



## U.S. IMMIGRATION LAWS FOR BUSINESS

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**TABLE OF CONTENTS**

<b>Introduction</b> .....	<b>ii</b>
<b>Immigration Law Team</b> .....	<b>ii</b>
<b>International Business Team</b> .....	<b>ii</b>
<b>I. Temporary Nonimmigrant Visa Options</b> .....	<b>1</b>
A. Business Visitors (Visa Waiver, B-1, and B-2) .....	1
B. Intracompany Transferees (L-1A and L-1B).....	1
C. Specialty Occupation Professionals (H-1B).....	2
D. Specialty Occupation Professionals (E-3 Australians).....	3
E. Temporary Non-Agricultural Workers (H-2B).....	3
F. Treaty Traders and Treaty Investors (E-1 and E-2).....	4
G. Individuals of Extraordinary Ability (O-1) .....	5
H. Temporary Religious Workers (R-1).....	6
I. NAFTA for Canadian and Mexican Professionals (TN).....	6
<b>II. Permanent Resident Green Card Options</b> .....	<b>7</b>
A. Intracompany Transferee Executives and Managers (EB-1) .....	7
B. Outstanding Professors and Researchers (EB-1) .....	7
C. Individuals of Extraordinary Ability (EB-1) .....	8
D. Individuals of Exceptional Ability & Advanced Degree Professionals (EB-2) .....	8
E. Professionals and Other Skilled Workers (EB-3) .....	9
F. Special Immigrant Religious Workers (EB-4) .....	10
G. Investors (EB-5).....	10
<b>Conclusion</b> .....	<b>11</b>
<b>Appendix A.</b> .....	<b>12</b>
<b>Appendix B.</b> .....	<b>15</b>

## **INTRODUCTION**

Vandeventer Black LLP is a full-service law firm with locations in Virginia, North Carolina, California, and Germany. Since 1883, we have provided legal counsel to businesses in a broad range of practice areas, including immigration law, international business, maritime, government investigations, labor and employment, litigation, government contracts, construction law, environmental law, creditors' rights, and workers' compensation, among others.

Our Immigration and International Business Law Teams are pleased to provide this publication to international businesses located, or seeking to locate, in the United States and to U.S. companies seeking to hire skilled foreign nationals. We hope that it will assist you in employing foreign nationals as managers, executives, professionals, and other personnel in the United States.

### **IMMIGRATION LAW TEAM**

We provide a full range of immigration services for businesses, families, and individuals. We prepare visa, green card, and citizenship applications; help businesses with strategies to transfer personnel to their U.S. operations; and help clients fight deportation and seek asylum. We also assist foreign nationals charged with traffic and criminal offenses in the United States to help avoid immigration consequences. With decades of experience, we efficiently and effectively provide a full range of legal services to our immigration clients. For more information on our Immigration Law Team, please contact Art Serratelli ([aserratelli@vanblk.com](mailto:aserratelli@vanblk.com) or 757-446-8683), Mara Mijal ([mmijal@vanblk.com](mailto:mmijal@vanblk.com) or 757-446-8522), or Trey Kelleter ([tkelleter@vanblk.com](mailto:tkelleter@vanblk.com) or 757-446-8697).

### **INTERNATIONAL BUSINESS TEAM**

We help international businesses that locate operations in or trade with the United States, as well as U.S. companies that set up operations internationally or engage in international trade. The Team is composed of immigration, corporate, tax, and commercial attorneys who are experienced in international transactions and trade. Depending on the individual needs of the client, we provide an integrated program of strategic advice about corporate structure, immigration requirements for executives and employees, tax planning, site acquisitions, export controls, and other areas of interest. We assist international clients ranging in size from sole proprietors and small partnerships to Fortune 500 companies. For more information on our International Business Team, please contact Katharina Brekke Powers ([kbpowers@vanblk.com](mailto:kbpowers@vanblk.com) or 757-446-8663).

#### **Disclaimer:**

The material in this booklet is intended to provide general information only and is not intended as legal advice. This booklet provides a summary of some of the most useful and popular immigration options available to U.S. employers. However, all of the detailed requirements of immigration law cannot be explained in a brief publication, nor can this booklet take the place of qualified immigration attorneys or other specialists. Further, because immigration law and policy are constantly changing, you should consult with a qualified immigration attorney to determine the best immigration strategy for your business and employees. Vandeventer Black LLP disclaims all liability to any person based on any actions taken or actions failed to be taken wholly or partly because of a reliance upon any content in this booklet.

## **I. TEMPORARY NONIMMIGRANT VISA OPTIONS**

Selecting the right immigration strategy depends upon the unique needs of your business and your employees. This section outlines some of the most popular temporary visas that are available to U.S. employers. However, you should consult with a qualified immigration attorney to determine which particular visa is right for you and your business.

### **A. BUSINESS VISITORS**

Individuals who need to enter the United States quickly and for brief periods of time for business purposes can come to the United States as business visitors either pursuant to the Visa Waiver Program (from designated countries) or a B-1 business visitor visa. Business visitors cannot engage in active employment in the United States or receive a salary from a U.S. company, although they can be advanced expenses by a U.S. company. Also, business visitors can undertake a number of important business activities, including attending business meetings, conferring with business associates, making investments, and conducting contract negotiations, which make a business visitor entry a very useful option for many companies.

