Employment-Based Immigration: The Preference Categories

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What Is Employment-Based Immigration?

- Typically a three step process
  - Labor certification (PERM)--DOL
  - Immigrant Petition (I-140)--USCIS
  - Application to adjust status (I-485)--USCIS or immigrant visa application (DS-230)--DOS
- In some cases, labor certification not required so process begins with immigrant petition
- Employer must generally prove financial ability to pay the offered wage
- See INA §203(b) and 8 CFR §204.5

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EB Visa Allocation

- 140,000 total visas per fiscal year (10/1 – 9/30)
  - 40,000 for EB-1 priority workers
  - 40,000 for EB-2 advanced degree
  - 40,000 for EB-3 professional/skilled workers/other workers
  - 10,000 for EB-4 special immigrants
  - 10,000 for EB-5 investors
  - Spill down/Spill up/+unused FB from family-based immigration
- Most, but not all, require job offer
- Principal applicant, spouse and unmarried children < 21 years old each charged against quota

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EB-1 First Preference

- EB-1 Priority workers
  - EB-1(1) Extraordinary Ability
  - EB-1(2) Outstanding Researchers
  - EB-1(3) Multinational Managers
- No PERM labor certification required

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EB-1(1) Extraordinary Ability

- Intended only for the top few in the alien's field
- No job offer required
- Requires:
  - Alien must show will continue to work in field
  - Major award or prize (Nobel, Pulitzer, etc.); OR
  - Documentation from 3 of 8 categories of evidence specified in regulation; OR
  - Other "comparable evidence" if above does not readily apply
- More rigorous than O-1 and must show prospective contribution to the United States
- Employer or alien can file I-140 with USCIS

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EB-1(1) Extraordinary Ability

- Evidentiary categories for the "3 of 10"
  - Nationally or internationally recognized prizes or awards for excellence of work
  - Membership in associations based on accomplishments
  - Published materials about the alien's work or citations to alien's work
  - Judging the work of others
  - Original contributions to the field
  - Authorship of scholarly articles
  - Display of alien's work at artistic exhibitions
  - Performance in a leading or critical role for distinguished establishment
  - Evidence of high salary or compensation
  - Commercial success

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EB-1(2) Outstanding Professors and Researchers

- Outstanding international reputation in an academic field
  - Documentation from 2 of 6 categories
- 3 years teaching and/or research experience in the academic field
- Tenure or tenure track teaching position with an institution of higher education or "permanent" research position with such an institution or private employer
  - Private employer must have at least three full-time researchers and a record of achievement in the alien's field of research

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EB-1(2) Outstanding Professors and Researchers

- "Permanent" research position
  - Not a postdoc, must have history of funding and a position employer classifies as permanent
- Categories for the "2 of 6"
  - Major prizes or awards for outstanding achievement
  - Membership that requires outstanding achievement
  - Published material about the alien's work
  - Judging the work of others
  - Original contributions to the field
  - Authorship of books or articles
  - Employer must file I-140 with USCIS

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EB-1(3) Multinational Executives and Managers

- Qualifying Corporate Relationship
  - Parent, affiliate or subsidiary including 50/50 joint venture
  - Petitioner doing business for at least one year
- Prior Employment Abroad
  - 1 continuous year within 3 years preceding filing of the petition
- Qualifying Capacity
  - Executive or managerial
  - No "specialized knowledge"
- Employer files I-140 with USCIS

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EB-1(3) Multinational Executives and Managers

- Role must be primarily managerial or executive
- Definitions same as those for L-1 purposes
  - Managers supervise other professionals or managers or manage an essential department or function of the company.
  - Executives direct a major component or function of the company, have broad discretionary authority and receive only general supervision

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EB-2 Advanced Degree Holder

- Position requires an advanced degree or equivalent
- Alien possesses advanced post-bachelor's degree or foreign equivalent; foreign bachelor's must be single-source
- U.S. or single-source foreign equivalent bachelor's degree plus five years of progressively more responsible work experience in the field may be equivalent to a masters degree
  - Cannot use combination of experience and education to equal a bachelor's degree. Must possess the academic degree
  - No combination of degree and experience permitted to equal a doctorate degree

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EB-2 Exceptional Ability

- Position requires exceptional ability
- Degree of expertise significantly above that ordinarily encountered
- Evidence must include any three of the following:
  - Degree relating to area of exceptional ability
  - Letter from current or former employer showing at least 10 years of experience
  - License to practice profession
  - Evidence of earnings commensurate with ability
  - Membership in professional organizations
  - Evidence of recognition for achievements and significant contributions to the field

