Immigrant Visa Options:
How to Obtain Permanent Resident Status
(Green Cards) in the United States
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There are four main ways to obtain U.S. permanent resident status. The easiest is usually through sponsorship by a close family member, usually a U.S. citizen or permanent resident spouse or parent. Employment and investment-based sponsorship is another way. The third way is through refugee, asylum, or cancellation of removal. Finally, the Diversity Visa (DV) lottery provides an opportunity for almost all.

Family-Sponsored Immigrants

U.S. immigration law was designed to promote family reunification. Therefore, most immigrant visas are issued to close relatives of U.S. citizens or permanent residents.

Immediate relatives of U.S. citizens are exempt from visa quotas and can generally process their applications quickly. Immediate relatives include spouses and minor children of U.S. citizens and parents of U.S. citizens who are over 21 years of age. Spouses of U.S. citizens are granted a two-year conditional green card, unless the marriage has been in existence for at least two years at the time the applicant is admitted as a resident. Conditional permanent residents must apply to remove the conditional nature of the green card during the 90-day window prior to the expiration of the conditional green card.

There are also four family-sponsored preference categories that are subject to numerical limits, which often create long waiting lines. The waiting lines can be longer for applicants born in India, China, Mexico, and the Philippines.

The first preference is for unmarried sons and daughters of U.S. citizens regardless of age. There is generally a waiting line in excess of seven years for first preference immigrants.

The second preference includes two sub-categories: one for spouses and minor children of permanent residents; and the other for unmarried adult sons and daughters of permanent residents. The first sub-category presently has a waiting line of about 3 years. There are no benefits granted to applicants waiting for a visa to become available. Because of the very limited number of visas allocated, and the large number of applicants, adult unmarried sons and daughters of permanent residents have to wait even longer to obtain permanent resident status and that waiting line is in excess of 7 years. Caution should be exercised before filing a second preference petition for unmarried adult sons and daughters. They will generally not be able to legally immigrate for at least 7-8 years.

The third preference category is for married sons and daughters of U.S. citizens. This category has a waiting line in excess of ten years, and may get even longer.

The fourth preference is for brothers and sisters of U.S. citizens who are 21 years of age or over. This category is backlogged over 11 years and is moving slowly. It is possible that it could take anywhere from 15 to 20 years to immigrate through a U.S. citizen sibling.

Employment/Investment-Based Immigrants

Employment-based immigrant categories provide a variety of options to potential
The fifth preference investor category (EB-5) is reserved for immigrants who make large investments. Ten thousand visas are allocated annually to individuals who invest $1 million and create at least ten new jobs. The law permits the amount to be reduced to $500,000 if the business is located in a rural area, or in an urban area with high unemployment. The requirement of ten full-time jobs — excluding independent contractors and immediate family members — is usually the obstacle to these types of cases. It is also possible to qualify with investments in troubled businesses, which have lost at least 20% annually for two successive years prior to filing. Investments in troubled businesses sometimes allow an applicant to show that the ten jobs have been saved rather than created.

The Immigrant Investor Program allows applicants to make qualifying investments of $500,000 in commercial enterprises in designated regional centers. The program does not require the investor to directly hire ten qualified workers. Instead, the qualifying employees may include individuals who provide services or a job that has been created indirectly by the investment in the new commercial enterprise. This program sunsets on September 30, 2015 but is expected to be extended by Congress.

The EB-5 immigrant investor category provides for a conditional green card. A final petition must be filed to remove the conditional nature of the green card during the ninety-day window prior to the expiration of the conditional green card.

Refugee and Asylum Benefits

The United States allocates up to 100,000 visas annually to refugees who can prove a well-founded fear of persecution based on political or religious beliefs, or membership in particular social groupings. Applicants already in the United States may also apply for political asylum if they can show a well-founded fear of persecution should they return home. Recent changes require applications to be filed within one year of arrival unless there have been changed country conditions or “extraordinary circumstances.”

Suspension of Deportation / Cancellation of Removal

Suspension of deportation has been replaced with a new form of relief called “cancellation of removal.” Persons with ten years of continuous physical presence and good moral character and who can show exceptional and extremely unusual hardship to a qualifying U.S. citizen or permanent resident spouse, parent or child may be eligible to obtain permanent residence. The process is not easy and requires a hearing before an Immigration Judge.

Diversity Visas (DV) Lottery

Almost anyone who has completed high school, or who has two years of work experience within the past five years in an occupation requiring at least two years of training or experience to perform, is eligible to enter in this annual program which issues 50,000 “green cards” each year.

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Many family-based immigrants including spouses and children of permanent residents, or married children of U.S. citizens — must wait many years before being able to obtain immigrant visas. It is therefore, often better to obtain employment-based immigrant visas, especially for multinational managers and individuals with extraordinary abilities. These applicants can often process their green cards quickly. There are many immigrant visa categories for applicants, even those with basic skills. To maximize opportunities, it is worth exploring your eligibility for both immigrant and nonimmigrant visas by having a thorough review of your case.

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Nonimmigrant Visas:
Options to Work in the United States
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Foreign nationals seeking employment in the United States must apply for a nonimmigrant visa. Many of the non-immigrant or temporary work visas provide relatively quick employment authorization. With some limited exceptions, non-immigrant visas are employer-specific, i.e. one can only work for the company that petitions or sponsors the foreign national.

In order to live in the United States permanently, a “green card” or permanent resident status is required. The “green card” offers the ability to live, work or conduct business anywhere in the United States. An application for permanent residence often involves complex procedures that can take years to complete. Most applicants obtain permanent resident or “green card” status through either family or job sponsorship. Since there are long waiting lines for most categories, temporary, non-immigrant visas are often required to visit, study, work or invest in the United States.