**Visa Waiver Program.** Under the Visa Waiver Program, nationals of 36 countries can enter the United States without a visa as business or tourist visitors for a period of up to 90 days. The Visa Waiver Program should not be used by individuals who may need to stay for more than 90 days, because no extensions or changes to other visa categories are permitted. After 90 days, Visa Waiver visitors must leave the United States before entering the country again in any status.

Visa Waiver countries as of this writing include Andorra, Australia, Austria, Belgium, Brunei, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

**Business (B-1) And Tourist (B-2) Visitor Visas.** B-1 business and B-2 tourist visas can be issued by a U.S. embassy for a validity period of up to 10 years for multiple entries. Business or tourist entries pursuant to the visa can be for an initial period of up to six months, with six-month extensions thereafter. A business visitor can attend meetings, attend conferences, explore making an investment, or confer with business associates. Business visitors must remain on the payroll of a foreign firm, although they can be advanced expenses by a U.S. company.

Recently, U.S. embassies and border officials have been scrutinizing every aspect of visitor visa applications, and very often B-1/B-2 travelers are receiving shorter admission periods and detailed questions upon entry at the U.S. border. Therefore, to avoid delay and/or denial of applications, it is essential for business visitors to provide sufficient documentation that all criteria of the visitor visa category are met.

### **B. INTRACOMPANY TRANSFEREES (L-1A and L-1B)**

Intracompany transferee visas are available to multinational companies to facilitate the transfer of executive, managerial, and specialized-knowledge employees from their foreign operations to their U.S. operations. The L-1 can be an excellent visa option, because L-1 petitions are not subject to an annual cap (like the H-1B, see below). Additionally, spouses of L-1 visa holders are permitted to apply for work authorization. Further, with respect to managers and executives, it is often relatively easy to convert from this temporary work status to a permanent green card.

**The basic requirements for an L-1 visa are as follows:**

- The employee must have one year of continuous employment experience abroad within the three years preceding the application.
- The employment abroad must have been with a parent, branch, affiliate, or subsidiary of an existing or new U.S. entity.
- The employment abroad and in the United States must be in a managerial, executive, or specialized knowledge capacity.

**Managerial (L-1A) capacity** is defined to include managing the organization, or a department, subdivision, function, or component of the organization; supervising and controlling the work of other supervisory, professional, or managerial employees, or managing an essential function within the organization; having the authority to hire and fire or to recommend those as well as other personnel actions (such as promotion and leave authorization) or otherwise functioning at a senior level within the organizational hierarchy or with respect to the function managed; and exercising discretion over the day-to-day operations of the activity or function for which the employee has authority.

**Executive (L-1A) capacity** is defined to include directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization, component, or function; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Please note that first-line supervisors are not considered to be acting in a managerial capacity merely by virtue of supervisory duties, unless the supervised employees are professionals.

**Specialized knowledge (L-1B) capacity** is defined as “special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.” As of the date of this writing, the U.S. Citizenship and Immigration Service adheres to several policy memoranda regarding the application of the L-1B standards, which require employers to provide substantial documentation of the “specialized knowledge” possessed by the L-1B employee.

L-1A employees can be approved for an initial period of three years and are eligible for two-year extensions for a total of seven years of employment. L-1B employees can be approved for an initial period of three years and are eligible for one two-year extension for a total of five years of employment.

**C. SPECIALTY OCCUPATION PROFESSIONALS (H-1B)**

Although the H-1B has more legal obligations than some of the other work visa categories, it is generally the most flexible because it suits a broad range of positions for foreign nationals with a wide variety of credentials. The H-1B visa is available to professionals with a four-year college degree (or equivalent education and/or work experience) and is useful for employees who do not otherwise qualify for intracompany transferee (L-1, above) or treaty trader/investor (E-1/E-2, below) visas.

**The basic requirements of the H-1B category are as follows:**

- A job offer in a “specialty occupation,” which is defined as a position that requires a bachelor’s degree or the equivalent in a specific field of study.
- The employee possesses a bachelor’s degree, a foreign equivalent degree, or a combination of education and experience equivalent to a bachelor’s degree in the required field of study.

- A Labor Condition Application (LCA) approved by the Department of Labor. As part of the LCA process, employers must obtain prevailing wage data, post a notice of filing, and maintain a public access file containing information related to the petition.

New H-1B petitions are generally subject to an annual cap of 65,000. However, the H-1B Visa Reform Act of 2004 created 20,000 additional H-1B cap-exempt slots for beneficiaries who have earned a master's degree or higher from a U.S. institution of higher education. This effectively raises the H-1B cap by 20,000 for those who qualify for this exemption. Further, H-1B extension and amendment petitions are generally exempt from the cap, as are petitions filed by U.S. institutions of higher education; non-profit entities that are affiliated with a U.S. institution of higher education; U.S. non-profit research organizations; and U.S. government research organizations.

Employers should note that individuals with H-1B status may accept new employment in the same or similar occupation upon the filing of an H-1B amendment petition by the new employer; these employees do not need to wait for the petition to be approved to begin working for the new employer.

