers - This sub-category provides an immigrant visa for individuals who were employed as executives or managers overseas during at least one year within the three-year period immediately prior to transfer into the United States, and who are transferred to the United States to perform executive or managerial duties. The overseas and U.S. employers must be the same or affiliated entities. The definitions of executive capacity and managerial capacity are fairly broad, and include managing a function, not just employees.

Employment-Based Category 2 (EB-2) 
ADVANCED DEGREE HOLDERS AND ALIENS OF EXCEPTIONAL ABILITY

The second employment-based category annually allows for 40,000 visas, plus any spilldown of unused visas from the EB-1 category. This category has two sub-categories. The first is open to members of the professions holding advanced degrees (e.g. above that of baccalaureate) or their equivalent. The second sub-category is available to those who, because of their exceptional ability in the sciences, arts or business, will substantially benefit the national economy, cultural or educational interests, or welfare of the United States. Under the second sub-category, the applicant's exceptional ability must be demonstrated by more than just a degree or license, and must be substantially above that normally encountered in the sciences, arts or business.

An applicant in this category generally must obtain a labor certification for his position. However, a specific job offer and labor certification may not be necessary if an applicant can demonstrate that such an exemption would be in the national interest.

Employment-Based Category 3 (EB-3) 
SKILLED WORKERS, PROFESSIONALS AND OTHER WORKERS
This category also allows for 40,000 visas annually, plus any spilldown of unused visas from the EB-1 and EB-2 categories. There are three sub-categories in this category. An applicant in each of these sub-categories must obtain a labor certification for his or her position.

Category 3 - Sub-category A
Skilled workers - An alien qualifies as a skilled worker if, at the time of petitioning for classification, he or she is capable of performing skilled labor requiring at least two years training or experience, and is being sponsored for a permanent position for which qualified workers are not available in the United States.

Category 3 - Sub-category B
Professionals - This sub-category encompasses aliens holding baccalaureate degrees or their equivalent who are members of the professions. The employer must show that no qualified U.S. workers are available for the job.

Category 3 - Sub-category C
Other workers - This sub-category is reserved for aliens capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. A cap of 10,000 visas within the overall 40,000 annual limit for the EB-3 category is set for applicants seeking to qualify in this sub-category.

Employment-Based Category 4 (EB-4)
SPECIAL IMMIGRANTS

This category has 10,000 visas available per year, and encompasses religious workers, certain former United States government employees, and certain foreign nationals working for international organizations.

Employment-Based Category 5 (EB-5)
EMPLOYMENT-CREATION IMMIGRANTS

This "immigrant investor" category provides up to 10,000 visas annually to applicants who invest a minimum of $1 million in a new enterprise in the United States that will create jobs for at least ten U.S. citizens or permanent residents, other than immediate family members of the investor. In certain targeted employment areas, the investment may be reduced to $500,000.

B. FAMILY-BASED IMMIGRANTS

There are two basic types of familial relationships that serve as a basis to apply for permanent resident status: immediate relatives and family-sponsored preference immigrants. There is worldwide cap on family-sponsored immigrants of 480,000 per year.

Immediate Relatives
Spouses and minor (i.e., under 21) unmarried children of United States citizens, parents of U.S. citizens (provided the citizen is over 21 years old), and certain spouses of deceased U.S. citizens can qualify for an immigrant visa as immediate relatives. There are no numerical limitations on this category of immigrant visas.

Family Sponsored Immigrants
Each family preference category has its own annual allocation of visas under the worldwide limit on family-based visas. The current family-based preference categories and annual numerical limits are:

| Family First Preference (23,400 visas) | Unmarried sons and daughters of U.S. citizens |
| Family Second Preference (114,000 visas) | Spouses and unmarried children of permanent resident aliens |
| Family Third Preference (23,400 visas) | Married sons and daughters of U.S. citizens |
Family Fourth Preference  
(65,000 visas)  
Brothers and sisters of U.S. citizens, if such citizen is at least 21 years old

In addition, the spouse or child of the principal alien is entitled to the same status and order of consideration, if accompanying or following to join the spouse or alien.

C. DIVERSITY IMMIGRANTS

"Diversity immigration" refers to a concept of allowing people a chance to immigrate to the United States even if they lack close relatives or a job offer. 55,000 immigrant visas are available each year to people from countries that traditionally have not had much immigration to the United States in the past. To qualify for this program, applicants must have at least a high school education or its equivalent, or have worked two years in an occupation that requires two years of training or experience.

The diversity immigration program is aimed at helping potential immigrants from such regions as Africa and Europe. Millions of people apply for the permanent diversity visa program every year.

TAX NOTES

Residence for tax purposes

U.S. law creates a statutory definition of the term "resident alien" for tax purposes. There are two tests, one based upon visa status, the other based upon "substantial presence" in the United States.