**H-1B Specialty Occupation Visa for Professional Workers**

The basic requirement for an H-1B visa is a Bachelor’s degree or the foreign equivalent, and a job offer in a position that typically requires a degree to perform the job.

An employer is required to make certain attestations to the government to ensure that the wages and working conditions do not undermine those of U.S. workers. The H-1B visa may be approved for up to three years and it may be extended up to a maximum of six years. Spouses and minor children are eligible for H-4 dependent status, which does not grant employment authorization.

*Please see the H-1B brochure for further details about the H-1B program.*

**Free-Trade Agreement H-1B1 visas for Chile and Singapore**

The Free-Trade Agreement H-1B1 visa is available to professionals from Chile and Singapore. There are 1,400 H-1B1 visas for Chileans and 5,400 H-1B1 visas set aside for Singaporeans. Free-Trade Agreement H-1B1 visas are issued for 18 months and are renewable indefinitely. Spouses and minor children are eligible for H-4 dependent status, which does not grant employment authorization.

**E-3 Visa for Australian Professionals**

The E-3 visa is for Australian professionals coming to the United States to perform services in a specialty occupation, i.e. an occupation that usually requires a Bachelor's degree as a minimum for entry into that occupation. The existing H-1B regulations are used as a basis to determine what constitutes a "specialty occupation." The E-3 visa is issued in two-year increments and may be renewed indefinitely. The E-3 is limited to 10,500 visas per year.

Spouses of E-3 visa holders are allowed to apply for work authorization.

**TN NAFTA Visas for Canadians and Mexicans**

The North American Free Trade Agreement provides work visas to certain Canadian and Mexican professionals with U.S. job offers. The TN visa is issued for one-year and can be renewed annually. Spouses and minor children are eligible for T.D. (Treaty Dependent) visas, which do not allow employment authorization.
occupational field, or five years of work experience outside the United States in the occupational field. Trainees must enter the United States to participate in a structured and guided work-based training program in the specific occupational field. Therefore, the trainee category is suitable for certain individuals who may not have university degrees. This visa may be granted for an eighteen-month period.

Both J-1 interns and trainees must not be engaged in productive employment, unless such employment is incidental and necessary to the training or internship.

J-1 visa holders may be exempt from certain taxes. Spouses may also obtain discretionary employment authorization in certain instances.

**B-1 Visitor for Business / B-2 Visitor for Pleasure**

The most common visa categories are the B-1 Visitor for Business and the B-2 Visitor for Pleasure. Depending on each country’s reciprocity schedule, these visas may be granted for up to ten years although periods of admission to the U.S. are normally authorized for stays of only six months for tourists. An extension may be granted for an additional six-month period. Persons holding visitor visas must be careful not to confuse the validity of the visa with the authorized period of stay granted on the I-94 card upon admission. Overstays of an authorized admission automatically invalidates the B-1/B-2 visa even if the overstay is only for one day. B-1 business visitors are usually admitted for the period required to conduct their business, usually 1–2 months. Business visitors and tourists are generally prohibited from working in the United States.

**Visa Waiver Program**

The visa waiver program permits business or pleasure visits for 90 days without having to apply for a visa. This option is now available to 37 countries, including Andorra, Australia, Austria, Belgium, Brunei, 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, Taiwan and the United Kingdom.

The program’s restrictions can create difficulties as persons who enter on the visa waiver may not apply for an extension of stay, and are not permitted to change status to a work visa category in the United States. Individuals who enter the United States under the visa waiver program, who ultimately receive a job offer, must leave and obtain the visa abroad.

**F-1 Student (or M-1 Vocational Student) Visa**

The F-1 Student or M-1 Vocational Student visa is useful to become acquainted with American culture and take advantage of the many fine educational institutions in the United States.

F-1 students are generally eligible to apply for up to one year of employment authorization for the purpose of gaining practical training (OPT). Certain F-1 students graduating with STEM (Science, Technology, Engineering and Mathematics) degrees are entitled to twenty-nine months of OPT if they work for employers who meet additional criteria. Most students use OPT to work after graduation. In some situations, an F-1 student may also be eligible for approved curricular practical training (CPT), which allows students to participate in training programs and internships during the academic year.

Most students usually convert to an H-1B specialty occupation visa after the one-year period of OPT, if they receive an offer of employment in the United States. F-2 spouses and minor children are not eligible for employment authorization. F-2 spouses who wish to pursue full-time studies must apply for their own F-1 visas.
H-1B SPECIALTY OCCUPATION VISAS FOR PROFESSIONALS

- **H-1B Quota or H-1B Cap**: There are 65,000 H-1B visas available per fiscal year (from October 1st to September 30th). Out of the 65,000 H-1B visas, 1,400 are set aside for citizens of Chile and 5,400 are set aside for citizens of Singapore. An additional 20,000 H-1B visas are available to those who have earned Master's degrees or higher degrees from U.S. universities. This H-1B "cap" or "quota" only applies to private industry H-1Bs.

- **Cap Exempt Organizations**: The H-1B cap does not apply to the following:

  o institution of higher education (i.e. universities and colleges);
  o non-profit organization affiliated with institution of higher education;
  o non-profit research organization; and
  o government research organization.

These cap-exempt organizations may apply for H-1B visas at any time and are not subject to the H-1B cap.