H-1B status is generally granted for an initial period of three years, and it can be extended for a total of six years of H-1B employment. However, there are certain circumstances under which H-1B employees can extend their status beyond six years. First, if the H-1B employee has spent time outside of the United States during the six-year H-1B period, he or she can apply to "recapture" that time. Second, an H-1B employee who meets certain milestones in the employment-based green card process can extend his or her H-1B status until able to file the final green card application and receive a green card. Therefore, an employer who wishes to retain an H-1B employee for longer than six years should be sure to begin the green card process on behalf of that employee no later than the beginning of employee's fifth year of H-1B time, to ensure that there will be no gap in that H-1B employee's ability to work in the United States.

**A few words about F-1 students.** Many companies hire foreign nationals who are recent graduates of U.S. colleges and universities. An excellent option for businesses is to hire F-1 students pursuant to their "practical training" work authorization, which permits those students to work for up to one year without the employer filing any type of petition with the U.S. government. Practical training enables companies to recruit top foreign graduates of U.S. colleges and universities without delays or paperwork and is especially useful during any period of H-1B unavailability.

#### **D. SPECIALTY OCCUPATION PROFESSIONALS (E-3 AUSTRALIANS)**

While the requirements of the E-3 visa category largely mirror those of the H-1B, the E-3 is available only to Australian nationals. Two major benefits of the E-3 category that differ from the H-1B are that the employee may apply for an E-3 visa directly at a U.S. embassy abroad, without the employer first filing a petition with the U.S. Citizenship and Immigration Services in the United States, and spouses of E-3 visa holders may obtain work authorization. Additionally, E-3 employers are not required to pay the special filing fees associated with H-1B petitions. Like H-1Bs, E-3s are subject to an annual cap, but as of this writing, the E-3 cap has never been hit.

#### **E. TEMPORARY NON-AGRICULTURAL WORKERS (H-2B)**

H-2B visas are designed for employers looking to fill temporary jobs which last less than one year. Although the H-2B visa can be extended for up to a maximum of three years, very close scrutiny is given to each extension request, with the exception of seasonal workers who are eligible to apply to re-enter the United States annually. Unfortunately, the H-2B visa program has a number of limitations that reduce its usefulness. First, the application process takes approximately three to six months to complete, and employers must convince four separate government

agencies that their temporary need for laborers satisfies all applicable H-2B requirements. Second, the H-2B category is subject to an annual cap of 66,000, and only citizens of designated countries are eligible to apply. The list of designated countries is updated each year and published in the Federal Register.

To qualify employees for H-2B visas, the U.S. employer must demonstrate, through a government-controlled application process, that it is offering the workers “temporary employment;” the sponsored workers intend to return home after the expiration of the visa; and there are no qualified U.S. workers willing or able to do the job.

**“Temporary employment” in the context of the H-2B category is defined as one of the following:**

- **One-Time Occurrence.** Employers must demonstrate either that (a) they have not hired workers in the past for this particular service and do not anticipate needing this same category of worker in the future, or (b) a temporary event has created a one-time need for the particular service. Examples include construction workers needed to repair hurricane damage, or additional chefs for restaurants servicing the Olympic games.
- **Recurring Seasonal Job.** Employers must demonstrate that the service is of a recurring nature and is thereby tied to a season of the year by an event or pattern. Examples include deckhands needed aboard fishing vessels which harvest seasonal shrimp, landscape laborers needed during the growth seasons, or laborers in seasonal resort areas. Employment is not considered seasonal if the period in which the service will be needed is unpredictable or subject to change.
- **Peakload Demand.** Employers must demonstrate that the temporary addition to their workforce will not become permanent. This category is for employers who regularly employ permanent employees but need to supplement the permanent workforce temporarily due to a short-term demand. Examples include construction workers hired for an unanticipated single project, or seamstresses hired for unexpected projects such as manufacture of Olympic uniforms. Please note that placement agencies in the permanent business of providing short-term, temporary workers to other companies cannot establish a peakload need, because they have an ongoing, permanent need for workers to place with other businesses.
- **Intermittent/Occasional Jobs.** Employers must demonstrate that they have not permanently hired this type of worker before and that they need to temporarily hire this type of worker due to an occasional need. Examples include technicians upgrading foreign machinery, or skilled computer personnel to provide periodic training.

Job vacancies caused by labor shortages in permanent positions do not qualify for H-2B visas. In addition, although both skilled and unskilled workers may qualify for H-2B visas, excluded from the H-2B program are agricultural workers (H-2A program) and foreign medical graduates seeking to perform work in medical fields.

**F. TREATY TRADERS AND TREATY INVESTORS (E-1 and E-2)**

Treaty trader (E-1) and treaty investor (E-2) visas can be a very useful visa option because, although E visas do not always lead to clear-cut, employment-based green card options, E-1 or E-2 temporary work status can be renewed indefinitely. Treaty trader and treaty investor visas are generally obtained in two distinct circumstances. The first is by large multinational companies that have made substantial investments of capital in the United States or have been engaging in substantial trade with a qualifying country. The second is by small start-up businesses where an individual is investing funds or engaging in substantial trade and desires to transfer him or herself to the United States in E-1/E-2 status to operate the business.