First, an alien who has been granted lawful permanent resident status is a resident for U.S. tax purposes, without exception. Absence from the United States for the entire year does not prevent the need to file a U.S. tax return, unless the alien's permanent resident status has been terminated under the immigration laws. Permanent resident status can be relinquished in appropriate cases.

Second, even many nonimmigrants can be deemed to be U.S. residents for tax purposes if they have been physically present in the United States for 183 or more days within the calendar year. This is known as the "substantial presence" test. Alternatively, one is deemed "substantially present" in the United States if he or she has been "cumulatively present" in the United States over the last three years for a sufficient number of days. Cumulative presence is calculated by a complex formula. An exception to the cumulative presence rules is provided for an individual alien who is able to show that his or her "tax home" and family connections remain in a foreign country.

Generally, non-residents holding A, F, G, J or M visas are not considered residents for tax purposes. However, non-residents who are engaged in trade or business in the United States or who have U.S.-source income may have to file form 1040-NR and pay applicable taxes on that income.

Estate taxes and immigration status

Ordinarily under U.S. law, if a person dies he or she can leave a certain amount to his or her spouse tax free. This is known as the "marital deduction." That deduction normally is not available where the surviving spouse is not a U.S. citizen unless there is a disposition by means of a qualified domestic trust. Accordingly, it may be important for spouses to consider careful tax planning or apply for naturalization as U.S. citizens to avoid excessive estate taxes.

Further, the federal income tax definition of resident does not apply for federal estate or gift tax purposes. Rather, one is a resident for estate or gift tax purposes if his or her "domicile" is the United States. If one dies a resident of the United States, i.e., is a "domiciliary," the estate is subject to U.S. estate tax on everything he or she owns, regardless of its location. If one dies a nonresident, the estate is subject to U.S. estate tax only on property situated in the United States.
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WHAT:

The H-1B temporary worker visa allows professional foreign nationals to work in the United States in specialty occupations for a period of up to six years. The application must be filed by the employer; an individual cannot obtain an H-1B visa on his or her own.

QUALIFICATIONS:

The position must be a professional one that requires specialized training. A Bachelor's degree must be a minimum requirement of the position. The foreign national must also have the appropriate Bachelor's degree, or equivalent training and experience. If the position requires a license, the foreign national must possess the appropriate license prior to the filing of the H-1B petition.

PROCEDURE:

Employers must obtain the approval of both the U.S. Department of Labor (DOL) and the U.S. Citizenship and Immigration Services (USCIS, formerly the service component of INS). For DOL approval, an employer must show that: (1) he or she is paying the higher of the "prevailing wage" or "actual wage" for the position; (2) he or she has notified other workers of the intention to employ H-1B workers; (3) there is no strike or lockout at the place of employment; and (4) the H-1B workers will not adversely affect the working conditions of U.S. workers. There are severe penalties for failure to comply with these attestations. The DOL may investigate an employer upon a complaint, or without a complaint if it receives "specific, credible information" from a reliable source. Note: Under December 2004 legislation, employers are required to pay 100% of the prevailing wage.

For USCIS approval, the employer must show that the position is a professional position that requires specialized training and that the foreign national is a professional who is qualified for the position.

The entire application process usually takes a few months, unless premium processed. An applicant who is not already work authorized may not begin employment until the petition is approved by both DOL and USCIS.

PORTABILITY:

An approved H-1B petition is not immediately transferable to a second employer or a second job with the same employer. If a foreign worker accepts a new job, the new employer must begin the entire H-1B process again. However, the employee who is already in H-1B status can join the new employer as soon as the change-of-employer H petition is "filed" with (meaning receipted by) USCIS. In other words, the employee does not need to wait until the new petition is approved to join the new company. If the new H-1B petition is ultimately denied, the authorization will end at the time of the denial.
H-1B VISA QUOTA:

This visa category is subject to a worldwide quota of less than 65,000 per fiscal year (October 1 to September 30 of the following year). However, the H-1B quota will not apply to anyone employed (or who has an offer of employment) at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a government research organization. If someone leaves a quota-exempt job, then they become re-subject to the H-1B quota unless the next employer is also exempt. However, anyone who has was counted against the quota in the past six years will not be counted against the quota again. USCIS has a random selection process (lottery) for years where the number of petitions received exceeds the number of H-1Bs available under the quota. Employers and workers are advised to start the process by contacting us no later than March in order to assure filing by the first week in April. USCIS receipts cap-subject H-1Bs for the first 5 business days in April.