- **H-1B Government Filing Fees**: The government filing fees for H-1Bs are as follows:

  o $1,500 ACWIA training fee (if company has 26 or more employees) **OR** $750 training fee (if company has 25 or fewer employees); the ACWIA training fee only applies to new H-1Bs, change-of-employer H-1Bs and the first extension request. The ACWIA fee is only paid by private industry H-1Bs.
  o $500 fraud fee; applies to all new H-1B petitions (both private industry and cap-exempt organizations) and change-of-employer petitions, but not to extension requests.
  o $325 regular filing fee
  o $290 filing fee for spouse/children

Cap-exempt organizations must pay all of the above-mentioned government filing fees, but are exempt from the $750/$1,500 ACWIA training fee.

**Premium Processing**: For an additional $1,225, USCIS will process H-1B applications on an expedited basis within 15 calendar days of receipt. Filing under the premium processing program is optional.

- **March Madness – when to file the H-1B**: an H-1B petition may be filed up to six months prior to the start date. Since the USCIS fiscal year starts on October 1, virtually all private industry employers file H-1B petitions on April 1 (or during the limited filing period of approximately 1 week)
States and granted a change-of-status, 60 days after the date a worker becomes eligible to work for the employer.

- **Termination of Employment:** Employment under an H-1B visa is still treated as at-will employment. Therefore, an H-1B worker can be terminated or can leave at any time during the H-1B period. However, if terminated, an employer must offer the H-1B worker “reasonable costs of return transportation” to the H-1B employee’s residence abroad. Employers must also notify USCIS of the termination. An employer will not be penalized for terminating the H-1B employment relationship as long as the grounds for termination do not violate state and federal law.

  N.B. If an H-1B worker is terminated, laid off or voluntarily leaves employment, there is no grace period. The H-1B worker must immediately file a new petition or change to an alternative visa category or leave the United States.

- **H-1B Portability (Changing Employers):** an H-1B worker may “port” or “transfer” his/her H-1B upon filing of a new H-1B petition with USCIS. The H-1B worker does not have to wait for the approval of the new H-1B petition to commence employment for the new employer. In order to qualify for H-1B portability, the H-1B worker must have been lawfully admitted into the United States, previously been issued an H-1B visa, and must not have worked without USCIS authorization. Such an H-1B worker is not subject to the H-1B cap because the H-1B worker has previously been “counted” towards the H-1B cap.

  N.B. H-1B workers who are employed by cap-exempt organizations, such as universities cannot “port” to a private employer unless they have previously been “counted” towards the cap. Such H-1B workers may have to wait and file a new H-1B under the next fiscal year.

- **Remainder Options For Individuals Who Have Previously Held H-1B Status:** individuals who have previously held H-1B status, but who did not use the full six-year period, may apply for an H-1B for the remaining unused time from the six-year period. Individuals in this situation are not subject to the H-1B cap because they have already been “counted.” For example, someone who works for three years on an H-1B decides to go back to school as an F-1 student to obtain an MBA. After graduation, this person can apply for an H-1B for the remaining three years and is not subject to the cap.

  N.B. In certain situations, if an individual on an H-1B leaves the United States and is physically abroad for at least one year, that person can either apply for a “new” cap-subject H-1B to obtain a “new” six-year period, or that person can choose to apply for the “remainder” of unused time without being subject to the H-1B cap.

- **Spouses and Children:** are eligible for H-4 status but are not allowed to seek employment. Spouses may apply for their own working visa if they qualify under one of the nonimmigrant visa categories. Spouses and children are allowed to attend school on an H-4 visa.
E-1 & E-2 VISAS

The limited H-1B quotas, together with the restrictive and ever tightening L-1 intra-company transferee adjudications, now make consideration of the E visa option essential in evaluating nonimmigrant visa options.

Treaties between the United States and many countries allow foreign nationals to come to the United States to conduct trade or to manage substantial investments. Unlike the one million dollar threshold for the permanent resident investor visa, there is no fixed dollar amount for treaty investment. The E visa is also one of the only nonimmigrant visa options that permit a foreign national to engage in self-employment. Those qualifying for the E-1 (Trader) or E-2 (Investor) visas can pursue long-term business objectives using these practical visas.

The E visa is a highly desirable option for nonimmigrants seeking to invest in, or trade with, the United States. It is also an excellent choice for employers who wish to transfer key managers, executives and essential employees with the treaty country’s nationality.

WHOQUALIFIES FOR AN E-1 TREATY TRADER VISA?

A person may be issued an E-1 Treaty Trader visa if:

- The individual or the company has the nationality of the treaty country (at least half of the company must be owned by nationals of the treaty country).
- There is substantial trade (more than 50 percent of the company’s trade) between the United States and the country of nationality. “Trade includes the exchange, purchase, or sale of goods or services; the transfer of technology; and binding contracts that call for the immediate exchange of items of trade. This trade must be continuous and ongoing.
- The individual is either the principal trader, who is coming to the United States to engage in substantial trade, or an executive, manager, or employee with special skills essential to the company.

WHO QUALIFIES FOR AN E-2 TREATY INVESTOR VISA?

A person may be issued an E-2 Treaty Investor visa if:

- The individual or the company has the nationality of the treaty country (at least half of the company must be owned by nationals of the treaty country).
List of Countries with Treaties and Laws Containing Trader and Investor Visa Provisions:

E-1

Argentina, Australia, Austria, Belgium, Bolivia, Bosnia & Herzegovina, Brunei, Canada, Chile, China (Taiwan), Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Jordan, Korea (South), Latvia, Liberia, Luxembourg, Macedonia, Mexico, Netherlands, Norway, Oman, Pakistan, Paraguay, Philippines, Singapore, Slovenia, Spain, Suriname, Sweden, Switzerland, Thailand, Togo, Turkey, United Kingdom, Yugoslavia.