**The basic requirements for treaty trader (E-1) status are as follows:**

- There must be a qualifying treaty with the country of the beneficiary’s nationality (please see Appendix A for E-1 treaty countries).

- The beneficiary and the company must possess the nationality of the treaty country. Accordingly, the U.S. business must be at least 50% owned by nationals of the treaty country.
- The activities of the business must constitute “trade,” which can include activities such as import/export, purchases from a related company, and trade in technology.
- The trade must be “substantial” either monetarily or in sheer volume of transactions.
- The trade must at least 50% between the United States and the treaty country.
- Employees of a treaty trader company must serve in an executive or supervisory position or possess skills essential to the company’s operations in the United States.

**The basic requirements for treaty investor (E-2) status are as follows:**

- There must be a qualifying treaty with the country of the beneficiary’s nationality (please see Appendix A for E-2 treaty countries).
- The beneficiary and the company must possess the nationality of the treaty country.
- There must be an investment, or the active process of investing, in a business that must be a real and operating commercial enterprise.
- The investment must be “substantial” and more than a marginal one solely for earning a living. There is no specific dollar amount required. Generally \$100,000 is a good starting point; however, in some cases, smaller investments can be successful.
- If an individual is the actual treaty investor, he or she must be in a position to develop and direct the enterprise, which generally means holding a majority of the stock and serving as an officer and/or director.
- Employees of a treaty investor company must serve in an executive or supervisory position or possess skills essential to the company’s operations in the United States.

Generally, E-1/E-2 visa applications are filed directly with a U.S. embassy abroad, but they may also be filed with the U.S. Citizenship and Immigration Services inside the United States, if the sponsored individual is eligible to do so and does not have any immediate plans to travel abroad. E-1/E-2 visas are generally issued for an initial period of two to four years, depending on the treaty country, and can be renewed indefinitely. Generally, E-1/E-2 entries pursuant to the visa are for two years each and also can be renewed indefinitely. In addition, spouses of E-1/E-2 visa holders may apply for work authorization.

**G. INDIVIDUALS OF EXTRAORDINARY ABILITY (O-1)**

O-1 nonimmigrant status is available to individuals who have “extraordinary ability” in the sciences, arts, education, business, or athletics. Extraordinary ability can be established through evidence of receipt of a major, internationally recognized award (for example, a Nobel Prize) or by submitting documentation of at least three of the following:

- Receipt of nationally or internationally recognized prizes or awards for excellence.
- Membership in associations that require outstanding achievements of their members.
- Published material in professional or major trade publications or major media about the applicant and his or her work in the field.
- Participation on a panel, or individually, as a judge of the work of others in the field.
- Original scientific, scholarly, or business-related contributions of major significance.
- Authorship of scholarly articles in the field, in professional journals, or other major media.
- Employment in a critical or essential capacity for organizations that have a distinguished reputation.
- High salary or other remuneration for service.

O-1 status may be granted for a maximum period of three years and can be extended indefinitely.



## **H. TEMPORARY RELIGIOUS WORKERS (R-1)**

The religious worker visa category is for individuals coming to the United States to work in a religious capacity. The initial period of admission for religious worker cannot exceed 30 months. An extension may be authorized for up to 30 additional months, for a total period of stay not to exceed five years. Religious workers include the following:

- Religious ministers authorized by a recognized denomination to conduct religious worship and perform other duties usually performed by members of the clergy such as administering sacraments, or their equivalent. This does not apply to lay preachers.
- Workers in a religious vocation or calling to religious life, evidenced by a lifelong commitment, such as taking vows. Examples include nuns, monks, and religious brothers and sisters.
- Workers in religious occupations that relate to a traditional religious function. Examples include liturgical workers, religious instructors or cantors, catechists, workers in religious hospitals, missionaries, religious translators, or religious broadcasters. Religious occupations do not include janitors, maintenance workers, clerks, fundraisers, solicitors of donations, or similar occupations.
- Religious professionals who possess at least a baccalaureate degree or equivalent, and who will work in a religious vocation or occupation that requires such a degree.

To qualify for R-1 status, the religious worker must be a member of a religious denomination having a bona fide nonprofit religious organization in the United States; the religious worker must have been a member of the denomination for at least two years immediately preceding the filing of the R-1 petition; and the religious denomination or its affiliate, if applicable, are exempt from taxation or qualifies for exemption.

## **I. NAFTA (TN) FOR CANADIAN AND MEXICAN PROFESSIONALS**

The North American Free Trade Agreement (NAFTA) went into effect on January 1, 1994 and contains special immigration provisions which are applicable to Canadians and Mexicans. NAFTA created the TN visa category for Canadians and Mexicans seeking temporary entry for certain specified business activities at the professional level. The TN can be granted in increments of up to three years. Although the TN can renewed indefinitely, the holder must establish at each entry and renewal that he or she continues to maintain a permanent residence outside of the United States to which he or she plans to return.

Please see Appendix B for a list of the permissible TN professions and the eligibility requirements of each. It is noteworthy that for most TN occupations, experience cannot be substituted for education in meeting the TN educational requirements (as can be done in the H-1B context).