VISA STRATEGY FOR STUDENTS:

F-1 or J-1 students (not foreign medical graduates) are best advised to apply for optional practical training (OPT) before applying for H-1B visa classification. Practical training can be authorized for up to 12 months for F-1 visa holders, and 18 months to 3 years for J-1 visa holders. A student must obtain work authorization from his or her school and USCIS before graduating. If the employment will continue beyond the practical training period, the employer may file an H-1B petition on behalf of the foreign national. Employers and employees should be aware, however, that H-1B visa allocations could be depleted before the end of the fiscal year. While the cap-subject H-1B "change of status" petition is pending, OPT will be automatically extended until October 1, the start date on the H-1B if the H-1B is selected in the quota lottery. For students whose degrees are in the STEM fields (science, technology, engineering, mathematics), OPT may be extended a further 17 months if the employer has enrolled in E*Verify.

DEPENDENTS:

Dependents of H-1B visa holders hold H-4 visas and are NOT authorized to accept employment.

ADDITIONAL FILING FEES:

Recent legislation has re-imposed an employer paid fee of $1500 for employers with 26+ employees and $750 for small employers, in addition to the current filing fee of $320 for each H-1B petition filed. The fee is not required of colleges, universities, affiliated nonprofits, or non-profit research organizations. The fee is also not required for extensions with the same employer after the first. These funds are targeted primarily to train U.S. workers. Employers may not require an H-1B employee-beneficiary to reimburse or otherwise compensate the employer for the cost of this fee, or they will be subject to a $1,000 fine per violation. Before filing the petition, we will request a check from the employer payable to USCIS to cover this fee. Additionally, there is a $500 “antifraud” fee for the initial H-1B filing by an employer or for change of employment.

ADDITIONAL REQUIREMENTS:
Additional requirements for the H-1B process in addition to those mentioned above, are as follows:

--Whistle blower protection: An employer may not discharge or otherwise discriminate against an employee, former employee or applicant because such individual has disclosed information to the employer or anyone else regarding a potential violation, or for cooperating in an investigation or proceeding.

--No "benching" rule: Employers must pay H-1B nonimmigrants the required wage for the full hours specified on the H-1B visa petition even if the beneficiary is in nonproductive status due to a decision by the employer, or based on the nonimmigrant's lack of a permit or license. In other words, full-time employees must be paid full-time wages, and part-time employees must be paid for the minimum hours stated on the petition. This provision does not apply for nonproductive time due to non-work-related factors, such as voluntary absence or circumstances rendering the individual unable to work.

--Pay Return Flight: Under H-1B regulations, an employer will be liable for the reasonable costs of return transportation of the H-1B employee to the place of his/her last foreign residence, if the employee is dismissed from employment by the employer before the end of the period of authorized H-1B admission.

--Benefits: Employers must offer H-1B employees benefits and eligibility for benefits (including participation in health, life, disability, and other insurance plans, retirement and savings plans, bonuses and stock options) on the same basis and in accordance with the same criteria as are offered to U.S. workers.

PERMANENT RESIDENCE:

H-1B visa holders are not permanent residents but may apply to adjust their status to become permanent residents. A permanent resident is sometimes referred to as a "green card" holder. Permanent resident status may be obtained based on the same or similar job as used in the H-1B visa petition process.

FOREIGN MEDICAL GRADUATES:

Foreign medical doctors applying through a clinical employer or residency training program for H-1B classification must additionally show: 1) a state medical license; 2) FLEX I & II, USMLE 1, 2, and 3, FMGEMS I & II or NBME passing scores (all parts of one examination, no mixing of test parts allowed); 3) English language proficiency as documented by ECFMG certification or a medical school diploma from a U.S. accredited school; and 4) an M.D. or equivalent foreign degree or unrestricted foreign Clinical Medical License. Under certain circumstances, J-1 doctors may change to H-1B status through USCIS. Otherwise, J-1s must depart the U.S. to obtain the visa at a U.S. consulate or embassy ("consular processing").

FOR MORE INFORMATION:

Contact Hilary Fraser, Rosanne Mayer, Carolyn Lee, Nick Hinrichsen or Stephen Yale-Loehr at Miller Mayer, LLP, 202 East State Street, Suite 700, Ithaca, New York 14850; tel: 607-273-4200; fax: 607-272-6694; e-mail: immig@millermayer.com.

If you seek permanent resident status (a "green card") in the United States and do not have a close relative who is a U.S. citizen or legal permanent resident, you most likely will need your employer to sponsor you. Exceptions exist for asylum seekers, diversity lottery winners, investors, and ministers, among others. There are three steps in the usual process to obtain a green card based on a job. The first step is called labor certification. The second step is the visa petition itself. The third step involves adjustment to permanent resident status through an immigration agency office in the U.S., or consular processing at a U.S. embassy or consulate overseas.

Avoiding Labor Certification

The first step, labor certification, can be the most difficult part of the process.