E-2

Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bolivia, Bosnia & Herzegovina, Bulgaria, Cameroon, Canada, Chile, China (Taiwan), Colombia, Congo (Brazzaville), Congo (Kinshasa), Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Grenada, Honduras, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Korea (South), Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Mexico, Moldova, Mongolia, Morocco, Netherlands, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Romania, Senegal, Singapore, Slovak Republic, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Ukraine, United Kingdom, Yugoslavia.
SUMMARY OF RULES FOR F-1 STUDENTS

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Application Period for OPT

F-1 students may apply for OPT up to 90 days before their academic programs end and no later than 60 days after graduation.

17-Month Extension of OPT for Certain Students

F-1 students with a degree in science, technology, engineering or mathematics (STEM) who are employed by businesses enrolled in the E-Verify program may extend OPT by 17 months, for a maximum of 29 months.

Eligibility: To be eligible for a STEM OPT extension, an F-1 student must:

- Currently be participating in a 12 month period of approved post-completion OPT;
- Have successfully completed a degree (bachelor’s, master’s or doctorate) in science, engineering, technology or mathematics (STEM) included in the DHS STEM Designated Degree Program List, which includes, but is not limited to the following:
  - Actuarial Science
  - Computer Science (except Data Entry/Microcomputer Applications)
  - Engineering
  - Engineering Technologies
  - Biological and Biomedical Sciences
  - Mathematics and Statistics
  - Military Technologies
  - Physical Sciences
  - Life Sciences
  - Science Technologies
  - Medical Scientist
  - Digital Arts
  - Management Sciences

The complete list is available at http://www.ice.gov/sevis/stemlist.htm.

- Be working for a U.S. employer in a job directly related to the F-1 student’s major area of study

- Be working for, or accepted employment with, an employer registered and in good standing with USCIS’ E-Verify program. E-Verify is a free, internet-based system
Students who are self-employed must set up a business and register with E-Verify. For employment through an agency or consulting firm, the agency or consulting firm would need to be registered in E-Verify, but not the company for whom the student is providing services.

**H-1B “Cap-Gap” Relief**

USCIS is authorized to extend the status of F-1 students caught in a “cap-gap” between the end of the student’s OPT and the start date of an approved H-1B petition. This cap-gap extension automatically becomes effective when the H-1B cap has been reached and the student has an H-1B petition filed on his/her behalf during the acceptance period.

- The interim rule automatically extends the F-1 status and employment authorization of an F-1 student who has filed an H-1B petition that has been granted by, or remains pending with USCIS. This means that:
  - If an H-1B petition is filed and pending, the F-1 student’s status and employment authorization is automatically extended while the petition is pending.
  - If the H-1B petition filed on behalf of the student is selected as a “cap case,” the F-1 student may remain in the United States and continue working until the October 1 start date indicated on the petition.
  - Once USCIS rejects, denies or revokes a pending H-1B petition, the automatic status and employment authorization ends. The F-1 student has the standard 60-day grace period (from notification of the denial, rejection or revocation of the petition) before he or she is required to depart the United States.

Students do not automatically receive notification when they have a cap-gap extension. Students should request a new I-20 from their school.

**Timing and Eligibility:**

- Unlike the extension of OPT, which is limited to F-1 students who have obtained STEM degrees, the extension of status for F-1 students in a cap-gap situation applies to all F-1 students with pending H-1B petitions.
- The “cap-gap” relief only applies to F-1 students who apply for “change-of-status” petitions and not to those who elect consular processing.
- A student must be in valid OPT status for the cap-gap extension of status and employment authorization provision to apply. If the student’s OPT has already expired before the H-1B acceptance period, the student is not eligible for “cap-gap” relief.
- Work for hire: commonly referred to as 1099 employment where an individual performs a service based on a contractual relationship rather than an employment relationship.
- Self-employed business owner: students on OPT may start a business and be self-employed. In this situation, the student must work full-time. The student must be able to prove that s/he has the proper business license and is actively engaged in a business related to the student’s degree program.
- Employment through an agency: students must be able to provide evidence showing they worked an average of at least 20 hours per week while employed by an agency.

- Unpaid employment: students may work as volunteers or unpaid interns, where this work does not violate labor laws. The work must be at least 20 hours per week and be related to their field of study.

What Type of Employment is Allowed For Students During An OPT STEM Extension?
- Students granted an OPT STEM extension must work at least 20 hours per week for an E-Verify-enrolled employer in a position directly related to the student’s STEM degree.
- STEM students may work multiple jobs related to their STEM degree, but all the employers must be enrolled in E-Verify.
- Students on an OPT STEM extension are allowed to volunteer, incidental to their status. This means that volunteer work is allowed but does not count as employment for the purpose of maintaining F-1 status.

How does travel outside the United States impact the period of unemployment?
- If a student whose approved period of OPT has started, travels outside of the United States while unemployed, the time spent outside the United States will count as unemployment against the 90/120-day limits.
- If a student travels while employed (either during a period of leave authorized by an employer or as part of their employment), the time spent outside the United States will not count as unemployment.

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O-1 Visa: Aliens of Extraordinary Ability in Arts, Motion Pictures and Television
(Entertainment)

- The O-1 visa is the standard visa for most artists and entertainers, including but not limited to artists, singers, actors, musicians, composers, VFX artists, graphic designers, art directors, creative directors, producers, directors, editors, stylists, sound engineers, choreographers, dancers, cinematographers and models.