No visa is required for Canadian TN professionals, though Mexicans must obtain a visa from a U.S. consulate. Application for entry is made at a land border, preclearance station, or at an airport. Canadians and Mexicans are required to submit proof of citizenship, evidence of qualifications meeting the criteria for the TN visa such as diplomas, transcripts, licenses and experience credentials, and evidence of an offer of employment or contract with a U.S. company.

It also is worth noting that one important NAFTA benefit to Mexicans and Canadians is the following expanded list of business activities permitted of B-1 business visitors:

- Research and design by technical, scientific, and statistical researchers.
- Growth, manufacture, and production activities for purchasing and production management personnel conducting commercial transactions.

- Market research or analysis and attending trade fairs and conventions.
- Taking sales orders and negotiating sales contracts.
- Distribution of goods or passengers by transportation operators, and customs brokers performing brokerage duties.
- After-sales service performed by installers, repair and maintenance personnel, and supervisors pursuant to a warranty or service contract incidental to the sale of equipment.
- General service performed by certain personnel on behalf of a Canadian or Mexican business who do not receive a salary or remuneration in the United States, including professionals, management and supervisory personnel, computer specialists, financial services personnel, public relations and advertising personnel, tourism personnel, tour bus operators, and translators or interpreters.

## **II. PERMANENT RESIDENT GREEN CARD OPTIONS**

Many individuals coming to the United States want to obtain a permanent resident “green card” to eliminate the need to obtain extensions of temporary visas, to allow the spouse and children to work or attend college, and to facilitate owning a home, borrowing money, and otherwise participating in the “American Dream.” Green cards can be obtained through a number of different methods, including employment, investment, family, asylum, lottery, and as a result of unique skills. The following information focuses on obtaining green cards through employment, investment, and unique skills. You should consult with a qualified immigration attorney to obtain information on all available choices and to determine the particular approach that is right for you.

### **A. INTRACOMPANY TRANSFEREE EXECUTIVES AND MANAGERS (EB-1)**

Intracompany managers and executives (but not specialized knowledge employees) are eligible for streamlined permanent resident processing under the first preference employment category (EB-1). No labor certification is required, and there are no education requirements. Following is a brief summary of the eligibility requirements for this category, which very closely resemble those of the L-1A nonimmigrant visa:

- If outside the United States, in the three years immediately preceding the filing of the petition, the individual must have been employed abroad for at least one year.
- If already in the United States, in the three years immediately preceding the entry as a nonimmigrant, the individual must have been employed abroad for at least one year.
- The employment abroad must have been with a parent, branch, affiliate, or subsidiary of the U.S. entity.
- The employment abroad and in the United States must be in a managerial or executive capacity (a detailed discussion of these capacities is contained in the section on L-1 visas above).

The petitioning employer must have been doing business for at least one year. Accordingly, for new international businesses, their L-1 employees are not eligible for permanent residence until after the business has been in existence for at least one year and can demonstrate to the satisfaction of the U.S. Citizenship and Immigration Services that the business can reasonably be expected to have the ability to support the sponsored employee in a permanent position.

### **B. OUTSTANDING PROFESSORS AND RESEARCHERS (EB-1)**

This first preference category is an excellent streamlined method by which professors and researchers can relatively quickly obtain permanent resident status. Although a job offer is required, labor certification is not required. U.S. colleges and universities may sponsor outstanding professors and researchers, as can certain private employers who employ at least three full-time researchers. Outstanding professor or researcher petitions must be accompanied

by evidence of at least three years of experience in teaching and/or research; evidence of an offer of employment from a university or institution of higher learning in a tenured or tenure-track teaching position or a permanent research position or from certain private employers offering a permanent research position; and *at least* two of the following:

- Documentation of receipt of major prizes or awards for outstanding achievement.
- Documentation of membership in associations that require outstanding achievements
- Published material in professional publications written by others about the individual's work.
- Evidence of participation, either individually or on a panel, as the judge of the work of others.
- Evidence of original scientific or scholarly research contributions.
- Evidence of authorship of scholarly books or articles in scholarly journals with international circulation.

### **C. INDIVIDUALS OF EXTRAORDINARY ABILITY (EB-1)**

The requirements of this first preference category are very similar to those of the O-1 nonimmigrant category described above, although the standard of proof required by the U.S. Citizenship and Immigration Services is higher. This green card category is available to individuals with “extraordinary ability” in the sciences, arts, education, business, or athletics. Neither an offer of employment nor a labor certification is required. Although employer sponsorship is not required, the petitioner must submit evidence that the person is coming to the United States to continue work in his or her area of expertise. Evidence can take the form of letters from prospective employers, evidence of prearranged commitments such as contracts, or statements detailing how the petitioner intends to continue his or her work in the United States. An extraordinary ability petition must be accompanied by evidence of a one-time achievement (such as a major, internationally recognized award) or include evidence of *at least* three, and preferably as many as possible, of the items described in the section on O-1 visas, above.