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EB-2 Exceptional Ability

- Where alien is of "exceptional ability" by virtue of the advance degree, PERM labor certification not required but must meet "exceptional ability" qualifications of Schedule A Group II (20 CFR §656.15(d))
- Where alien is of "exceptional ability" and does not have the advance degree, must meet the Schedule "A" Group II standard and the "exceptional ability" standard of 8 CFR §204.5(k)(3)(ii)

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EB-3 Third Preference

- EB-3 bachelor's level professionals, skilled & unskilled labor
  - Labor certification required except for Schedule A occupations
  - Professional = bachelor's degree
  - Skilled labor > 2 years of training or experience
  - Unskilled labor < 2 years of experience or training
- Petition filed by employer

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EB-3 Professionals

- Obtain a credentials evaluation for all foreign degrees
  - Assure the evaluator is credible and can back up the evaluation if required
- Carefully evaluate especially all 3-year degree programs
  - USCIS will question all 3-year programs
- AACRAO – Edge Database is a tool for initially evaluating degree equivalencies heavily relied upon by USCIS
- Best Resource: *AILA's Focus on EB-2 and EB-3 Degree Equivalency* by Ronald Y. Wada

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EB-3 Skilled Workers

- Aliens with bachelor's degree through combination of education and experience may qualify as skilled workers
  - Does not make a difference in terms of visa number availability
  - Need to obtain evaluation of equivalence before beginning case
- Aliens whose bachelor's degree equivalency is based on a combination of education and experience qualify as skilled workers (not professionals)

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EB-2 National Interest Waiver

- Immigration of the individual is in the national interest such that it outweighs labor certification protection for U.S. workers
  - Work is in field of substantial intrinsic merit
    - *e.g.,* AIDS research, national defense
  - Individual already has a recognized record of achievement in the field
  - Impact of individual's work in the field is substantial and national in scope

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EB-4 Special Immigrants

- Religious Workers
- Certain Panama Canal Company and Canal Zone Government Employees
- International Organization Employee or Family Member

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EB-4 Religious Workers

- Tax exempt religious denomination or organization
- Alien must have two years of paid experience working in a religious occupation abroad or lawfully in the U.S. prior to filing the petition
  - A break in the employment for a sabbatical or further religious training will not serve to interrupt the two years so long as there was no unauthorized employment in the U.S.
  - Alien must be member of the denomination for two years and during the qualifying work experience

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EB-4 Religious Workers

- Full-time job offer (at least 35 hours per week) as a "minister" in a religious vocation or occupation
- Employer must prove ability to pay salary or non-salary compensation and alien is not paying his own salary but may contribute to the denomination per customary tithing or donations
- Employer files I-360 petition with USCIS
- USCIS will send investigator to determine bona fides of the case

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EB-5 Alien Entrepreneurs

- Must invest $1 million in new (established after November 29, 1990) commercial enterprise or $500,000 in targeted employment area or approved Regional Center
- Investment must create 10 full time jobs within a two year conditional residency time frame
- Regional Centers apply to USCIS for approval based on proposed promotion of economic growth in a geographic region
- Regional Center job creation requirement may be proved indirectly through industry job multiplier data

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EB-5 Alien Entrepreneurs

- File Form I-526 to seek conditional resident status
- Processed at the California Service Center
- File I-829 within last 90 days of conditional status to remove condition
- Investment and 10 jobs must be demonstrated in petition to remove conditions

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Immigrant Visa Allocation

- Immigrant visa quota begins each October 1
- Alien is charged to country of birth, not country of nationality
  - Can cross-charge to spouse country of birth but not to children's
- Quotas by country, preference category and category within country
- In EB cases, place in line for a visa is based on the date of filing the labor certification OR immigrant petition (if no labor certification required)
- Date of filing becomes the "priority date"
- DOS oversees visa issuance and will set "cut off" dates in the Visa Bulletin to assure quota is not exceeded

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Employment-Based Visa Allocation

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DOS May…

- Determine that not enough visas are available and move the cut-off date forward or make the category "current"
- Determine that there are too many visas being used and "retrogress" the cut-off date or indicate "unavailability"

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If a Visa Number Is Available…

- An applicant may file an application for permanent residence
- USCIS can approve an application that has already been filed
- DOS can issue an immigrant visa to an applicant

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If a Visa Number is NOT Available…

- An applicant must continue to wait and must maintain valid nonimmigrant status
- USCIS cannot approve a pending application
- DOS cannot schedule or conduct an immigrant visa interview

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June 2012 Priority Dates

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Who Is Impacted?

- Impacted:
  - Cases with requirements of bachelor's degree or less
  - Applicants born in China, India, Mexico, and Philippines
- Not yet impacted:
  - 1st preference – managers/execs, extraordinary ability, outstanding researchers/professors
  - 2nd preference (other than India and China)

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Questions & Answers

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