- This visa is granted based on extraordinary ability and achievement in the field in which the applicant is coming to perform. For this purpose, modeling and acting are not the same field. Therefore, if a model wants to act in film/television, s/he must separately show extraordinary achievement in acting and extraordinary achievement in modeling is not enough.

- Extraordinary ability/achievement must be proved by objective evidence. The exact amount of evidence will vary with each case. Examples include the following:

1. Credits/Discography/Tear sheets (listing films, TV shows, commercials, advertising campaigns, albums, etc.)
2. Leading roles in distinguished productions/campaigns or for distinguished organizations
3. Press/interviews/television/radio appearances featuring the applicant or the applicant’s work
4. National or international awards/nominations
5. Testimonials/reference letters from experts in the industry
6. High salary/remuneration
7. Evidence of commercial success
8. Published material by the applicant (e.g. “Chat with the Expert” column)
9. Acting as a judge for a festival/competition
10. Showcasing work at film festivals or art festivals

- Each O-1 petition must have a petitioner (or “Sponsor”). This can be an agent/manager/representative, employer, studio, label or production company. An agent/manager must submit either a deal memorandum or contract confirming the terms of the representation.

- Each O-1 petition must be accompanied by an itinerary of projects as shown by deal memos or contracts for each project or an employment agreement. The maximum length of the visa is 3 years, but USCIS has the authority to limit the length of the visa to the duration of the project(s).
Following a successful interview, the passport with the O-1 visa stamp is typically returned in 3-5 business days.

With the O-1 visa in hand, the applicant is now ready to enter the United States. It is important to show both the O-1 approval notice (I-797 Notice of Action) and O-1 visa stamp upon entry into the United States, as well as to check that all information on the I-94 Arrival/Departure admission card is accurate. The applicant must never overstay the date of his/her I-94 card, regardless of the length of the O-1 approval notice or O-1 visa stamp.

O-1 visas can be renewed indefinitely as long as you continue to work in your field.

O-1 Transfers (Changing Employers): an O-1 visa can be transferred to a new employer at any time. The applicant cannot start working for the new employer until the new O-1 has been filed and approved by USCIS.

Concurrent O-1 visas: one may work for multiple employers if each employer files its own concurrent O-1 visa.

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FREQUENTLY ASKED QUESTIONS ABOUT VISA RETROGRESSION

1. WHAT IS THE “QUOTA BACKLOG”?  

The Immigration and Nationality Act sets limits on how many green card visas may be issued each Fiscal Year (October 1 through September 30) in all visa categories. In addition, in the employment-based area where immigration is based on employment and not family relationships or investment, nationals of each country may obtain immigrant visas (i.e., a green card), in different preference categories (i.e., EB-1, EB-2, EB-3). The law further provides that no one country may have more than a specific percentage of the total number of visas available annually. If these limits are exceeded in a particular category, for a particular nationality, a waiting list is created and applicants are placed on the list according to the date of their case filing. This date is called a "Priority Date." The priority date is the single, most important, factor in any immigration case.

2. WHAT ARE THE DIFFERENT EMPLOYMENT-BASED PREFERENCE CATEGORIES?

Employment-Based First Preference (EB-1)  
Employment-Based Second Preference (EB-2)  
Employment-Based Third Preference (EB-3)  
Other Workers

3. WHAT DOES EB-1 MEAN?

Employment-Based First Preference (EB-1) includes: (1) Persons with extraordinary ability in the sciences, arts, education, business and athletics (persons who have risen to the top of their profession); (2) Outstanding professors and researchers; and (3) Multi-national executives and managers.

4. WHAT DOES EB-2 MEAN?

Employment-Based Second Preference (EB-2) includes: (1) Members of professions holding advanced degrees (Master’s or Ph.D.) (The position must be one that requires a Master’s or Ph.D. to perform the duties - the degree held by the individual does not determine whether or not it is an EB-2, rather it is the company’s minimum job requirements. Additionally, the immigration regulations provide that a job which requires a minimum of a Bachelor’s degree PLUS a five years of progressively responsible experience will be considered equivalent to a Master’s level position and will qualify for EB-2; and (2) Persons of exceptional ability in the sciences, art or business. Persons of exceptional ability are those who have a degree of expertise above that which is ordinarily expected. The EB-2 category includes National Interest Waiver petitions.
12. WHAT DOES IT MEAN TO BE “CURRENT”?  

If there is a “C” in your employment-based category on the Visa Bulletin, then there is no quota backlog and you may proceed with your I-485 adjustment application or immigrant visa application.

13. IF THE VISA BULLETIN SHOWS A DATE OF 6-1-02 AND MY PRIORITY DATE IS 6-1-02, IS MY PRIORITY DATE CURRENT?  

No. In order for the priority date to be current, it must be a date prior to the date published in the visa bulletin.

14. HOW OFTEN DO THE BACKLOGS CHANGE AND WILL THEY IMPROVE?  

Each month, the State Department issues the visa bulletin, usually in the middle of the month. When the bulletin is issued, it will provide information that will take effect on the first day of the following month. (i.e., on 9-12-05, the DOS released the dates effective as of 10-1-05). Depending on the availability of immigrant visas, the priority dates in each category and for each country can change each month. However, please note that the priority dates can also stay the same. They can move very slowly or progress by several months or years. They can move forward or backward. Therefore, there is no way to anticipate what the priority date will be in a future month or when a category will become current.

15. THE CUT-OFF DATE IS JANUARY 1, 2000. DOES THIS MEAN THAT IT WILL TAKE 5 YEARS BEFORE THE PRIORITY DATE WILL BECOME CURRENT?  