### **D. INDIVIDUALS OF EXCEPTIONAL ABILITY & ADVANCED DEGREE PROFESSIONALS (EB-2)**

The second preference employment-based category (EB-2) includes individuals of exceptional ability, as well as professionals holding advanced degrees. An individual meeting either of these standards may be eligible to apply under this category. The second preference category generally requires a job offer and a labor certification. However, if the applicant's work is found to be in the national interest, then the position is exempt from the labor certification process. The labor certification process is discussed in detail below in the section on the EB-3 green card category.

**To qualify as an EB-2 individual of exceptional ability**, one must have “a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business, “which is established by presenting evidence of *at least* three of the following:

- An official academic record showing a university degree.
- Evidence in the form of letters from current or former employers showing at least ten years of full-time experience in the field.
- A license or other certification to practice the profession.
- Evidence of high salary, or other remuneration for services, which demonstrates exceptional ability.
- Evidence of membership in professional associations.
- Evidence of recognition for achievements and significant contributions by peers, governmental entities, or professional or business organizations.

**To qualify as a professional with an advanced degree**, one must possess a U.S. academic or professional degree or a foreign equivalent degree that is above a baccalaureate, or the equivalent, as well as job offer in a position that requires such a degree. To establish equivalency to an advanced degree, one must have a baccalaureate degree

followed by at least five years of progressive, post-baccalaureate experience in the field.

As previously noted, exceptional ability and advanced degree professionals are required to obtain a job offer and a labor certification. However, an important exception to the requirement of a job offer, and thus of a labor certification, exists where an exemption would be in the national interest, which has been defined to include, among other activities, the following:

- Improving the U.S. economy.
- Improving wages and working conditions of U.S. workers.
- Improving education and training programs for U.S. children and other qualified workers.
- Improving health care.
- Providing more affordable housing for young and/or older, poorer U.S. residents.
- Improving the U.S. environment and making more productive use of natural resources.
- Involving a request from an interested U.S. government agency.

Because USCIS adjudicators have a good deal of discretion when adjudicating this type of petition, creative possibilities exist for qualified individuals in many fields. However, successful petitions based on a national interest waiver must show that the area of work has “substantial intrinsic merit,” that the work will be “national in scope,” and that the foreign national has a unique set of skills that will serve the national interest to a “substantially greater degree” than would an available U.S. worker having the same minimum qualifications.

#### **E. PROFESSIONALS AND OTHER SKILLED WORKERS (EB-3)**

The third preference employment-based category (EB-3) includes professionals and skilled workers. All EB-3 employees are generally required to obtain a job offer and a labor certification. Professionals include individuals who have at least a baccalaureate degree, and skilled workers include individuals who perform skilled labor which requires at least two years of training or experience.

The purpose of the labor certification process is to establish that the U.S. employer needs the skills and abilities of a foreign worker; that it has tried to recruit U.S. workers for the position; that it has offered the position at the prevailing wage; and that it has found no qualified and available U.S. worker to fill the position.

Employers are required to conform to the PERM system for filing and processing such applications for labor certification. Implemented in 2005, PERM was designed to reduce the lengthy processing times that plagued the previous labor certification system, which often took several years or more and involved significant involvement by both the U.S. Department of Labor (DOL) and the state workforce agencies. Under the PERM rules as of this writing, the following procedures apply:

- State workforce agencies play no role in the labor certification process.
- Applications are filed online with a centralized federal processing center.
- Employers conduct recruitment before filing labor certification applications in accordance with detailed DOL requirements, which include posting a notice in-house, placing a job order with the state workforce agency, placing two advertisements on two different Sundays in the area’s newspaper of general circulation, and performing three additional recruiting steps (from a specified list of 10 additional steps) for professional jobs.
- Preparing an audit file, to include a detailed recruitment report to keep in-house for five years.

As of the date of this writing, many of the EB-3 and EB-2 green card categories are significantly backlogged, meaning that the employee may have to wait several years after starting the green card case before s/he is able to obtain the actual green card. Under current law, an employment-based green card applicant whose final I-485 application has been pending for 180 days or more can change jobs or employers without invalidating the underlying I-140 or labor certification, provided that the new job is in the same or similar occupational classification.

#### **F. SPECIAL IMMIGRANT RELIGIOUS WORKERS (EB-4)**

To qualify as an EB-4 special immigrant religious worker, an individual must be a member of a religious denomination that has a nonprofit religious organization in the United States and must have been a member of that denomination for at least two years before filing the required petition. In addition, the sponsored worker must have been performing remunerated religious work for the two years immediately preceding the filing. Voluntary service does not satisfy this two year requirement; work must be remunerated.

##### **This category is available for the following religious workers:**

- Religious ministers in the religious denomination.
- Individuals working in a religious vocation or occupation for the religious organization or its nonprofit affiliate. A religious vocation involves a calling or devotion to religious life; a religious occupation is an activity devoted to traditional religious functions, such as cantors, missionaries, and religious instructors.
- Individuals working in a professional capacity in a religious vocation or occupation for the religious organization. A professional capacity means that a baccalaureate degree or equivalent is required to do the job.