There are several ways to avoid or decrease the burden of labor certification. For example, three types of workers, together referred to as "priority workers," are totally exempt from the labor certification requirement. These are foreign nationals of "extraordinary ability," "outstanding professors and researchers" who have at least three years full-time teaching experience and a full-time tenure track offer in the United States, and certain executives and managers of multinational corporations.

Another way of avoiding labor certification is by proving that your continued employment in the United States is in the "national interest" of the United States. This proof is made by showing that your employment benefits the economy, national health care system, educational system, or other high-priority federal interest. Further, nurses and physical therapists and foreign nationals possessing "exceptional ability in the arts or sciences" are eligible for an exemption from labor certification called "Schedule A." College and university professors and foreign nationals possessing "exceptional ability in the performing arts" are eligible for a special form of labor certification called "Special Handling."

Labor Certification

If you do not fit into any of the categories described above, you must secure an approved labor certification from the U.S. Labor Department before applying for a green card from the immigration agency. To obtain an approved labor certification, your employer must prove that there are no American workers qualified or available to do the job you seek to fill. To make this proof, your employer must advertise the position, list the position with the local Labor Department job bank, and post a notice disclosing the position, title, and salary to other employees or unions at the work place. The employer must also pay a salary that the Labor Department deems comparable to the average wage paid for this type of position in your area.

The Visa Petition

Once labor certification is approved or if you are exempt from labor certification, your employer can apply for immigrant visa ("green card") classification on your behalf by filing Form I-140 with a Regional Service Center of the U.S. immigration agency. The visa petition seeks classification in one of several employment-based ("EB") categories. On this form, the employer must describe the business, the position, and your qualifications. Depending upon which classification is sought, a
visa may be immediately available, or there may be a delay of several years before a visa is available. These delays are caused by quotas assigned to the various visa classifications and countries of origin. Visa availability is determined by the State Department each month. Current information can be found at http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html or by calling (202) 663-1541.

The "EB-2" category is for advanced degree holders, meaning that you must hold either a Bachelor's degree and at least five years of progressive experience or an advanced degree, and will be employed in a professional job.

The "EB-3" category is for skilled workers, professionals, and other workers. Skilled workers are defined as those with at least two years' training or experience, including foreign nationals holding two-year Associate's degrees. A professional is defined as someone holding a Bachelor's degree or its foreign equivalent.

The Other Worker sub-category of the EB-3 classification encompasses unskilled workers.

It can take several months to obtain approval of a visa petition from the immigration agency. If you have a spouse and/or minor children, they may obtain green cards with you as your dependents.

Adjustment and Consular Processing

After a visa petition approval is received from the U.S. immigration agency, you, the foreign national, may complete the third step of the process—either adjustment to permanent resident status or consular processing. "Adjustment" is made by filing Form I-485 with an immigration agency office in the U.S. This form asks for biographical, health, and other personal information. The last step in the adjustment process may be an interview conducted at an immigration agency office.

Alternatively, you can obtain your green card at a U.S. consular office in your home country. The consular office will conduct an interview, medical exam, and investigation of your past that is very similar to the adjustment process. The forms and procedures, however, are different because the U.S. consular offices are under the jurisdiction of the State Department, not the U.S. immigration agency.

Conclusion

From start to finish, obtaining a green card can take a long time, particularly if your visa category is subject to a backlog. During this time, you can usually travel freely, unless you are subject to a restriction. You should always check with your lawyer if you plan to travel while your labor certification, visa petition, or adjustment application are pending.

In addition to being time consuming, obtaining a green card is expensive. No fee is paid to the Labor Department for labor certification, but several hundred dollars must be paid to the immigration agency or State Department for the visa petition, adjustment and medical exam. Legal fees for the entire process vary, depending upon your case.

Once you obtain a green card, you are subject to most of the same rights and obligations as U.S.
for some government benefits. However, you cannot vote. Most significantly, you are subject to the "abandonment of residency" rules, meaning that you may lose your green card if you are absent from the U.S. for an extended period of time. If you want to become a naturalized U.S. citizen, you usually must hold your green card for five years and physically reside in the U.S. at least half that time.

While obtaining permanent resident status based on a job in the U.S. can take a substantial amount of your time and money, there are numerous advantages of permanent resident status. By obtaining a green card, you greatly enhance your ability to travel, seek employment and/or relocate.

For further information on these or any other immigration issues, please contact Miller Mayer.

Obtaining Permanent Status
Other Adjustment of Status Resources
More Visa Information for Individuals
Immigration Home Page
Our internationally renowned immigration attorneys partner with investors, Regional Centers, migration consultants and developers through all phases of the designation, project development, and investor petition process. Committed to employment immigration practice since 1990, Miller Mayer attorneys assist universities, high-tech, hospitality, and medical businesses obtain temporary and permanent work authorizations for their employees. We assist families, investors, entrepreneurs, and talented individuals with all types of immigration petitions.

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