No. It all depends on how many visas are used. Please see the answer to the above question.

16. CAN I GET AHEAD ON THE QUOTA BACKLOG LIST?  

There is no way to get ahead on the list, other than filing an Immigrant Visa Petition in a higher preference category, provided that the individual and/or their position meet the criteria to do so. Otherwise, the individual must wait until eligible to apply along with others on the list before proceeding with filing the last step in the green card process. The last step is accomplished by filing an I-485 application to adjust status to that of a lawful permanent resident in the U.S., or by obtaining an immigrant visa at a U.S. Consulate abroad.

17. IF I AM CHINESE OR INDIAN AND WOULD NORMALLY FILE AN EB-1 AS AN ALIEN OF EXTRAORDINARY ABILITY OR AN OUTSTANDING PROFESSOR/RESEARCHER, DO I HAVE ANY ALTERNATIVES?  

Yes. An employer, usually a university or private company, may file a petition for you under the Schedule A, Group II category for Aliens of Exceptional Ability. Unlike the EB-1 and EB-2 categories, there are no backlogs in the Schedule A category, which is current. Schedule A occupations are a special “pre-certified” category of occupations which are exempted from the

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23. I HAVE HEARD THAT ONLY THOSE INDIVIDUALS FROM INDIA AND CHINA ARE SUBJECT TO QUOTA BACKLOGS. I WAS NOT BORN IN ONE OF THOSE COUNTRIES. DO QUOTA BACKLOGS APPLY TO ME?

Yes. Quota backlogs can apply to everyone, regardless of where they are from. While the backlogs have typically affected some countries more than others, note that on the October Visa Bulletin, the backlogs apply to all countries for the EB-3 preference category.

24. MY EMPLOYER HAS A LABOR CERTIFICATION PENDING ON MY BEHALF. DO QUOTA BACKLOGS AFFECT THE PROCESSING OF THE APPLICATION?

No. The labor certification process is not affected by quota backlogs.

25. CAN I CHANGE THE VISA CATEGORY AND/OR REFILE THE LABOR CERTIFICATION TO GET AROUND THE QUOTA BACKLOGS?

No. The visa category cannot be changed once the labor certification (or I-140 if there is no labor certification) has been filed. Also, since quota backlogs are based on the filing date, it is not in your interest to refile a case now and obtain a 2005 or later priority date.

26. THE LABOR CERTIFICATION FILED ON MY BEHALF WAS APPROVED. CAN THE COMPANY STILL FILE THE I-140 PETITION IF THE PRIORITY DATE IS NOT CURRENT?

Yes. The filing and adjudication of an I-140 is not affected by the quota backlogs.

27. MY I-485 WAS ALREADY APPROVED. HOWEVER, MY DEPENDENT’S APPLICATION IS STILL PENDING AND MY PRIORITY DATE IS NO LONGER CURRENT. IS MY DEPENDENT’S APPLICATION AFFECTED BY THE QUOTA BACKLOG SINCE MY APPLICATION IS APPROVED?

Yes. Even through your case was approved, your dependent’s application is still based on your priority date. The CIS cannot approve the dependent’s application until the priority date is current.

28. THE QUOTA BACKLOGS WERE NOT IN AFFECT WHEN I FILED MY I-485 APPLICATION. DOES THIS OCTOBER QUOTA BACKLOG AFFECT ME?

Yes. The CIS can work on the pending application. However, they cannot approve the application unless the priority date is current.

29. THE I-140 AND I-485 WERE CONCURRENTLY FILED AND BOTH ARE PENDING AT CIS. WILL THE I-140 BE PROCESSED IF THE PRIORITY DATE IS NO LONGER CURRENT AND THE I-485 CANNOT BE APPROVED?
Yes. Fingerprint results expire after 15 months. CIS will review the fingerprints at the time that they are ready to complete the adjudication of the I-485. If the results have expired, they will send out a new fingerprint appointment notice.

37. **IF THE CASE IS PENDING AT CIS AND CANNOT BE APPROVED DUE TO QUOTA BACKLOGS, WILL I BE REQUIRED TO PROVIDE ANY UPDATED INFORMATION OR DOCUMENTS?**

The CIS may ask for updated employment information. However, new photos and medical exams should not be required.

38. **IF I AM NOT ABLE TO FILE THE I-485 DUE TO QUOTA BACKLOGS, IS THERE ANOTHER WAY FOR MY H-4 SPOUSE TO OBTAIN WORK AUTHORIZATION?**

An I-765 (EAD) application cannot be filed unless an I-485 is pending. Therefore, your spouse will not be eligible for an EAD card and will need to seek employment sponsorship for work authorization.

39. **IF I-140 PETITION FILED ON MY BEHALF IS STILL PENDING AND MY PRIORITY DATE BECOMES CURRENT, MAY I FILE MY ADJUSTMENT APPLICATION?**

Yes, if you have an I-140 Petition pending and your Priority Date becomes current, you and your dependents may file your adjustment applications as long as the Priority Dates remains current.

40. **I AM RUNNING OUT OF H-1B TIME. WHAT WILL HAPPEN TO MY H-1B STATUS IF THE QUOTA BACKLOG HOLDS UP MY GREEN CARD APPLICATION?**

The AC21 legislation provides for H-1B extensions beyond six years in certain circumstances.

If you have a labor certification or an I-140 petition that has been pending for more than 365 days, you may extend your H-1B in one-year increments until a final decision is made. Another provision of AC 21 also provides that if you have an approved I-140 petition and you are unable to file the I-485 due to quota backlogs, you may apply for an extension of H-1B time for a three-year period. Your dependent's H-4 status may also be extended.

