Wayne State University
Permanent Residency Workshop
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Aafaf Vicky Farah

Law Offices of Aafaf Vicky Farah
201 E. Liberty Street
Ann Arbor, MI 48104
Tel: 734-663-9813
Fax: 734-663-2920
avfsq@aol.com
www.vickyfarah.com
I. Introduction

A. Effect of new Administration on U.S. immigration and nationality procedures.

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. 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." (EB1A)

2. Outstanding professors and researchers. (EB1B)

3. Certain multinational executives and managers. (EB1C)

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. Now it is much more difficult for an NIW petition to be approved.

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.

III. 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. Effective June 1, 2008, all permanent labor certification applications are being processed by Department of Labor in Atlanta. Currently cases being processed in approximately five months but this changes based on volume of applications being filed.

      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 opportunity in a competitive recruitment and selection
process through which the foreign national was found to be more 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. Originally, the advertisement must have appeared in a print journal appropriate to the field. Online advertisements are now acceptable provided the ad ran for at least 30 days.
   b. Must provide a copy of the ad.

4. Evidence of all other recruitment sources utilized.

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

6. Audit File housed at Office of International Students and Scholars for five years from the date the PERM application is filed. Resumes of all applicants for the position must be included in the Audit File.

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

7. Department of Labor will approve, deny, or select the PERM application for Audit.

D. After approval of PERM application.

1. Filing I-140 visa petition with Citizenship and Immigration Services Regional Service Center in Lincoln, Nebraska.

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.

IV. 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." (EB1A)

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 has judged the work of others in the field;

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 high salary 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.

V. Outstanding Professors and Researchers (INA §203(b)(1)(B)) (EB1B)

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.

VI. 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 experience is deemed the equivalent of a Master'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 certain 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 Center 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. On December 27, 2016, Matter of New York Department of Transportation was vacated (overturned) by Matter of Dhanasar.

1. In Matter of Dhanasar, the AAU set forth three factors for consideration in determining whether a person may qualify for approval of an NIW:

   a. That the foreign national's proposed endeavor has both substantial merit and national importance.

   b. That the foreign national is well positioned to advance the proposed endeavor.

   c. That, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.

VII. 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 experience required); 2) Professionals (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.

VIII. Possible To Pursue Multiple Employment-Based Preference Categories

A. "Upgrading" from employment-based third preference to employment-based second preference.

B. At times, the employment-based third preference for people born in China has a much later cut-off date than the employment-based second preference. It is possible to file two I-140 petitions, one in each category. These multiple petitions may be filed at the same time or at different times.

IX. Application for Adjustment of Status (I-485 application)

A. A priority date must be current in order to submit an application for Adjustment of Status.

1. An applicant for Adjustment of Status may submit an application for an employment authorization (I-765) document and application for a parole/travel (I-131) document with the I-485 application.

B. Dependents may also file I-485 applications.

C. Grounds of Excludability.

D. New requirement of personal interview for employment-based Adjustment of Status applicant.

X. Retrogression of Immigrant Visa Waiting List

A. 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 EB3.

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

A. When I-485 based on EB1A 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 EB1, EB2, or 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.
Permanent Residency ("Green Card") Basic Procedures

Flow Chart

Application for Labor Certification (PERM)

- Obtaining prevailing wage determination from the U.S. Department of Labor
- Extensive advertising and recruitment results
- Drafting forms and gathering documents, including documents to verify foreign national meets requirements for position
- File PERM application (ETA form 9089) with U.S. Department of Labor

Time: approximately 10 months, if case not selected for Audit

Employment-based Immigration Petition (I-140)

- Once PERM approved, prepare and file I-140 petition with U.S. Citizenship and Immigration Services

Time: 2 weeks to 12 months

Final immigration Step

- Provided visa number is available, prepare and file Adjustment of Status (I-485 application) with U.S. Citizenship and Immigration Services or immigrant visa application at U.S. Consulate abroad. Dependents (spouse and/or children who are unmarried and younger than 21) are part of the final step
- At this stage, foreign national needs personal documents including birth certificate, and if applicable, marriage certificate and proof of termination of prior marriages
- Personal interview at local U.S. Citizenship and Immigration Services office now required

Time: anywhere from 6 to 12 months unless problem with visa availability

No Labor Certification Needed For:

- Alien of Extraordinary Ability
- Outstanding Professor/Researcher
- Multinational Manager or Executive
- National Interest Waiver

Note:

Employment authorization application may be submitted with I-485 application for principal and/or dependents
OFFICE OF FOREIGN LABOR CERTIFICATION
Permanent Labor Certification Program – Selected Statistics, FY 2018 YTD¹

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Processing Status of Active PERM Applications

- Sponsorship p/BE: 1%
- Audit Review: 11%
- Analyst Review: 83%
- Appeal: 5%

47,717 Applications remaining as of 12/31/2017

Review of Applications Certified FY 2018 YTD (% of total certified FY 2018 YTD)

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<th>Top 5 Occupations (O*Net Job Family)</th>
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Top 5 Work Site States

- California: 4,031 (25%)
- Texas: 1,561 (10%)
- New York: 1,306 (8%)
- New Jersey: 1,138 (7%)
- Washington: 1,079 (7%)

Top 5 Industries (NAICS Code by Industry)

- Professional, Scientific, and Technical Services: 6,127 (38%)
- Manufacturing: 2,557 (16%)
- Information: 1,410 (9%)
- Retail Trade: 1,126 (7%)
- Finance and Insurance: 1,078 (7%)

Top 5 Visa Classifications

- H-1B: 10,666 (67%)
- F-1: 1,198 (8%)
- L-1: 1,185 (7%)
- Blank: 1,111 (7%)
- TN: 372 (2%)

Top 5 Countries of Citizenship

- India: 7,989 (50%)
- China: 1,675 (11%)
- South Korea: 871 (5%)
- Canada: 653 (4%)
- Mexico: 417 (3%)

Minimum Education Requirements

- Advanced Degree: 7,661 (48%)
- Bachelor’s: 5,973 (38%)
- Less than Bachelor’s: 1,785 (11%)
- Other: 505 (3%)

¹Cumulative numbers may not match the numbers on previous reports due to change in case processing status.
²“Applications Received” is derived from data not publically disclosed.
³“Advanced Degree” is defined as Master’s and/or Doctorate Degrees.


Data as of December 31, 2017. All figures are rounded and not audited.

AILA Doc. No. 18012531. (Posted 1/25/18)
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**IMMIGRANT VISA BULLETIN**

February 2018

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