#### **G. INVESTORS/EMPLOYMENT CREATION (EB-5)**

The investor green card option is often referred to as the “million dollar visa.” Although 10,000 investor visas are available each year, relatively few are utilized. This is due, in part, to the fact that individuals with the ability to invest \$1 million (or \$500,000 in certain rural or high unemployment areas) in the United States can usually process a green card in a less expensive and more streamlined manner, such as an intracompany transferee (see above). Another drawback of this category is that the initial green card is conditional, and the condition must be removed after a period of two years. At that time, the investment and all other category requirements are reevaluated by USCIS. However, for those with the financial means and without other immigrant options available, the million dollar visa may be the appropriate alternative. Following is a brief summary of the criteria for investor visas:

- The applicant must invest in and actively manage or establish policies for a new commercial enterprise which can include (1) the creation of a new business or the purchase of an existing business and the simultaneous or subsequent restructuring or reorganization of the business such that a new commercial enterprise results; (2) an investment in an existing business that increases either its net worth or the number of employees by 40%, creates at least 10 new jobs, and creates a new net worth which is 140% of the pre-expansion net worth or number of employees; or (3) an investment in a troubled business that has been in existence for at least two years and has incurred a net loss equal to at least 20% of its prior net worth.
- The applicant must be in the process of investing, or have already invested, a minimum of \$1 million, or \$500,000 in certain rural or high unemployment areas. The capital investment can be from U.S. or overseas sources and can be a combination of cash, inventory, equipment, or loans, provided that the borrowed funds are secured personally by the investor and not by the assets of the business.
- Except in the case of an investment in a troubled business, the investment must create or preserve at least 10 full-time positions for qualified U.S. workers, including holders of certain temporary work visa and permanent residents but not including family members of the investor.

Although there are many creative methods to structure investments to reduce the amount of cash required, including the pooling of funds, investors should proceed with extreme caution as USCIS has challenged the validity of many of these arrangements.

### **CLOSING**

With this booklet, we have provided a summary of the most popular temporary work visas and permanent green card options for foreign national employees working in the United States; there may be other options available, depending on the unique circumstances of each employer and foreign national employee. You should consult with a qualified immigration attorney to determine the right immigration strategy for your business and your employees. We hope that the information in this booklet will assist you in employing foreign nationals as managers, executives, professionals, and other personnel in the United States.

**APPENDIX A**  
**E-1/E-2 TREATY COUNTRIES**

<b>Country</b>	<b>Treaty Classification</b>
Albania	E-2
Argentina	E-1, E-2
Armenia	E-2
Australia	E-1, E-2
Austria	E-1, E-2
Azerbaijan	E-2
Bahrain	E-2
Bangladesh	E-2
Belgium	E-1, E-2
Bolivia	E-1, E-2
Bosnia and Herzegovina	E-1, E-2
Brunei	E-1
Bulgaria	E-2
Cameroon	E-2
Canada	E-1, E-2
Chile	E-1, E-2
China (Taiwan)	E-1, E-2
Colombia	E-1, E-2
Congo (Brazzaville)	E-2
Congo (Kinshasa)	E-2
Costa Rica	E-1, E-2
Croatia	E-1, E-2
Czech Republic	E-2
Denmark	E-1, E-2
Ecuador	E-2
Egypt	E-2

Estonia	E-1, E-2
Ethiopia	E-1, E-2
Finland	E-1, E-2
France	E-1, E-2
Georgia	E-2
Germany	E-1, E-2
Greece	E-1
Grenada	E-2
Honduras	E-1, E-2
Iran	E-1, E-2
Ireland	E-1, E-2
Israel	E-1, E-2
Italy	E-1, E-2
Jamaica	E-2
Japan	E-1, E-2
Jordan	E-1, E-2
Kazakhstan	E-2
Korea (South)	E-1, E-2
Kosovo	E-1, E-2
Kyrgyzstan	E-2
Latvia	E-1, E-2
Liberia	E-1, E-2
Lithuania	E-2
Luxembourg	E-1, E-2
Macedonia, the Former Yugoslav Republic of	E-1, E-2
Mexico	E-1, E-2
Moldova	E-2
Mongolia	E-2
Montenegro	E-1, E-2
Morocco	E-2



Netherlands	E-1, E-2
Norway	E-1, E-2
Oman	E-1, E-2
Pakistan	E-1, E-2
Panama	E-2
Paraguay	E-1, E-2
Philippines	E-1, E-2
Poland	E-1, E-2
Romania	E-2
Serbia	E-1, E-2
Senegal	E-2
Singapore	E-1, E-2
Slovak Republic	E-2
Slovenia	E-1, E-2
Spain	E-1, E-2
Sri Lanka	E-2
Suriname	E-1, E-2
Sweden	E-1, E-2
Switzerland	E-1, E-2
Thailand	E-1, E-2
Togo	E-1, E-2
Trinidad & Tobago	E-2
Tunisia	E-2
Turkey	E-1, E-2
Ukraine	E-2
United Kingdom	E-1, E-2
Yugoslavia	E-1, E-2