41. **IF I AM NOT ABLE TO FILE THE I-485 AND THEN I loose MY JOB OR CHANGE JOBS, DOES AC21 PORTABILITY PROTECT ME?**

No. In order to take advantage of AC21 portability, the I-140 Petition must be approved and the I-485 must be filed and pending over 180 days.

42. **DUE TO THE QUOTA BACKLOGS, I WANT TO REVIEW MY OPTIONS FOR IMMIGRATING THROUGH A US CITIZEN. I HAVE MINOR US CITIZEN
The second preference category is for foreign nationals with advanced degrees or who have demonstrated exceptional ability whose employment is in the national interest.

Step 1. Immigrant Visa Application (Form I-140)

The foreign national files Form I-140 together with extensive documentation evidencing how his or her work is in the national interest. This involves demonstrating that it would be in the national interest for the U.S. Citizenship and Immigration Services (USCIS) to waive its usual requirement that the foreign national have a job offer from a sponsoring employer who has advertised for qualified American workers through the lengthy labor-certification process.

Establishing eligibility for the National Interest Waiver (NIW) involves arguing:

1. That your employment is in an area of intrinsic national interest to the United States;
2. The scope of your work is national in impact; and
3. The U.S. national interest would be better served by your permanent presence here than it would be by reserving your job opportunity for an American worker, i.e. the U.S. national interest would be adversely affected by requiring that you go through the labor certification process.

Within the immigration community, this is known as the New York State Department of Transportation, or “NYSDOT,” test. NYSDOT mandates that the third prong of this test is satisfied by establishing that you have had some degree of influence on your field as a whole, which is documented with evidence of your prior achievements demonstrating your ability to benefit the national interest.

In the academic and research contexts, the following evidence may assist in meeting this burden of proof:

1. Publication of scholarly articles in highly ranked, peer-reviewed journals. The number of articles published is not necessarily the determinative factor. Rather, it is most important to establish the impact of the research findings reported in the published papers. First author publications also assist in convincing USCIS that the impact should be attributed directly to you rather than your co-authors and colleagues.
   a. USCIS considers a high citation record solid evidence of the impact of the applicant’s research.
   b. Reference letters that discuss, in detail, your influence on the field may be persuasive to USCIS if you do not have a high citation record.

2. Acting as a reviewer for a prominent journal, committee member for meetings and conferences of national organizations or societies, and/or reviewer of grant proposals submitted to national organizations or societies.
B) Consular Processing (Interview with home U.S. Consulate)

The approved I-140 petition will be forwarded to the National Visa Center (NVC). Upon filing of the applicable documents (Packet 3), an interview will be scheduled for the applicant and family members. They must appear at the consulate for their interview and undergo their medical examinations. If their applications for permanent residence are approved, the applicant and family members will receive their temporary permanent residence stamps (I-551 stamps) upon re-entry into the United States.

Prior to the interview, the applicant and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4) during their stay in the United States.

Please note that the U.S. embassy or consulate will not schedule the interview until an immigrant number is available. If an immigrant visa is available, interviews are generally scheduled approximately 4-6 months after the I-140 approval. If the foreign national is affected by visa retrogression and there are no immigrant visas available, then, the consular post will not schedule the interview until the priority date is current.

This is a general summary of permanent residence processing for foreign nationals pursuing a national interest waiver. There are also other permanent residence visa options for professionals, including multinational executives or managers, outstanding researchers, and aliens of extraordinary ability. If you wish to discuss these options, please feel free to contact us.
OBTAINING PERMANENT RESIDENCE ("GREEN CARD") THROUGH AN EXTRAORDINARY ABILITY IMMIGRANT PETITION
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The first preference category is for foreign nationals of extraordinary ability in the sciences, arts, education, business or athletics. Extraordinary ability means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. In order to qualify, the foreign national must show sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.

A foreign national may self-petition under this category, which does not require a job offer or sponsorship by an employer. Therefore, the foreign national may petition on his/her own behalf, but an employer may also file a petition on behalf of the foreign national. In the case of a self-petition, the foreign national must show that s/he is coming to the United States to continue work in the area of expertise.

In order to qualify under the extraordinary ability classification, evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following must be shown:

1. Receipt of lesser or internationally recognized prizes or awards for excellence in the field of endeavor;

2. Membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their fields;

3. Published material about the foreign national in professional or major trade publications or other major media, relating to the foreign national’s work in the field.

4. Participation, individually or on a panel, as a judge of the work of others in the field;

5. Original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the field;

6. Authorship of scholarly articles or books in the field published in professional or major trade publications or other major media;

7. Display of work at artistic showcases or exhibitions

8. Performance in a leading or critical role for organizations or establishments that have a distinguished reputation;

9. Receipt of a high salary or other significantly high remuneration for services in relation to others in the field; and

10. Commercial successes in the performing arts, as shown by box office receipts or records, or sales, etc.
Please note that if immigrant visa numbers are not available (based on the foreign national’s employment-based classification and country of chargeability), the I-485 Application to Adjust Status cannot be filed simultaneously with I-140 Immigrant Visa petition (Form I-140). This is called visa retrogression. The foreign national must wait for visa numbers to become available before filing the I-485 application. For the past few years, there has been no retrogression in the employment-based, first preference immigrant visa category.