**APPENDIX B**  
**NAFTA TN PROFESSIONAL OCCUPATIONS**

<b>OCCUPATION</b>	<b>MINIMUM QUALIFICATIONS</b>
Accountant	Baccalaureate or Licenciatura degree; or CPA, CA, CGA, or CMA
Architect	Baccalaureate or Licenciatura degree; or state/provincial license
Computer Systems Analyst	Baccalaureate or Licenciatura degree; or postsecondary diploma/certificate and three years of experience
Disaster Relief Insurance Claims Adjuster	Baccalaureate or Licenciatura degree and successful completion of training in disaster relief adjustment; or three years of experience and successful completion of training in disaster relief adjustment
Economist	Baccalaureate or Licenciatura degree
Engineer	Baccalaureate or Licenciatura degree; or state/provincial license
Forester	Baccalaureate or Licenciatura degree; or state/provincial license
Graphic Designer	Baccalaureate or Licenciatura degree; or postsecondary diploma/certificate and three years of experience
Hotel Manager	Baccalaureate or Licenciatura degree in hotel/restaurant management; or postsecondary diploma/certificate in hotel/restaurant management and three years of experience
Industrial Designer	Baccalaureate or Licenciatura degree; or postsecondary diploma/certificate and three years of experience
Interior Designer	Baccalaureate or Licenciatura degree; or postsecondary diploma/certificate and three years of experience
Land Surveyor	Baccalaureate or Licenciatura degree; or state/provincial/federal license
Landscape Architect	Baccalaureate or Licenciatura degree
Lawyer (including Notary in province of Quebec)	LLB, JD, LLL, BCL, or Licenciatura degree (five years) or membership in a state/provincial bar
Librarian	MLS, or BLS for which another Baccalaureate or Licenciatura degree was a prerequisite

Management Consultant	Baccalaureate or Licenciatura degree; or five years of experience as a management consultant or related field of specialty
Mathematician (including Statistician)	Baccalaureate or Licenciatura degree
Range Manager and Range Conservationist	Baccalaureate or Licenciatura degree
Research Assistant (working at postsecondary educational institution)	Baccalaureate or Licenciatura degree
Scientific Technician/Technologist	Possession of (a) theoretical knowledge of agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics, and (b) the ability to solve practical problems in any of these disciplines, or the ability to apply principles of these disciplines to basic or applied research
Social Worker	Baccalaureate or Licenciatura degree
Sylviculturist (including forestry specialization)	Baccalaureate or Licenciatura degree
Technical Publications Writer	Baccalaureate or Licenciatura degree, or postsecondary diploma/certificate and three years of experience
Urban Planner (including Geographer)	Baccalaureate or Licenciatura degree
Vocational Counselor	Baccalaureate or Licenciatura degree
<b>MEDICAL/ALLIED PROFESSIONALS</b>	
Dentist	DDS, DMD, Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license
Dietician	Baccalaureate or Licenciatura degree, or state/provincial license
Medical Laboratory Technologist	Baccalaureate or Licenciatura degree, or postsecondary diploma/certificate and three years of experience
Nutritionist	Baccalaureate or Licenciatura degree
Occupational Therapist	Baccalaureate or Licenciatura degree, or state/provincial license
Pharmacist	Baccalaureate or Licenciatura degree, or state/provincial license
Physician (teaching or research only)	MD Doctor en Medicina, or state/provincial license
Physiotherapist/Physical Therapist	Baccalaureate or Licenciatura degree, or state/provincial license
Psychologist	Licenciatura degree, or state/provincial license
Recreational Therapist	Baccalaureate or Licenciatura degree
Registered Nurse	Licenciatura degree, or state/provincial license
Veterinarian	DVM, DMV, or Doctor en Veterinaria, or state/provincial license

<b>SCIENTISTS</b>	
Agriculturist (including Agronomist)	Baccalaureate or Licenciatura degree
Animal Breeder	Baccalaureate or Licenciatura degree
Animal Scientist	Baccalaureate or Licenciatura degree
Apiculturist	Baccalaureate or Licenciatura degree
Astronomer	Baccalaureate or Licenciatura degree
Biochemist	Baccalaureate or Licenciatura degree
Biologist	Baccalaureate or Licenciatura degree
Chemist	Baccalaureate or Licenciatura degree
Dairy Scientist	Baccalaureate or Licenciatura degree
Entomologist	Baccalaureate or Licenciatura degree
Epidemiologist	Baccalaureate or Licenciatura degree
Geneticist	Baccalaureate or Licenciatura degree
Geochemist	Baccalaureate or Licenciatura degree
Geologist	Baccalaureate or Licenciatura degree
Geophysicist	Baccalaureate or Licenciatura degree
Horticulturist	Baccalaureate or Licenciatura degree
Meteorologist	Baccalaureate or Licenciatura degree
Pharmacologist	Baccalaureate or Licenciatura degree
Physicist	Baccalaureate or Licenciatura degree
Plant Breeder	Baccalaureate or Licenciatura degree
Poultry Scientist	Baccalaureate or Licenciatura degree
Soil Scientist	Baccalaureate or Licenciatura degree
Zoologist	Baccalaureate or Licenciatura degree
<b>TEACHERS</b>	
College Teacher	Baccalaureate or Licenciatura degree
Seminary Teacher	Baccalaureate or Licenciatura degree
University Teacher	Baccalaureate or Licenciatura degree



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