B) Consular Processing (Interview with U.S. Consulate in Foreign National’s Home Country)

If at the time of filing the I-140, the petitioning employer indicates that the alien worker will be applying for his or her immigrant visa at his/her home consulate (instead of applying for adjustment of status), the approved I-140 petition will be forwarded to the National Visa Center (NVC). Upon filing of the applicable documents (Packet 3), an interview will be scheduled for the foreign national’s and family members. They must appear at the consulate for their interview and undergo their medical examinations. If their applications for permanent resident status are approved, the foreign national’s and family members will enter the United States as permanent residents.

Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4 or O-1/O-3) during their stay in the United States.

*H-1B Visa Extensions Beyond the 7th Year

An H-1B visa holder can obtain a yearly extension of an H-1B visa after the sixth year cap date if a labor certification or I-140 Immigrant Visa Petition, designating the H-1B alien as the beneficiary, has been pending for at least 365 days. In addition, an H-1B visa holder with an approved I-140 petition, who is unable to file the I-485 Application to Adjust Status because of visa retrogression, can extend the H-1B until a decision on the I-485 Application to Adjust Status is made.

This is a general summary of permanent residence processing for foreign nationals seeking extraordinary ability classification. There are also other permanent residence visa options for professionals, including multinational executives or managers, outstanding researchers, and foreign nationals pursuing a national interest waiver. If you wish to discuss these options, please feel free to contact us.
OBTAINING PERMANENT RESIDENT STATUS ("GREEN CARD Through Program Electronic Review Management ("PERM")

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LABOR CERTIFICATION

General Explanation

Please note this is not intended to be relied upon as legal advice nor is it meant to used to implement the recruitment process necessary for PERM labor certification (see below). Our office will provide specific recruitment instructions at the appropriate time based on the information provided by the company regarding the alien worker and the position for which certification is being sought.

Prior to the United States Citizenship & Immigration Services (USCIS) granting employment-based permanent resident status to a professional alien worker, the USCIS requires the sponsoring employer to first test the US job market to demonstrate there are no qualified US applicants willing to accept the position. Therefore, the employer must conduct a good faith recruitment effort prior to filing an application for Labor Certification with the U.S. Department of Labor ("DOL").

Step 1. PERM Labor Certification

The PERM program is an attestation and audit process requiring employers to conduct advertising and recruitment before filing the labor certification application, demonstrating that there are no able, willing, qualified and available U.S. workers to perform the job, and that the employment of the alien will have no adverse effects on the wages and working conditions of similarly-employed U.S. workers.

Employers must place two (2) Sunday advertisements (which may be consecutive) in the newspaper of general circulation in the area of intended employment and a job order with the appropriate State Workforce Agency (SWA) for 30 days.

In addition, for professional occupations, employers must take three (3) additional recruitment steps from the following alternatives: (1) job fairs; (2) employer’s website; (3) job search website other than the employer’s; (4) on-campus recruiting; (5) trade or professional organizations; (6) private employment firms; (7) employee referral program with incentives; (8) campus placement offices; (9) Local and ethnic newspapers; and (10) radio and television advertising.

If the job requires experience and an advanced degree, and a professional journal normally would be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday ads, place an advertisement in the professional journal.

Employers must post a notice of the job opportunity at the location of employment for ten (10) consecutive business days or provide such notice to a certified collective bargaining unit representative, if any, in the location of intended employment.

The notice must also be published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions.
country. Individuals with nonimmigrant visas other than H-1B/H-4 or L-1/L-2 must always obtain an advance parole before travel abroad during the period the I-485 is pending. Without their valid/unexpired advance paroles, they will not be admitted into the United States upon return after foreign travel. Furthermore, their adjustment of status applications will be deemed abandoned.

The EAD cards and advance paroles are typically valid for one year. If the adjustment of status applications are not approved within the one-year period, the employee and his family members may apply for extensions of their EAD cards and travel documents.

NOTE: Should there be a termination of the employment relationship with the petitioner while the adjustment of status application is pending at the USCIS, the employee can continue to obtain his/her permanent residence, ONLY IF the I-140 has been approved, the adjustment of status application has been pending for 180 days or longer and the new job is in the same or similar occupational classification as the job for which the certification or approval was initially made. If the adjustment of status application has been pending for less than 180 days, the employee and his family members’ applications for adjustment of status may be denied. The employee cannot begin working for a new employer until the 180 days have lapsed.

Please note that if there are immigrant visa numbers available (based on the alien worker’s employment-based classification and country of chargeability) an alien worker’s application to adjust status (Form I-485) may be filed simultaneously with the employer’s immigrant visa petition (Form I-140). If the alien is affected by visa retrogression and there are no immigrant visas available, then, the alien must wait until the priority date is current before s/he can file the I-485 application.

B) Consular Processing (Interview with U.S. Consulate in Alien’s home country)

If at the time of filing the I-140, the petitioning employer indicates that the alien worker will be applying for his or her immigrant visa at his/her home consulate (instead of applying for adjustment of status), the approved I-140 petition will be forwarded to the National Visa Center (NVC). Upon filing of the applicable documents (Packet 3), an interview will be scheduled for the alien worker and family members. They must appear at the consulate for their interview and undergo their medical examinations. If their applications for permanent resident status are approved, the alien worker and family members will receive their temporary permanent resident stamps (I-551 stamps) upon re-entry into the United States.

Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4) during their stay in the United States.

Please note that the U.S. embassy or consulate will not schedule the interview until an immigrant number is available. If an immigrant visa is available, interviews are generally scheduled approximately 4-6 months after the I-140 approval. If the alien is affected by visa retrogression and there are no immigrant visas available, then, the consular post will not schedule the interview until the priority date is current.

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Please note that the Department of Labor (DOL) published new regulations on May 17, 2007, which are effective as of July 16, 2007. One of the major changes relates to payment of legal fees